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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 51

[Docket #AMS–FV–07–0099; FV–06–308]

RIN 0581–AC63

Multi-Year Revision of Fees for the Fresh Fruit and Vegetable Terminal Market Inspection Services

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This rule would revise the regulations governing the inspection and certification for fresh fruits, vegetables and other products by increasing certain fees charged for the inspection of these products at destination markets for the next two fiscal years (FY–2007 and FY–2008) by approximately 15 percent each fiscal year. This rule would increase fees 30 days after publication in FY–2007 and again in March 2008. These revisions are necessary in order to recover, as nearly as practicable, the costs of performing inspection services at destination markets under the Agricultural Marketing Act of 1946 (AMA of 1946). The fees charged to persons required to have inspection on imported commodities in accordance with the Agricultural Marketing Agreement Act of 1937 and for imported peanuts under section 1308 of the Farm Security and Rural Investigation Act of 2002.

DATES: *Effective Date:* August 31, 2007.

FOR FURTHER CONTACT INFORMATION: Rita Bibbs-Booth, USDA, 1400 Independence Ave., SW, Room 0640–S, Washington, DC 20250–0295, or call (202) 720–0391.

SUPPLEMENTARY INFORMATION:

Executive Order 12866 and Regulatory Flexibility Act

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

Also, pursuant to the requirement set forth in the Regulatory Flexibility Act (RFA), AMS has considered the economic impact of this action on small entities. Accordingly, AMS proposes this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. The action described herein is being taken for several reasons, including that additional user fee revenues are needed to cover the costs for: (1) Providing current program operations and services; (2) improving the timeliness in which inspection services are provided; and (3) improving the work environment.

AMS regularly reviews its user-fee financed programs to determine if the fees are adequate. The Fresh Products Branch (FPB) has and will continue to seek out cost saving opportunities and implement appropriate changes to reduce its costs. Such actions can provide alternatives to fee increases. FPB has reduced costs by approximately $2 million. However, even with these efforts, FPB's existing fee schedule will not generate sufficient revenue to cover program costs while maintaining the Agency mandated reserve balance. Revenue projections for FPB's destination market inspection work during FY–2006 are $15.3 million with costs projected at $20.4 million and an end-of-year reserve balance of approximately $12.7 million. However, this reserve balance is due in part, to appropriated funding received in October 2001, for infrastructure, workplace, and technological improvements. FPB's costs of operating the destination market program are expected to increase to approximately $21.6 million during FY–2007 and $22.5 million during FY–2008. Revenues are projected to be $15.3 million for end of the fiscal year. The reserve balance for FY–2007 and FY–2008, will fall below the Agency's mandated four-month reserve level. The reserve balance is projected to be approximately $6.5 million for FY–2007 (3.6 months) and approximately negative $600,000 for FY–2008 (− 0.3 months).

This fee increase should result in an estimated average of $2.4 million in additional revenues per year (effective in FY–2007, if the fees were implemented by October 1, 2006). However, fees would not be increased until later in FY–2007. Further, as a result, the next fee increase is delayed until March 2008 instead of the start of FY–2008. These increases will not cover all of FPB's costs. FPB will need to continue to increase fees in order to cover the program's operating cost and maintain the required reserve balance. FPB believes that increasing fees incrementally is appropriate at this time. Additional fee increases beyond FY–2008 will be needed to sustain the program in the future. However, we will continue to reduce costs, wherever possible.

Employee salaries and benefits are major program costs that account for approximately 80 percent of FPB's total operating budget. A general and locality salary increase for Federal employees, ranging from 2.87 to 5.62 percent depending on locality, effective January 2006, has significantly increased program costs and will continue to increase costs at a similar rate in future years. This salary adjustment will increase FPB's costs by over $700,000 per year. Increases in health and life insurance premiums, along with workers compensation will also increase program costs. In addition, inflation also impacts FPB's non-salary costs. These factors have increased FPB's costs of operating this program by over $600,000 per year.

Additional funds are necessary in order for FPB to continue to cover the costs associated with additional staff and to maintain office space and equipment. Additional revenues are also necessary to improve the work environment by providing training and purchasing needed equipment. In addition, FPB began in 2001, developing (with appropriated funds) the Fresh Electronic Inspection Reporting/Resource System (FEIRS) to replace its manual paper and pen inspection reporting process. FEIRS was implemented in 2004. This system has been put in place to enhance and streamline FPB's fruit and vegetable

inspection process, however additional revenue is required to maintain FEIRS. FPB has also begun to cover the costs associated with the Training and Development Center (TDC) in Fredericksburg, VA. A portion of the appropriated funds received in October 2001, were for infrastructure improvements including the development and maintenance of the inspector TDC. With appropriated funding now depleted, FPB is now obligated to support the TDC under revenues from the terminal market user fee inspection program.

This rule should increase user fee revenue generated under the destination market program by approximately 15 percent each fiscal year. This action is authorized under the Agricultural Marketing Act of 1946 (AMA of 1946) (See 7 U.S.C. 1622(h)), which provides that the Secretary of Agriculture may assess and collect ''such fees as will be reasonable and as nearly as may be to cover the costs of services rendered * * *'' There are more than 2,000 users of FPB's destination market grading services (including applicants who must meet import requirements [1]—inspections which amount to under 2.5 percent of all lot inspections performed). A small portion of these users are small entities under the criteria established by the Small Business Administration (13 CFR 121.201). There would be no additional reporting, recordkeeping, or other compliance requirements imposed upon small entities as a result of this rule. In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the information collection and recordkeeping requirements in Part 51 have been approved previously by OMB and assigned OMB No. 0581–0125. FPB has not identified any other Federal rules which may duplicate, overlap or conflict with this proposed rule.

The destination market grading services are voluntary (except when required for imported commodities) and the fees charged to users of these services vary with usage. The impact on all businesses, including small entities, is very similar. However, except for those persons who are required to obtain inspections, most of these businesses are typically under no obligation to use these inspection services, and, therefore, any decision on their part to discontinue the use of the services should not prevent them from marketing their products. Further, even though fees will be raised, the increase is not excessive and should not significantly affect these entities.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have retroactive effect. This rule will not preempt any State or local laws, regulations or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures which must be exhausted prior to any judicial challenge to the provisions of this rule.

Action

The AMA of 1946 authorizes official inspection, grading, and certification, on a user-fee basis, of fresh fruits, vegetables and other products such as raw nuts, Christmas trees and flowers. The AMA of 1946 provides that reasonable fees be collected from the users of the services to cover, as nearly as practicable, the cost of the services rendered. This rule would amend the schedule for fees and charges for inspection services rendered to the fresh fruit and vegetable industry to reflect the costs necessary to operate the program.

AMS regularly reviews its user-fee financed programs to determine if the fees are adequate. The Fresh Products Branch (FPB) has and will continue to seek out cost saving opportunities and implement appropriate changes to reduce its costs. Such actions can provide alternatives to fee increases. FPB has reduced costs by approximately $2 million. However, even with these efforts, FPB's existing fee schedule will not generate sufficient revenue to cover program costs while maintaining the Agency mandated reserve balance. Revenue projections for FPB's destination market inspection work during FY–2006 are $15.3 million with costs projected at $20.4 million and an end-of-year reserve balance of approximately $12.7 million. However, this reserve balance is due in part, to appropriated funding received in October 2001, for infrastructure, workplace, and technological improvements. FPB's costs of operating the destination market program are expected to increase to approximately $21.6 million during FY–2007 and $22.5 million during FY–2008. Revenues are projected to be $15.3 million for end of the fiscal year. The reserve balance for FY–2007 and FY–2008, will fall below the Agency's mandated four-month reserve level. The reserve balance is projected to be approximately $6.5 million for FY–2007 (3.6 months) and a negative $584,000 for FY–2008 (−0.3 months).

Employee salaries and benefits are major program costs that account for approximately 80 percent of FPB's total operating budget. A general and locality salary increase for Federal employees, ranging from 2.87 to 5.62 percent depending on locality, effective January 2006, has significantly increased program costs, and will continue to increase costs at a similar rate in future years. This salary adjustment will increase FPB's costs by over $700,000 per year. Increases in health and life insurance premiums, along with workers compensation will also increase program costs. In addition, inflation also impacts FPB's non-costs. These factors have increased FPB's costs of operating this program by over $600,000 per year.

Additional revenues are necessary in order for FPB to continue to cover the costs associated with additional staff and to maintain office space and equipment. Additional revenues are also necessary to continue to improve the work environment by providing training and purchasing needed equipment. In addition, FPB began in 2001, developing (with appropriated funds) an automated system known as FEIRS, to replace its manual paper and pen inspection reporting process. Approximately $10,000 in additional revenue per month will be needed to maintain the system. This system has been put in place to enhance FPB's fruit and vegetable inspection processes. FPB has also begun to cover the costs associated with the TDC in Fredericksburg, VA. A portion of the appropriated funds received in October 2001, were for infrastructure improvements including the development and maintenance of the inspector TDC. With appropriated funding now depleted, FPB is now obligated to support the TDC under revenues from the terminal market user fee inspection program.

Based on the aforementioned analysis of this program's increasing costs, AMS

[1] Section 8e of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), requires that whenever the Secretary of Agriculture issues grade, size, quality or maturity regulations under domestic marketing orders for certain commodities, the same or comparable regulations on imports of those commodities must be issued. Import regulations apply during those periods when domestic marketing order regulations are in effect. Section 1308 of the Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171), 7 U.S.C. 7958, required USDA among other things to develop new peanut quality and handling standards for imported peanuts marketing in the United States.

Currently, there are 14 commodities subject to 8e import regulations: Avocados, dates (other than dates for processing), filberts, grapefruit, kiwifruit, olives (other than Spanish-style green olives), onions, oranges, potatoes, prunes, raisins, table grapes, tomatoes and walnuts. A current listing of the regulated commodities can be found under 7 CFR Parts 944, 980, 996 and 999.

will increase the fees for destination market inspection services. The following table compares current fees and charges with the proposed fees and charges for fresh fruit and vegetable inspection as found in 7 CFR 51.38. Unless otherwise provided for by regulation or written agreement between the applicant and the Administrator, the changes in the schedule of fees as found in § 51.38 are:

Service	Current	2007	2008
Quality and condition inspections of products each in quantities of 51 or more packages and unloaded from the same land or air conveyance:			
• Over a half carlot equivalent of each product	$114.00	$131.00	$151.00
• Half carlot equivalent or less of each product	95.00	109.00	125.00
• For each additional lot of the same product	52.00	60.00	69.00
Condition only inspections of products each in quantities of 51 or more packages and unloaded from the same land or air conveyance:			
• Over a half carlot equivalent of each product	95.00	109.00	125.00
• Half carlot equivalent or less of each product	87.00	100.00	115.00
• For each additional lot of the same product	52.00	60.00	69.00
Quality and condition and condition only inspections of products each in quantities of 50 or less packages unloaded from the same land or air conveyance:			
• For each product	52.00	60.00	69.00
• For each additional lot of any of the same product	52.00	60.00	69.00
Lots in excess of carlot equivalents will be charged proportionally by the quarter carlot..			
Dock side inspections of an individual product unloaded directly from the same ship:.			
• For each package weighing less than 30 pounds	[1]2.9	[1]3.3	[1]3.8
• For each package weighing 30 or more pounds	[1]4.4	[1]5.1	[1]5.9
• Minimum charge per individual product	114.00	131.00	151.00
• Minimum charge for each additional lot of the same product	52.00	60.00	69.00
Hourly rate for inspections performed for other purposes during the grader's regularly scheduled work week:			
• Hourly rate for non-carlot equivalent inspections such as count, size, temperature, container, etc. or work associated with inspections such as digital image services will be charged at a rate that reflects the cost of providing the service	56.00	64.00	74.00
Overtime rate (per hour additional) for all inspections performed outside the grader's regularly scheduled work week	29.00	33.00	38.00
Holiday pay	29.00	66.00	74.00
Hourly rate for inspections performed under 40 hour contracts during the grader's regularly scheduled work week	56.00	64.00	74.00
Rate for billable mileage	1.00	1.15	1.32

[1]In cents.

A notice of proposed rulemaking was published in the **Federal Register** on December 1, 2006, (71 FR 69497). FPB received one comment after the comment period closed.

As previously stated, because the FY–2007 fee increase in effect in the latter part of the fiscal year, AMS is changing the effective date of the FY–2008 fee increase to March 1, 2008, to provide a sufficient amount of time between the two fee increases. Finally, the regulatory text in the proposed section 51.38(e) is corrected to reflect separate fees for overtime and holiday note that appeared in the supplementary information section of the proposed rule.

List of Subjects in 7 CFR Part 51

Agricultural commodities, Food grades and standards, Fruits, Nuts, Reporting and recordkeeping requirements, Trees, Vegetables.

■ For reasons set forth in the preamble, 7 CFR Part 51 is amended as follows:

PART 51—[AMENDED]

■ 1. The authority citation for 7 CFR Part 51 continues to read as follows:

Authority: 7 U.S.C. 1621–1627.

■ 2. Section 51.38 is revised to read as follows:

§ 51.38 Basis for fees and rates.

(a) When performing inspections of product unloaded directly from land or air transportation, the charges shall be determined on the following basis:

(1) Quality and condition inspections of products in quantities of 51 or more packages and unloaded from the same air or land conveyance:

(i) $131 ($151, on or after March 1, 2008) for over a half carlot equivalent of an individual product;

(ii) $109 ($125, on or after March 1, 2008) for a half carlot equivalent or less of an individual product;

(iii) $60 ($69, on or after March 1, 2008) for each additional lot of the same product.

(2) Condition only inspection of products each in quantities of 51 or more packages and unloaded from the same land or air conveyance:

(i) $109 ($125, on or after March 1, 2008) for over a half carlot equivalent of an individual product;

(ii) $100 ($115, on or after March 1, 2008) for a half carlot equivalent or less of an individual product;

(iii) $60 ($69, on or after March 1, 2008) for each additional lot of the same product.

(3) For quality and condition inspection and condition only inspection of products in quantities of 50 or less packages unloaded from the same conveyance:

(i) $60 ($69, on or after March 1, 2008) for each individual product:

(ii) $60 ($69, on or after March 1, 2008) for each additional lot of any of the same product. Lots in excess of carlot equivalents will be charged proportionally by the quarter carlot.

(b) When performing inspections of palletized products unloaded directly from sea transportation or when palletized product is first offered for inspection before being transported from the dock-side facility, charges shall be determined on the following basis:

(1) Dock side inspections of an individual product unloaded directly from the same ship:

(i) 3.3 (3.8, on or after March 1, 2008) cents per package weighing less than 30 pounds;

(ii) 5.1 (5.9, on or after March 1, 2008) cents per package weighing 30 or more pounds;

(iii) Minimum charge of $131 ($151, on or after March 1, 2008) per individual product;

(iv) Minimum charge of $60 ($69, on or after March l, 2008) for each additional lot of the same product.

(2) [RESERVED]

(c) When performing inspections of products from sea containers unloaded directly from sea transportation or when palletized products unloaded directly from sea transportation are not offered for inspection at dock-side, the carlot fees in ''a'' of this section shall apply.

(d) When performing inspections for Government agencies, or for purposes other than those prescribed in paragraphs (a) through (c) of this section, including weight-only and freezing-only inspections, fees for inspections shall be based on the time consumed by the grader in connection with such inspections, computed at a rate of $64 ($74, on or after March 1, 2008) per hour;

Provided, that:

(1) Charges for time shall be rounded to the nearest half hour;

(2) The minimum fee shall be two hours for weight-only inspections, and one-half hour for other inspections;

(3) When weight certification is provided in addition to quality and/or condition inspection, a one hour charge shall be added to the carlot fee;

(4) When inspections are performed to certify product compliance for Defense Personnel Support Centers, the daily or weekly charge shall be determined by multiplying the total hours consumed to conduct inspections by the hourly rate. The daily or weekly charge shall be prorated among applicants by multiplying the daily or weekly charge by the percentage of product passed and/or failed for each applicant during that day or week. Waiting time and overtime charges shall be charged directly to the applicant responsible for their incurrence.

(e) When performing inspections at the request of the applicant during periods which are outside the grader's regularly scheduled work week, a charge for overtime or holiday work shall be made at the rate of $33 for overtime and $66 for holiday work ($38 for overtime and $74 for holiday work, on or after March 1, 2008) per hour or portion thereof in addition to the carlot equivalent fee, package charge, or hourly charge specified in this subpart. Overtime or holiday charges for time shall be rounded to the nearest half hour.

(f) When an inspection is delayed because product is not available or readily accessible, a charge for waiting time shall be made at the prevailing hourly rate in addition to the carlot equivalent fee, package charge, or hourly charge specified in this subpart. Waiting time shall be rounded to the nearest half hour.

Dated: July 26, 2007.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E7–14826 Filed 7–31–07; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

8 CFR Part 103

[CIS No. 2415–07; Docket No. USCIS–2007–0039]

RIN 1615–AB60

Temporary Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule for Certain Adjustment of Status and Related Applications

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Final rule.

SUMMARY: This rule temporarily amends the applicable fees for employment-based Forms I–485, ''Application to Register Permanent Residence or Adjust Status,'' and applications for derivative benefits associated with such Forms I–485 filed pursuant to the Department of State's July Visa Bulletin No. 107, dated June 12, 2007. The fees for all other petitions and applications administered by U.S. Citizenship and Immigration Services will continue in force as effective on July 30, 2007.

DATES: *Effective Date:* This rule is effective July 30, 2007, at 12:02 a.m. EST.

FOR FURTHER INFORMATION CONTACT: Efren Hernandez III, Business and Trade Services, Service Center Operations (Business and Trade Services), U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, Suite 3000, Washington, DC 20001, telephone (202) 272–8400.

SUPPLEMENTARY INFORMATION:

I. Background

1. USCIS Fee Schedule

On May 30, 2007, USCIS published the final rule, effective July 30, 2007, ''Adjustment of the Immigration and Naturalization Benefit Application and Petition Fee Schedule,'' amending 8 CFR part 103 to prescribe new fees to fund the cost of processing applications and petitions for immigration and naturalization benefits and services, and USCIS' associated operating costs pursuant to section 286(m) of the Immigration and Nationality Act (INA), 8 U.S.C. 1356(m). 72 FR 29851. That rule provides that applications that are submitted to USCIS with the incorrect fee will be rejected. For the reasons described below, USCIS, through this rule, is amending the fees again on a temporary basis for certain applications. This rule will become effective immediately after the final fee rule published on May 30, 2007, and makes only temporary modifications to that rule to respond to the events described below. The rule provides limited relief for specific applicants from the final fee rule published on May 30, 2007. The effect of this rule is limited to those applications filed before August 18, 2007. For applications filed on or after August 18, 2007, the fees set forth in the final rule published on May 30, 2007, will be required. USCIS will remove this regulation by another rule to be published in **Federal Register** on or about August 17, 2007, to be effective August 18, 2007.

2. Visa Availability—Summary

The INA establishes formulas and numerical limits for regulating persons immigrating to the United States for permanent residence, to include defining the employment-based immigrant visa classifications. INA sec. 201 *et seq.*, 8 U.S.C. 1151 *et seq.* The INA provides an annual world-wide numerical limit on the number of aliens who may immigrate to the United States, as well as an annual per-country numerical limit on the number of aliens who may emigrate from a particular country. INA sections 201(d) and 202(a)(2), 8 U.S.C. 1151(d) and 1152(a)(2). In addition, the INA allocates the total number of world-wide visas among five employment-based categories or preferences. INA sec. 203(b), 8 U.S.C. 1153(b). Taken together, the total number of visas, the country from which an alien emigrates, and the allocation of visas among the preference categories, determines whether a particular alien may immigrate to the United States at a certain date.

The Department of State (DOS) determines the availability of immigrant visa numbers. *See* INA sections 203(e) and (g), 8 U.S.C. 1153(e) and (g). DOS also controls individual allocation of employment-based immigrant visas. 22 CFR 42.32. DOS publishes a ''Visa

Bulletin'' each month which summarizes the availability of immigrant visa numbers.

The INA provides that the Secretary of Homeland Security may approve an application to adjust status if an immigrant visa is immediately available at the time the application is filed. *See* INA sec. 245(a)(3), 8 U.S.C. 1255(a)(3). Pursuant to Department of Homeland Security regulations, an immigrant visa is considered available, and an adjustment of status application can be filed and processed, if the applicant has a priority date earlier than the date shown in the current DOS Visa Bulletin. 8 CFR 245.1(g)(1).

3. The July Visa Bulletin

On June 12, 2007, DOS published July Visa Bulletin No. 107. This Visa Bulletin indicated that all visas were current and immediately available for most employment-based categories. On July 2, 2007, DOS published Visa Bulletin No. 108, announcing that there would be no further visa number authorizations for employment-based applications. USCIS announced on that day that it would not accept any additional employment-based adjustment of status applications.

4. USCIS July 17, 2007 Announcement

After consulting with USCIS, DOS advised USCIS that July Visa Bulletin No. 107 should be relied upon for purposes of determining whether employment-based immigrant visa numbers are currently available. DOS has withdrawn Visa Bulletin No. 108. Consequently, USCIS announced that, beginning July 17, 2007, and ending at the close of business on August 17, 2007, it will accept employment-based Forms I–485 filed by aliens whose priority dates are current under Visa Bulletin No. 107. See ''*USCIS Announces Revised Processing Procedures for Adjustment of Status Applications*'' at *http://www.uscis.gov/files/pressrelease/VisaBulletinUpdate17Jul07.pdf.* Visa Bulletin No. 107 is available at the DOS Web site at *http://travel.state.gov/visa/frvi/bulletin/bulletin_3258.html* or may be obtained by calling the Information contact listed in this rule. Applicable derivative benefit applications are Form I–765, ''Application for Employment Authorization,'' and Form I–131, ''Application for Travel Document,'' eligibility for which are based on the Form I–485 filing.

5. Changes Made by This Rule

Because of the mid-month change to the Visa Bulletin, USCIS has determined that aliens in employment-based categories filing applications pursuant to Visa Bulletin No. 107 should not be required to pay filing fees based on the fee schedule that becomes effective July 30, 2007. Therefore, as a result of this rule, aliens who file an employment-based Form I–485 and any related Forms I–765 and I–131, pursuant to Visa Bulletin No. 107, through August 17, 2007, must include the filing fees in effect prior to July 30, 2007. The new fee schedule becomes effective on July 30, 2007, for all other immigration and naturalization applications and petitions and on August 18, 2007, for Forms I–485 filed pursuant to Visa Bulletin No. 107 and to all subsequent or ''renewal'' applications for advance parole and employment authorization based on pending Forms I–485 filed pursuant to Visa Bulletin No. 107.

This rule does not affect the increase in fees, pursuant to the final fee schedule, set to take effect on July 30, 2007, for Form I–140, ''Immigrant Petition for Alien Worker.'' Therefore, aliens who file Form I–140 concurrently with Form I–485 based on Visa Bulletin No. 107 between July 30, 2007, and August 17, 2007, must provide the post-July 30, 2007, fee for the Form I–140 and the pre-July 30, 2007, fee for Form I–485. *See* 8 CFR 245.2(a)(2)(i)(C) (concurrent filing provisions). The current fee for Form I–485 is $325. Therefore, under this rule, the application fee for an employment-based Form I–485 filed between July 17 and August 17, 2007, pursuant to Visa Bulletin No. 107 is $325. In another rulemaking to be published on or about August 17, 2007, USCIS will separately terminate the effect of this rule, as of August 18, 2007 the fees will be as prescribed by the final rule of May 30, 2007, or $930 for Form I–485.

Similarly, this rule amends the effective date of the increase in the Biometric Services Fee that must accompany Forms I–485 or Forms I–131 or I–765 that are based on a pending I–485, submitted pursuant to Visa Bulletin No. 107 between July 30, 2007 and August 17, 2007. As of July 30, 2007, the fee for biometric services is $80 for all other benefits for which biometrics must be provided.

This rule also provides that applicants filing Forms I–131 and I–765 in conjunction with a pending employment-based Form I–485 submitted pursuant to Visa Bulletin No, 107, must include the pre-July 30, 2007, fees for these applications with their filings: $170 for Form I–131 and $180 for Form I–765. Moreover, all Forms I–131 or I–765 filed as of August 18, 2007, while adjudication of their Forms I–485 is pending must be accompanied by the new application fee. USCIS will not charge a fee for all other Forms I–131 and I–765 when either is filed by an applicant who has paid the new Form I–485 application fee because the new fee schedule ''bundles'' the fees for current and subsequent Forms I–131 and I–765 filed while the applicant awaits adjudication of Form I–485.

II. Rulemaking Requirements

This rule relates to internal agency management, procedure, and practice and is temporary in nature. 5 U.S.C. 553(b)(A). This rule does not alter substantive criteria by which USCIS will approve or deny applications or determine eligibility for any immigration benefit, but relieves certain requirements for a definite period of time for specific applications. As a result, DHS is not required to provide the public with notice of a proposed rule and the opportunity to submit comments on the subject matter of this rule. DHS finds that good cause exists for adopting this final rule, without prior notice and public comment because the urgency of adopting this rule make prior notice and comment impractical and contrary to the public interest. 5 U.S.C. 553(b)(B).

This rule relates to internal agency management, and, therefore, is exempt from the provisions of Executive Order Nos. 12630, 12988, 13045, 13132, 13175, 13211, and 13272. Further, this action is not a rule as defined by the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and is therefore exempt from the provisions of that Act. In addition, this rule is not subject to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, Title II of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. Ch. 17A, 25, or the E-Government Act of 2002, 44 U.S.C. 3501, note.

DHS finds that good cause exists for promulgating this rule without delaying the effective date of the rule because the rule relieves a requirement of existing regulations, must be adopted with an immediate effective date, and is temporary in nature. 5 U.S.C. 553(d)(1).

This rule does not affect any information collections, reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects in 8 CFR Part 103

Administrative practice and procedures, Authority delegations (government agencies), Freedom of Information, Privacy, Reporting and recordkeeping requirements, and Surety bonds.

■ Accordingly, part 103 of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552(a); 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; Public Law 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*); E.O. 12356, 47 FR 14874, 15557; 3 CFR, 1982 Comp., p.166; 8 CFR part 2.

■ 2. Section 103.7 is amended by revising the entries ''For capturing biometric information'' and the entries for ''Form I–131'', ''Form I–485'', and ''Form I–765'' in paragraph (b)(1) read as follows:

§ 103.7 Fees.

* * * * *

(b) * * *

(1) * * *

* * * * *

For capturing biometric information (Biometric Fee). A service fee of $80 will be charged for any individual who is required to have biometric information captured in connection with an application or petition for certain immigration and naturalization benefits (other than asylum), and whose residence is in the United States; provided that:

(1) *Extension for intercountry adoptions:* If applicable, no biometric service fee is charged when a written request for an extension of the approval period is received by USCIS prior to the expiration date of approval indicated on the Form I–171H if a Form I–600 has not yet been submitted in connection with an approved Form I–600A. This extension without fee is limited to one occasion. If the approval extension expires prior to submission of an associated Form I–600, then a complete application and fee must be submitted for a subsequent application.

(2) *Pursuant to Visa Bulletin No. 107:* The Biometric Services Fee that must accompany Forms I–485, or Forms I–131 or I–765 that are based on a pending I–485, that are submitted pursuant to U.S. Department of State Visa Bulletin No. 107, and filed with USCIS on or after July 30, 2007, and on or before August 17, 2007, is $70.

* * * * *

Form I–131. For filing an application for travel document—$305. However, the fee for Form I–131 that is submitted pursuant to U.S. Department of State Visa Bulletin No. 107 based on a pending I–485, and filed with USCIS on or after July 30, 2007, and on or before August 17, 2007, is $170.

* * * * *

Form I–485. For filing an application for permanent resident status or creation of a record of lawful permanent residence—$930 for an applicant fourteen years of age or older; $600 for an applicant under the age of fourteen years when submitted concurrently for adjudication with the Form I–485 of a parent and the applicant is seeking to adjust status as a derivative of the parent, based on a relationship to the same individual who provides the basis for the parent's adjustment of status, or under the same legal authority as the parent; no fee for an applicant filing as a refugee under section 209(a) of the Act; provided that no additional fee will be charged for a request for travel document (advance parole) or employment authorization filed by an applicant who has paid the Form I–485 application fee, regardless of whether the Form I–131 or Form I–765 is required to be filed by such applicant to receive these benefits. However, for aliens who file an employment-based Form I–485 pursuant to Visa Bulletin No. 107, and filed with USCIS on or after July 30, 2007, and on or before August 17, 2007, the fee is $325, plus a fee of $170 will be charged for a request for travel document (advance parole) and $180 to request employment authorization for an applicant who has paid the Form I–485 application fee, regardless of whether the Form I–131 or Form I–765 is required to be filed by such applicants to receive these benefits.

* * * * *

Form I–765. For filing an application for employment authorization pursuant to 8 CFR 274a.13—$340. However, the fee for a Form I–765 that is submitted pursuant to U.S. Department of State Visa Bulletin No. 107 based on a pending I–485, and filed with USCIS on or after July 30, 2007, and on or before August 17, 2007, is $180.

* * * * *

Dated: July 27, 2007.

Michael Chertoff,

Secretary.

[FR Doc. 07–3762 Filed 7–30–07; 9:56 am]

BILLING CODE 4410–10–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9330]

RIN 1545–BG66

Built-in Gains and Losses Under Section 382(h); Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to temporary regulations.

SUMMARY: This document contains a correction to temporary regulations (TD 9330) that were published in the **Federal Register** on Thursday, June 14, 2007 (72 FR 32792) applying to corporations that have undergone ownership changes within the meaning of section 382. These regulations provide guidance regarding the treatment of prepaid income under the built-in gain provisions of section 382(h).

DATES: This correction is effective August 1, 2007.

FOR FURTHER INFORMATION CONTACT: Keith Stanley at (202) 622–7750 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The correction notice that is the subject of this document is under section 382 of the Internal Revenue Code.

Need for Correction

As published, temporary regulations (TD 9330) contain an error that may prove to be misleading and is in need of clarification.

Correction of Publication

Accordingly, the publication of the temporary regulations (TD 9330), which was the subject of FR Doc. E7–11438, is corrected as follows:

On page 32794, column 1, in the preamble, under the paragraph heading ''Special Analyses'', line 4, the language ''Executive Order 12666. Therefore, a'' is corrected to read ''Executive Order 12866. Therefore, a''.

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E7–14802 Filed 7–31–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9330]

RIN 1545–BG66

Built-in Gains and Losses Under Section 382(h); Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to temporary regulations (TD 9330) that were published in the **Federal Register** on Thursday, June 14, 2007 (72 FR 32792) applying to corporations that have undergone ownership changes within the meaning of section 382. These regulations provide guidance regarding the treatment of prepaid income under the built-in gain provisions of section 382(h).

DATES: These corrections are effective August 1, 2007.

FOR FURTHER INFORMATION CONTACT: Keith Stanley at (202) 622–7750 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations that are the subject of this document are under section 382 of the Internal Revenue Code.

Need for Correction

As published, temporary regulations (TD 9330) contain errors that may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

■ Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

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 * * *

■ **Par. 2**. Section 1.382–7T is amended by revising paragraph (b)(2) to read as follows:

§ 1.382–7T Built-in gains and losses (temporary).

* * * * *

(b) * * *

(2) The applicability of this section expires on June 14, 2010.

■ **Par. 3**. The signature block is revised by adding the language ''Approved: June 4, 2007.''

LaNita Van Dyke,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. E7–14797 Filed 7–31–07; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9349]

RIN 1545–BF01

Employee Benefits—Cafeteria Plans

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Removal of temporary regulations.

SUMMARY: This document removes the temporary regulations pertaining to benefits that may be offered to participants under a section 125 cafeteria plan. The temporary regulations were published in the ≤ **Federal Register** on February 4, 1986. Guidance issued by the IRS and the Treasury Department under section 125 have made these temporary regulations obsolete.

DATES: *Effective Dates:* These regulations are effective August 1, 2007.

FOR FURTHER INFORMATION CONTACT: Mireille Khoury at (202) 622–6080 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On February 4, 1986, the IRS and Treasury Department published temporary regulations on section 125. The temporary regulations were published in the **Federal Register** (TD 8073; 51 FR 4318) as section 1.125–2T. A notice of proposed rulemaking issued under section 125 (REG–142695–05) and other guidance issued by the IRS and the Treasury Department under section 125 have made these temporary regulations obsolete. The temporary regulations are removed.

Special Analyses

It has been determined that this removal of temporary regulations is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to this removal of temporary regulations. This removal of temporary regulations does not impose a collection of information on small entities, thus the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, the preceding temporary 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 author of this removal of temporary regulations is Mireille Khoury, Office of Division Counsel/ Associate Chief Counsel (Tax Exempt and Government Entities). However, personnel from Treasury participated in its development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

■ Accordingly, 26 CFR part 1 is amended as follows:

■ **Paragraph 1**. The authority citation for part 1 continues to read in part, as follows:

Authority: 26 U.S.C. 7805 * * *

§ 1.125–2T [Removed]

■ **Par. 2**. Section 1.125–2T is removed.

Kevin M. Brown,

Deputy Commissioner for Services and Enforcement.

Approved: July 24, 2007.

Eric Solomon,

Assistant Secretary (Tax Policy).

[FR Doc. E7–14823 Filed 7–31–07; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2005–MD–0002; FRL–8447–6]

Approval and Promulgation of Air Quality Implementation Plans; Maryland; Clarification of Visible Emissions Exceptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision

submitted by the State of Maryland. This revision consists of clarifications to the exception provisions of the Maryland visible regulations.

DATES: *Effective Date:* This final rule is effective on August 31, 2007.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2005–MD–0002. All documents in the docket are listed in the *http://www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (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 through *http://www.regulations.gov* or in hard copy for public inspection 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 Maryland Department of the Environment, 1800 Washington Boulevard, Suite 705, Baltimore, Maryland 21230.

FOR FURTHER INFORMATION CONTACT: Linda Miller, (215) 814–2068, or by e-mail at *miller.linda@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On December 1, 2003, the State of Maryland submitted a formal SIP revision (#03–10) that clarifies Maryland's federally-approved general visible emissions (VE) regulations, including those related to specific source categories. The revised language will ensure that sources correctly interpret the exception provisions provided in those regulations. On April 26, 2005 (70 FR 21337), EPA published a direct final rule (DFR) approving revisions to Maryland's SIP pertaining to its VE regulations.

An explanation of the CAA's requirements and EPA's rationale for approving this SIP revision were provided in the DFR and will not be restated here. In accordance with direct final rulemaking procedures, on April 26, 2005 (70 FR 21387), EPA also published a companion notice of proposed rulemaking (NPR) for this SIP revision inviting interested parties to comment on the DFR. Timely adverse comments were submitted on EPA's April 26, 2005 DFR.

On June 27, 2005 (70 FR 36844), due to the receipt of adverse comments submitted in response to the DFR, EPA published a withdrawal of the DFR. A summary of those comments and EPA's responses are provided in Section II of this document.

II. Public Comment and EPA Response

Comment: EPA received the same comment on behalf of two commenters. The commenters state that the federal new source performance standards (NSPS) and national emission standards for hazardous air pollutants (NESHAPs) regulations allow exceedance of their respective opacity standards for up to three hours per occurrence during periods of startup, shutdown and repair. These federal regulations require the installation of continuous opacity monitors (COM). The commenters claim that air pollution control equipment on certain municipal waste combustion (MWC) sources cannot achieve the visible emissions exception requirements as stated in Maryland's clarified visible emissions rule due to the occasional formation of ''condensed'' plumes after emissions exit the stack, as a result of upset conditions that may occur during the operation of emission control devices used to reduce nitrogen oxides (NO_X) emissions. The commenters believe that Maryland's regulations regarding VE exceptions should be revised to be consistent with the existing federal NSPS and NESHAP regulations for MWCs.

Response: EPA understands that the VE requirements established in Maryland's regulations differ from those established in the NSPS and NESHAP regulations that currently apply to MWCs. States have frequently used VE limits as part of their efforts to attain the NAAQS. Under the CAA's bifurcated scheme, the State is responsible for choosing how a source must be regulated for purposes of attaining the NAAQS and EPA's role is limited in reviewing the State's choice to ensure it meets the minimum statutory requirements. Here, the commenter is not claiming that the regulations do not meet the statutory minimum, but rather that Maryland is seeking to require more than the minimum statutory requirements. The CAA is based upon ''cooperative federalism,'' which contemplates that each State will develop its own SIP, and that States retain a large degree of flexibility in choosing which sources to control and to what degree. EPA must approve a State's plan if it meets the ''minimum requirements of the CAA. *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 264–266 (1976).

III. Final Action

EPA is approving revisions to the Maryland VE exception provisions as a revision to the Maryland SIP.

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 (Pub. L. 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). 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 requirement, 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 approves a state rule implementing a Federal standard.

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 October 1, 2007. 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 revisions to the Maryland regulations which clarify the visible emissions exception provisions may not be challenged later in proceedings to enforce its requirements 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, Particulate matter, Reporting and recordkeeping requirements.

Dated: July 19, 2007.

William T. Wisniewski,

Acting 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 V—Maryland

■ 2. In § 52.1070, the table in paragraph (c) is amended by revising the entries for COMAR 26.11.06.02, 10.18.08 (Title), 10.18.08.04, 26.11.09.05, and 26.11.10.03 to read as follows:

§ 52.1070 Identification of plan.

* * * * *

(c) *EPA approved regulations.*

EPA-APPROVED REGULATIONS IN THE MARYLAND SIP

Code of Maryland administrative regulations (COMAR) citation	Title/subject	State effective date	EPA approval date	Additional explanation/citation at 40 CFR 52.1100
*	*	*	*	*
26.11.06 General Emission Standards, Prohibitions, and Restrictions				
*	*	*	*	*
26.11.06.02 [*Except:* .02A(1)(e), (1)(g), (1)(h), (1)(i)].	Visible Emissions	11/24/03	08/01/07 [Insert page number where the document begins].	Revised paragraph 26.11.02.02A(2).
*	*	*	*	*
10.18.08/26.11.08 Control of Incinerators				
*	*	*	*	*
10.18.08.04/26.11.08.04	Visible Emissions	11/24/03	08/01/07 [Insert page number where the document begins].	Revised COMAR citation; revised paragraph 26.11.08.04C.
*	*	*	*	*
26.11.09 Control of Fuel-Burning Equipment and Stationary Internal Combustion Engines, and Certain Fuel-Burning Installations				
*	*	*	*	*
26.11.09.05	Visible Emissions	11/24/03	08/01/07 [Insert page number where the document begins].	Revised paragraph 26.11.09.05A(3).

EPA-APPROVED REGULATIONS IN THE MARYLAND SIP—Continued

Code of Maryland administrative regulations (COMAR) citation	Title/subject	State effective date	EPA approval date	Additional explanation/citation at 40 CFR 52.1100
*	*	*	*	*
26.11.10 Control of Iron and Steel Production Installations				
*	*	*	*	*
26.11.10.03	Visible Emissions	11/24/03	08/01/07 [Insert page number where the document begins].	Revised paragraph 26.11.10.03A(2).
*	*	*	*	*

* * * * *

[FR Doc. E7–14773 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2007–0462; FRL–8442–4]

Revisions to the California State Implementation Plan, Sacramento Metropolitan Air Quality Management District and San Joaquin Valley Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Sacramento Metropolitan Air Quality Management District (SMAQMD) and San Joaquin Valley Air Pollution Control District (SJVAPCD) portions of the California State Implementation Plan (SIP). These revisions concern oxides of nitrogen (NO_X) emissions from boilers, process heaters, steam generators, and glass melting furnaces. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: This rule is effective on October 1, 2007 without further notice, unless EPA receives adverse comments by August 31, 2007. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number EPA–R09–OAR–2007–0462, by one of the following methods:

1. *Federal eRulemaking Portal: www.regulations.gov*. Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov*.

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through the *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. 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.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Francisco Dóñez, EPA Region IX, (415) 972–3956, *Donez.Francisco@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

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I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules addressed by this proposal with the dates that they were adopted by local air agencies and submitted by the California Air Resources Board (CARB).

TABLE 1.—SUBMITTED RULES

Local agency	Rule No.	Rule title	Adopted	Submitted
SMAQMD	411	NO_X from Boilers, Process Heaters and Steam Generators	10/27/05	06/16/06
SJVAPCD	4354	Glass Melting Furnaces	08/17/06	12/29/06

On July 21, 2006, the submittal of SMAQMD Rule 411 was found to meet the completeness criteria in 40 CFR Part 51, Appendix V, which must be met before formal EPA review. The submittal of SJVAPCD Rule 4354 was found to meet the completeness criteria on February 13, 2007.

B. Are there other versions of these rules?

We approved a version of Rule 411 into the SIP on February 9, 1996 (61 FR 4887). The SMAQMD adopted revisions to the SIP-approved version on January 9, 1997 and CARB submitted them to us on May 18, 1998. We approved a version of Rule 4354 into the SIP on December 6, 2002 (67 FR 72573). While we can act on only the most recently submitted version, we have reviewed materials provided with previous submittals.

C. What is the purpose of the submitted rule revisions?

NO_X helps produce ground-level ozone, smog and particulate matter, which harm human health and the environment. Section 110(a) of the CAA requires states to submit regulations that control NO_X emissions. Rule 411 has been amended to apply to boilers, process heaters and steam generators with a rated heat input capacity of 1 million Btu per hour or more. Several NO_X limits in the rule have been lowered, and some requirements for exemption from the rule's emission limits have been modified. Amended Rule 4354 now applies to glass melting furnaces located at stationary sources with the potential to emit at least 10 tons per year of either NO_X or VOC. EPA's technical support documents (TSD) have more information about these rules.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rules?

Generally, SIP rules must be enforceable (see section 110(a) of the Act), must require Reasonably Available Control Technology (RACT) for each category of sources covered by a Control Techniques Guidelines (CTG) document as well as each major source in nonattainment areas (see sections 182(a)(2) and 182(f)), and must not relax existing requirements (see sections 110(l) and 193). The SMAQMD and SJVAPCD both regulate ozone nonattainment areas (see 40 CFR part 81), so Rule 411 and Rule 4354 must fulfill RACT.

Guidance and policy documents that we used to help consistently evaluate enforceability and RACT requirements include the following:

1. ''State Implementation Plans; Nitrogen Oxides Supplement to the General Preamble; Clean Air Act Amendments of 1990 Implementation of Title I; Proposed Rule,'' (the NO_X Supplement), 57 FR 55620, November 25, 1992.
2. ''Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations,'' EPA, May 25, 1988 (the Bluebook).
3. ''Guidance Document for Correcting Common VOC & Other Rule Deficiencies,'' EPA Region 9, August 21, 2001 (the Little Bluebook).
4. ''Alternative Control Techniques Document—NO_X Emissions from Glass Manufacturing,'' EPA, EPA–453/R–94–037, June 1994.
5. ''Alternative Control Techniques Document—NO_X Emissions from Industrial/Commercial/Institutional Boilers,'' EPA, EPA–453/R–94–022, March 1994.
6. ''Determination of Reasonably Available Control Technology and Best Available Retrofit Control Technology for Industrial, Institutional, and Commercial Boilers, Steam Generators, and Process Heaters,'' California Air Resources Board, July 18, 1991.
7. ''Suggested Control Measure for the Control of Oxides of Nitrogen Emissions from Glass Melting Furnaces,'' California Air Resources Board, September 5, 1980.

B. Do the rules meet the evaluation criteria?

We believe these rules are consistent with the relevant policy and guidance regarding enforceability, RACT, and SIP relaxations. Rule 411 has been strengthened by the lowered applicability threshold and NO_X emissions limits, and the exemptions from the rule have been appropriately limited. Rule 4354 has also been strengthened by the lowering of its applicability threshold. The TSDs have more information on our evaluation.

C. EPA Recommendations To Further Improve the Rules

The TSDs describe additional rule revisions that do not affect EPA's current action but are recommended for the next time the local agency modifies the rules.

D. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted rules because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register**, we are simultaneously proposing approval of the same submitted rules. If we receive adverse comments by August 31, 2007, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on October 1, 2007. This will incorporate these rules into the federally enforceable SIP.

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.

III. Statutory and Executive Order Reviews

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

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). 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 approves a state rule implementing a Federal standard.

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 1, 2007. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: June 20, 2007.

Jane Diamond,

Acting Regional Administrator, Region IX.

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

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(345)(i)(B)(*1*) and (347)(i)(A)(*1*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(345) * * *

(i) * * *

(B) Sacramento Metropolitan Air Quality Management District.

(*1*) Rule 411, adopted on October 27, 2005.

* * * * *

(347) December 29, 2006

(i) Incorporation by reference.

(A) San Joaquin Valley Air Pollution Control District.

(*1*) Rule 4354, adopted on August 17, 2006.

[FR Doc. E7–14586 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2006–0729; FRL–8439–2]

Revisions To the Arizona State Implementation Plan, Pinal County Air Quality Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing a limited approval and limited disapproval of revisions to the Pinal County Air Quality Control District (PCAQCD) portion of the Arizona State Implementation Plan (SIP). This action was proposed in the **Federal Register** on October 17, 2006 and concerns particulate matter (PM–10) emissions from fugitive dust. Under authority of the Clean Air Act as amended in 1990 (CAA or the Act), this action simultaneously approves local rules that regulate these emission sources and directs Arizona to correct rule deficiencies.

DATES: *Effective Date:* This rule is effective on August 31, 2007.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2006–0729 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Francisco Dóñez, EPA Region IX, (415) 972–3956, *Donez.Francisco@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us'' and ''our'' refer to EPA.

I. Proposed Action

On October 17, 2006 (71 FR 60934), EPA proposed a limited approval and limited disapproval of the following rules that were submitted for incorporation into the Arizona SIP.

Local agency	Rule No.	Rule title	Adopted	Submitted
PCAQCD	4–2–020	General [Fugitive Dust]	06/29/93	11/27/95
PCAQCD	4–2–030	Definitions [Fugitive Dust]	06/29/93	11/27/95
PCAQCD	4–2–040	Standards [Fugitive Dust]	06/29/93	11/27/95

Local agency	Rule No.	Rule title	Adopted	Submitted
PCAQCD	4–2–050	Monitoring and Records [Fugitive Dust]	05/14/97	10/07/98

We proposed a limited approval because we determined that these rules improve the SIP and are largely consistent with the relevant CAA requirements. We simultaneously proposed a limited disapproval because some rule provisions conflict with section 110 and part D of the Act. These provisions include the following:

1. The exemption of agricultural activities from fugitive dust rules without justification in Rules 4–2–020 and 4–2–030.

2. Expression of rule requirements in highly general terms, using the vaguely defined criterion of ''reasonable precaution,'' in Rules 4–2–030 and 4–2–040.

3. The absence of recordkeeping provisions in Rule 4–2–050.

Our proposed action contains more information on the basis for this rulemaking and on our evaluation of the submittal.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received comments from the following parties.

1. Donald P. Gabrielson, Pinal County Air Quality Control District (PCAQCD); letter dated November 16, 2006 and received November 16, 2006.

2. Susan Asmus, National Association of Home Builders (NAHB); letter dated November 15, 2006 and received November 16, 2006.

The comments and our responses are summarized below.

Comment #1: PCAQCD commented that EPA's proposed rule incorrectly stated that there are no previous versions of Rules 4–2–020, 4–2–030, 4–2–040, and 4–2–050 in the SIP. The comment pointed out that EPA approved Pinal County Regulation 7–3–1.2 (Fugitive Dust) into the SIP on November 15, 1978 (43 FR 53034). Regulation 7–3–1.2 contains provisions similar to those in the submitted version of 4–2–040.

Response #1: EPA acknowledges that this correction to our proposed rule is accurate. However, this error does not have any substantive impact on our proposed action.

Comment #2: PCAQCD commented that the effective agricultural exemption in Rules 4–2–020 and 4–2–030 was removed in a subsequent amendment of these rules, adopted on January 24, 2003. However, these amended rules were not submitted as SIP elements.

Response #2: EPA acknowledges the 2003 amendments to Rules 4–2–020 and 4–2–030. However, we can only act on rules that have been submitted by the state as SIP amendments. As this comment indicates, the 2003 revisions were never submitted to EPA for inclusion in the SIP. If PCAQCD submits the 2003 version of these rules as a SIP amendment, our objection to the agricultural exemption will be resolved.

Comment #3: PCAQCD disagreed that the definition and use of ''reasonable precaution'' in Rules 4–2–030 and 4–2–040, respectively, is not sufficiently clear or enforceable. They commented that formulating specific requirements for every dust-generating activity would be impractical.

Response #3: In our General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990 we explain that procedures for determining compliance with a rule must be ''sufficiently specific and nonsubjective so that two independent entities applying the procedures would obtain the same result.'' See 57 FR 13498, 13568 (April 16, 1992). A SIP must also include ''clear, unambiguous, and measurable requirements'' for ensuring that sources are in compliance with control measures (ibid).

These rules do not meet EPA's enforceability criteria because they do not establish any standards by which to gauge source compliance with implementation of reasonable precautions. Rules 4–2–030 and 4–2–040 allow Executive Officer discretion in determining when measures have ''effectively prevented'' the emission of fugitive dust. EPA considers such Executive Officer discretion a violation of Clean Air Act section 110(a)(2)(A).

In contrast, analogous rules in other areas describe specific requirements for significant sources of PM–10 by source category. Examples of district rules containing specific source category requirements include:

- Maricopa County Environmental Services Department, Arizona (MCESD), Rule 310 (Fugitive Dust).
- San Joaquin Valley Unified Air Pollution Control District, California (SJVUAPCD), Regulation 8 (Fugitive PM–10 Prohibitions).
  - Rule 8021 (Construction, Demolition, Excavation, Extraction, and Other Earthmoving Activities)
  - Rule 8031 (Bulk Materials)
  - Rule 8041 (Carryout and Trackout)
  - Rule 8051 (Open Areas)
  - Rule 8061 (Paved and Unpaved Roads)
  - Rule 8071 (Unpaved Vehicle/Equipment Traffic Areas)
  - Rule 8081 (Agricultural Sources)
- South Coast Air Quality Management District, California (SCAQMD), Rule 403 (Fugitive Dust).
- Clark County, Nevada.
  - Section 90 (Fugitive Dust From Open Areas and Vacant Lots)
  - Section 91 (Fugitive Dust From Unpaved Roads, Unpaved Alleys, and Unpaved Easement Roads)
  - Section 92 (Fugitive Dust From Unpaved Parking Lots, Material Handling and Storage Yards, and Vehicle and Equipment Storage Yards)
  - Section 93 (Fugitive Dust From Paved Roads and Street Sweeping Equipment)
  - Section 94 (Permitting and Dust Control for Construction Activities)

It is PCAQCD's obligation to consider their own inventory and establish specific BACM requirements for significant source categories. EPA will work with PCAQCD to identify measures that are appropriate in light of local circumstances.

Comment #4: PCAQCD disagreed with EPA's assertion in our proposed rule that the absence of recordkeeping provisions in Rule 4–2–050 constitutes a rule deficiency. They further commented that the ''reasonable precaution'' standard, combined with monitoring information, is sufficient to ascertain compliance with these rules.

Response #4: Recordkeeping provisions in prohibitory rules provide the main instruments for effective enforcement of regulatory requirements. Recordkeeping is needed in order to verify compliance with the requirements or limits established by the rule. Section 110(a) of the Clean Air Act requires the inclusion of recordkeeping measures in any submitted SIP rule. Though recordkeeping requirements for fugitive dust may not be as detailed as those in typical stationary source rules, some feasible recordkeeping provisions are nevertheless required. Examples of district rules containing recordkeeping requirements include:

- Maricopa County Environmental Services Department, Arizona (MCESD), Rule 310 (Fugitive Dust).

• San Joaquin Valley Unified Air Pollution Control District, California (SJVUAPCD), Regulation 8 (Fugitive PM–10 Prohibitions), Rule 8011 (General Requirements).

• South Coast Air Quality Management District, California (SCAQMD), Rule 403 (Fugitive Dust).

• Clark County, Nevada.

○ Section 90 (Fugitive Dust From Open Areas and Vacant Lots)

○ Section 91 (Fugitive Dust From Unpaved Roads, Unpaved Alleys, and Unpaved Easement Roads)

○ Section 92 (Fugitive Dust From Unpaved Parking Lots, Material Handling and Storage Yards, and Vehicle and Equipment Storage Yards)

○ Section 93 (Fugitive Dust From Paved Roads and Street Sweeping Equipment)

○ Section 94 (Permitting and Dust Control for Construction Activities)

Comment #5: PCAQCD commented that EPA has no basis to impose sanctions on the basis of the currently submitted rules. They noted that the currently approved SIP Rule R7–3–1.2 also applies a ''reasonable precaution'' standard with respect to agricultural activity, and that EPA is not justified in starting a sanctions clock for the current rules, in which the ''reasonable precaution'' requirement is repeated.

Response #5: We approved Rule 7–3–1.2 into the SIP in 1978. Since that time, national policy on particulate matter and fugitive dust requirements has evolved. Sections 172(c)(1) and 189(a) of the CAA require moderate PM–10 nonattainment areas to implement reasonably available control measures (RACM), including reasonably available control technology (RACT) for stationary sources of PM–10. Section 189(b) requires that serious PM–10 nonattainment areas, in addition to meeting the RACM/RACT requirements, implement best available control measures (BACM), including best available control technology (BACT). In the northern part of PCAQCD is the Apache Junction portion of the Phoenix metropolitan area, which is a serious PM–10 nonattainment area. In the northeastern part of PCAQCD is Hayden-Miami, which is a moderate PM–10 nonattainment area. PCAQCD regulates certain sources of PM–10 within both nonattainment areas.

EPA's guidance for both moderate and serious PM–10 nonattainment areas requires that RACM/RACT and BACM/BACT be implemented for all source categories unless the State demonstrates that a particular source category does not contribute significantly to PM–10 levels in excess of the NAAQS (i.e., de minimis sources). See the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 57 FR 13498, 13540 (April 16, 1992) and Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990, 59 FR 41998, 42011 (August 16, 1994).

The potential to emit of the emission activities subject to PCAQCD Rules 4–2–020, 4–2–030, 4–2–040, and 4–2–050 comprises a small but significant portion of the total PM–10 emissions in the Phoenix metropolitan area, according to the August 1999 Apache Junction Portion of the Metropolitan Phoenix PM–10 Serious State Implementation Plan (PM–10 Plan). Therefore, Rules 4–2–020, 4–2–030, 4–2–040, and 4–2–050 must meet BACM/BACT control levels. Under this standard, Rules 4–2–020, 4–2–030, 4–2–040, and 4–2–050 are not wholly approvable for inclusion in the SIP, and per Clean Air Act Section 179, a sanctions clock must be started.

We also note the following from the preamble to the recently promulgated PM standards: ''The United States Department of Agriculture (USDA) has been working with the agricultural community to develop conservation systems and activities to control coarse particle emissions. Based on current ambient monitoring information, these USDA-approved conservation systems and activities have proven to be effective in controlling these emissions in areas where coarse particles emitted from agricultural activities have been identified as a contributor to violation of the NAAQS. The EPA concludes that where USDA-approved conservation systems and activities have been implemented, these systems and activities have satisfied the Agency's reasonable available control measure and best available control measure requirements. The EPA believes that in the future, when properly implemented, USDA-approved conservation systems and activities should satisfy the requirements for reasonably available control measures or best available control measures.''

Comment #6: NAHB sent a comment supporting EPA's proposed action.

Response #6: EPA acknowledges this comment.

III. EPA Action

No comments were submitted that change our assessment of the rules as described in our proposed action. Therefore, as authorized in sections 110(k)(3) and 301(a) of the Act, EPA is finalizing a limited approval of the submitted rules. This action incorporates the submitted rule into the Arizona SIP, including those provisions identified as deficient. As authorized under section 110(k)(3), EPA is simultaneously finalizing a limited disapproval of the rules. As a result, sanctions will be imposed unless EPA approves subsequent SIP revisions that correct the rule deficiencies within 18 months of the effective date of this action. These sanctions will be imposed under section 179 of the Act according to 40 CFR 52.31. In addition, EPA must promulgate a federal implementation plan (FIP) under section 110(c) unless we approve subsequent SIP revisions that correct the rule deficiencies within 24 months. Note that the submitted rules have been adopted by the PCAQCD, and EPA's final limited disapproval does not prevent the local agency from enforcing them.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

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.*)

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals under section 110 and subchapter I, part D of the Clean Air Act do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal

inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action promulgated does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it 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. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

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

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

This rule is not subject to Executive Order 13045 because it does not involve decisions intended to mitigate environmental health or safety risks.

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

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

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register.** A major rule cannot take effect until 60 days after it is published in the **Federal Register.** This action is not a ''major rule'' as defined by 5 U.S.C. 804(2). This rule will be effective August 31, 2007.

K. 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 October 1, 2007. Filing a petition for reconsideration by

the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting and recordkeeping requirements.

Dated: June 25, 2007.

Wayne Nastri,

Regional Administrator, Region IX.

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

PART 52—[AMENDED]

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

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

Subpart D—Arizona

■ 2. Section 52.120 is amended by adding paragraphs (c)(84)(i)(L) and (107)(i)(A)(*2*) to read as follows:

§ 52.120 Identification of plan.

* * * * *

(c) * * *

(84) * * *

(i) * * *

(L) Rules 4–2–020, 4–2–030, and 4–2–040, adopted on June 29, 1993.

* * * * *

(107) * * *

(i) * * *

(A) * * *

(*2*) Rule 4–2–050, adopted on May 14, 1997.

* * * * *

[FR Doc. E7–14555 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2007–0477; FRL–8448–5]

Approval and Promulgation of Implementation Plans; State of Iowa

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the state of Iowa for maintenance of the sulfur dioxide (SO_2) National Ambient Air Quality Standard (NAAQS) in Muscatine, Iowa.

DATES: This direct final rule will be effective October 1, 2007, without further notice, unless EPA receives adverse comment by August 31, 2007. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** informing the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R07–OAR–2007–0477, by one of the following methods:

1. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

2. *E-mail: Hamilton.heather@epa.gov.*

3. *Mail:* Heather Hamilton, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101.

4. *Hand Delivery or Courier:* Deliver your comments to Heather Hamilton, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101.

Instructions: Direct your comments to Docket ID No. EPA–R07–OAR–2007–0477. 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.regulations.gov,* 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 through *http://www.regulations.gov* or e-mail information that you consider to be CBI or otherwise protected. The *http://www.regulations.gov* Web site is 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 *http://www.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 *http://www.regulations.gov* index. 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 *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101. The Regional Office's official hours of business are Monday through Friday, 8 to 4:30 excluding Federal holidays. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

FOR FURTHER INFORMATION CONTACT: Heather Hamilton at (913) 551–7039 or by e-mail at *hamilton.heather@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This section provides additional information by addressing the following questions:

What is a SIP?
What is the Federal approval process for a SIP?
What are the criteria for approval of a maintenance plan?
What does Federal approval of a state regulation mean to me?
What is in the state's plan to maintain the standard?
What is being addressed in this document?
Have the requirements for approval of a SIP revision been met?
What action is EPA taking?

What is a SIP?

Section 110 of the Clean Air Act (CAA or Act) requires states to develop air pollution regulations and control strategies to ensure that state air quality meets the national ambient air quality standards established by EPA. These ambient standards are established under section 109 of the CAA, and they currently address six criteria pollutants. These pollutants are: Carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide.

Each state must submit these regulations and control strategies to us for approval and incorporation into the Federally-enforceable SIP.

Each Federally-approved SIP protects air quality primarily by addressing air pollution at its point of origin. These SIPs can be extensive, containing state regulations or other enforceable documents and supporting information such as emission inventories, monitoring networks, and modeling demonstrations.

What is the Federal approval process for a SIP?

In order for state regulations to be incorporated into the Federally-enforceable SIP, states must formally adopt the regulations and control strategies consistent with state and Federal requirements. This process generally includes a public notice, public hearing, public comment period, and a formal adoption by a state-authorized rulemaking body.

Once a state rule, regulation, or control strategy is adopted, the state submits it to us for inclusion into the SIP. We must provide public notice and seek additional public comment regarding the proposed Federal action on the state submission. If adverse comments are received, they must be addressed prior to any final Federal action by us.

All state regulations and supporting information approved by EPA under section 110 of the CAA are incorporated into the Federally-approved SIP. Records of such SIP actions are maintained in the Code of Federal Regulations (CFR) at title 40, part 52, entitled ''Approval and Promulgation of Implementation Plans.'' The actual state regulations which are approved are not reproduced in their entirety in the CFR outright but are ''incorporated by reference,'' which means that we have approved a given state regulation with a specific effective date.

What are the criteria for approval of a maintenance plan?

The Clean Air Act requires maintenance plans for areas which are redesignated from nonattainment to attainment for a criteria pollutant. The requirements for the approval and revision of a maintenance plan are found in section 175A of the CAA. A maintenance plan must provide a demonstration of continued attainment for 10 years after redesignation, including the control measures relied upon, provide contingency measures for the prompt correction of any violation of the standard, provide for continued operation of an adequate ambient air quality monitoring network, provide a means of tracking the progress of the plan, and include the attainment emissions inventory. Section 175A(b) requires a revision to the initial maintenance plan to demonstrate continued attainment for 10 years after the initial 10-year period.

What does Federal approval of a state regulation mean to me?

Enforcement of the state regulation before and after it is incorporated into the Federally-approved SIP is primarily a state responsibility. However, after the regulation is Federally approved, we are authorized to take enforcement action against violators. Citizens are also offered legal recourse to address violations as described in section 304 of the CAA.

What is in the state's plan to maintain the standard?

Background: A portion of Muscatine County, Iowa, was designated nonattainment for the 24-hour SO_2 NAAQS on March 10, 1994. An attainment demonstration and control strategy SIP were approved by EPA on December 1, 1997 (62 FR 63464). On March 19, 1998, EPA approved a maintenance plan for the area, finding that it met the requirements of section 175A of the Act, and redesignated the area from nonattainment to attainment (63 FR 13343). The SIP revision addressed below is a revision to this maintenance plan to address the requirement of section 175A(b) for a second ten-year maintenance plan.

Emission Inventory: Maintenance of the SO_2 standard in the Muscatine area was ensured through continued compliance with emission reductions requirements as prescribed in construction permits and incorporated and approved by EPA as revisions made to the SIP. These measures have been highly effective and attainment will continue to rely on ensuring that emissions are maintained at a level that is at or below current allowable emission rates. Past, current and projected emissions are included in the second 10-year plan. IDNR also reviewed county-wide point source emissions, on-road sources, non-road, and area sources into the current and projected level of SO_2 emissions. Projected levels of SO_2 emissions show decreased levels with the exception of the area source inventory. This is due to predicted increase in gas stations and dry cleaners but the increase is more than off set by the decreases of other sectors. The emissions inventory was reviewed by EPA technical personnel and was found to be acceptable.

Demonstration of Continued Attainment: The Iowa Department of Natural Resources (IDNR) will continue to ensure the enforceable emission limitations and operating conditions at the facilities, included in the previous two federally-approved SIP revisions, are enforced as necessary. Based on a review of the SO_2 ambient monitoring data collected since 1999, and an evaluation of predicted future SO_2 emissions for the area, IDNR has demonstrated that no additional control measures are necessary to maintain the NAAQS in Muscatine. The maintenance plan contains a detailed description of emission limits and operating conditions at each facility which have resulted in maintenance of the SO_2 standard.

Contingency Measures: The first maintenance plan identified three facilities in the Muscatine area that were the primary source of SO_2 emissions. IDNR negotiated emission reductions with the facilities and the reductions were incorporated into revised construction permits which were submitted as part of the section 110 SIP revision and thus, were Federally enforceable. Contingency measures for the second 10-year maintenance plan include mechanisms for responding to monitored exceedances of the NAAQS and include reviewing and regulating the allowable emissions for new and modified sources; requiring reduction in emissions from sources contributing to an exceedance of the NAAQS; ambient air quality monitoring, and emissions monitoring. In the event of an exceedance of the NAAQS, IDNR will conduct an investigation of the major SO_2 emitters in the area to determine if they are in compliance with permit conditions limiting SO_2 emissions, and other applicable regulatory requirements. SO_2 sources will be required to submit a written report within 60 days detailing their operations on the day of the exceedance if requested by the IDNR. (Violation of the 24-hour SO_2 standard was the basis for the previous nonattainment designation for the area.) Owners and operators of sources emitting SO_2 will be required to determine possible causes of excess emissions that may have contributed to the exceedance including malfunctions and upset conditions. The analysis will include an evaluation of the meteorological conditions prevailing at the time of the exceedance. Depending on the circumstances of the incident, other activities such as inspections, dispersions modeling, additional monitors, or proposing more stringent emission limitations may be necessary. The state commits to requiring implementation of any additional control measures no later than 24 months after a NAAQS

violation. Because the existing control strategy has resulted in readily quantifiable emissions reductions and has been adequate to prevent violations of the SO_2 NAAQS for more than 10 years after redesignation, EPA concludes that these contingency measures to address any subsequent violations are adequate to meet the requirements of section 175A.

Air Quality Monitoring: The current monitoring network operated by IDNR consists of three monitors. The Iowa SIP submittal proposed to discontinue two of these monitors as explained below. The Greenwood Cemetery monitoring site has never recorded an exceedance of the NAAQS for SO_2 and the maximum values recorded at the site have declined in recent years. During the last full year of data collection (2005), the maximum value recorded at the site was 17% of the 24-hour NAAQS. The maximum value recorded for the 3-hour averaging period and the 2005 annual value were both 15% or less of the 3-hour and annual NAAQS. Based on this information, IDNR has proposed to discontinue this monitor. EPA has determined that discontinuance of this monitor is acceptable.

The second monitor is located at Muscatine Power and Water (MPW) and, like the Greenwood Cemetery site, has never recorded an exceedance of the NAAQS and the maximum recorded values at the site have also declined. During 2005, the maximum value recorded at the site was 14% of the 24-hour NAAQS; the maximum recorded 3-hour value was less than 14% of the 3-hour NAAQS, and the 2005 annual value was only 10% of the annual NAAQS. Based on this information, IDNR has proposed to discontinue this monitor. EPA has determined that discontinuance of this monitor is acceptable.

The third monitor is located at Musser Park and recorded multiple exceedances prior to implementation of the emissions control strategy. Since the control strategy was implemented, only one 24-hour exceedance occurred which was on December 1, 1999, with a monitored value of 387.4 $\mu g/m^3$ (0.148 ppm). (The 24-hour SO_2 NAAQS is 0.14 ppm, not to be exceeded more than once per calendar year.) Maximum values recorded at the site have declined in recent years. During the last full year of data collection (2005) the maximum daily value recorded was 52% of the 24-hour NAAQS. No exceedances of the 3-hour or annual SO_2 NAAQS have been recorded at this site. During 2005, the 3-hour value recorded at the site was 33% of the 3-hour NAAQS. The 2005 annual value was only 20% of the annual NAAQS. IDNR will continue to monitor at this site. The monitoring plan proposed by IDNR continues to meet the monitoring requirements of 40 CFR Part 58.

Tracking the Progress of the Plan: An air quality modeling analysis was performed to support the development of the control strategy for the nonattainment area SIP. The inputs, procedures and results were reviewed during the development of the maintenance plan demonstration for the first 10-year maintenance plan, and a review for the second 10-year plan concluded that no additional modeling was necessary. This decision was supported by the Muscatine SO_2 monitoring network measurements which indicate no violations of the 24-hour SO_2 NAAQS since the maintenance plan period started.

Any new or modified major stationary source constructed in the state must comply with the state's Federally-approved New Source Review program. For major source construction or modification, implementation of the best available control technology provisions and completion of the ambient air quality impact analyses and additional impacts analyses, requirements of the Prevention of Significant Deterioration program will ensure that new or modified sources in the maintenance area, and in the vicinity of the maintenance area, are controlled to the extent necessary to maintain the SO_2 NAAQS.

What is being addressed in this document?

EPA is approving the State Implementation Plan (SIP) revision submitted by the state of Iowa for the purpose of establishing the second 10-year maintenance plan for the SO_2 NAAQS in Muscatine, Iowa. This action will continue to ensure the measures in the plan maintain the standard in Muscatine and remain in place as Federal requirements.

Have the requirements for approval of a SIP revision been met?

The state submittal has met the public notice requirements for SIP submissions in accordance with 40 CFR 51.102. The submittal also satisfied the completeness criteria of 40 CFR part 51, appendix V. In addition, as explained above and in more detail in the technical support document which is part of this docket, the revision meets the substantive SIP requirements of the CAA, including section 175A.

What action is EPA taking?

EPA is approving the second 10-year maintenance plan for the Muscatine, Iowa, area to maintain the SO_2 NAAQS. We are processing this action as a direct final action because the revisions are noncontroversial. Therefore, we do not anticipate any adverse comments. Please note that if EPA receives adverse comment on part of this rule and if that part can be severed from the remainder of the rule, EPA may adopt as final those parts of the rule that are not the subject of an adverse comment.

Statutory and Executive Order Reviews

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

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). 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 CAA. This rule also is not subject to Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it approves a state rule implementing a Federal standard.

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

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the 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 October 1, 2007. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

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

Dated: July 22, 2007.

John B. Askew,

Regional Administrator, Region 7.

■ Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart Q—Iowa

■ 2. In § 52.820(e) the table is amended by adding an entry in numerical order to read as follows:

§ 52.820 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED IOWA NONREGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
*	*	*	*	*
(37) SO_2 Maintenance Plan for the Second 10-year Period.	Muscatine	04/05/2007	08/01/2007 [insert FR page number where the document begins].	

[FR Doc. E7–14868 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52 and 81

[EPA–R03–OAR–2007–0324; FRL–8447–7]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Redesignation of the Johnstown (Cambria County) Ozone Nonattainment Area to Attainment and Approval of the Area's Maintenance Plan and 2002 Base Year Inventory

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. The Pennsylvania Department of Environmental Protection (PADEP) is requesting that the Johnstown (Cambria County) ozone nonattainment area (Cambria Area) be redesignated as attainment for the 8-hour ozone ambient air quality standard (NAAQS). EPA is approving the ozone redesignation request for Cambria Area. In conjunction with its redesignation request, PADEP submitted a SIP revision consisting of a maintenance plan for Cambria Area that provides for continued attainment of the 8-hour ozone NAAQS for at least 10 years after redesignation. EPA is approving the 8-hour maintenance plan. PADEP also submitted a 2002 base year inventory for the Cambria Area which EPA is approving. In addition, EPA is approving the adequacy determination for the motor vehicle emission budgets (MVEBs) that are identified in the Cambria Area maintenance plan for purposes of transportation conformity, and is approving those MVEBs. EPA is approving the redesignation request, and the maintenance plan and the 2002 base year emissions inventory as revisions to the Pennsylvania SIP in accordance with the requirements of the Clean Air Act (CAA).

DATES: *Effective Date:* This final rule is effective on August 1, 2007 pursuant to the authority of 5 U.S.C. 553(d)(1).

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2007–0324. All documents in the docket are listed in the *www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (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 through *www.regulations.gov* or in hard copy for public inspection 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 Pennsylvania Department of Environmental Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Rose Quinto, (215) 814–2182, or by e-mail at *quinto.rose@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On June 1, 2007 (72 FR 30509), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Pennsylvania. The NPR proposed approval of Pennsylvania's redesignation request, a SIP revision that establishes a maintenance plan for the Cambria Area that provides for continued attainment of the 8-hour ozone NAAQS for at least 10 years after redesignation, and a 2002 base year emissions inventory. The formal SIP revisions were submitted by PADEP on March 27, 2007. Other specific requirements of Pennsylvania's redesignation request, SIP revision for the maintenance plan, and the rationales for EPA's proposed actions are explained in the NPR and will not be restated here. No public comments were received on the NPR.

However, on December 22, 2006, the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's Phase 1 Implementation Rule for the 8-hour Ozone Standard. (69 FR 23591, April 30, 2004). *South Coast Air Quality Management Dist.* v. *EPA*, 472 F.3d 882 (D.C. Cir. 2006). On June 8, 2007, in *South Coast Air Quality Management Dist.* v. *EPA,* Docket No. 04–1201, in response to several petitions for rehearing, the D.C. Circuit clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. Therefore, the Phase 1 Rule provisions related to classifications for areas currently classified under subpart 2 of Title I, part D of the Act as 8-hour nonattainment areas, the 8-hour attainment dates and the timing for emissions reductions needed for attainment of the 8-hour ozone NAAQS remain effective. The June 8 decision left intact the Court's rejection of EPA's reasons for implementing the 8-hour standard in certain nonattainment areas under subpart 1 in lieu of subpart 2. By limiting the vacatur, the Court let stand EPA's revocation of the 1-hour standard and those anti-backsliding provisions of the Phase 1 Rule that had not been successfully challenged. The June 8 decision reaffirmed the December 22, 2006 decision that EPA had improperly failed to retain measures required for 1-hour nonattainment areas under the anti-backsliding provisions of the regulations: (1) Nonattainment area New Source Review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) Section 185 penalty fees for the 1-hour severe or extreme nonattainment areas; and (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the Act, on the contingency of an area not making reasonable further progress toward attainment of the 1-hour NAAQS, or for failure to attain NAAQS. In addition, the June 8 decision clarified that the Court's reference to conformity requirements for anti-backsliding purposes was limited to requiring the continued use of the 1-hour motor vehicle emissions budgets until 8-hour budgets were available for 8-hour conformity determinations, which is already required under EPA's conformity regulations. The Court thus clarified the 1-hour conformity determinations are not required for anti-backsliding purposes.

For the reasons set forth in the proposal, EPA does not believe that the Court's rulings alter any requirements relevant to this redesignation action so as to preclude redesignation, and do not prevent EPA from finalizing this redesignation. EPA believes that the Court's December 22, 2006 and June 8, 2007 decisions impose no impediment to moving forward with redesignation of this area to attainment, because even in the light of the Court's decisions, redesignation is appropriate under the relevant redesignation provisions of the Act and longstanding policies regarding redesignation requests.

In the June 1, 2007 NPR, EPA proposed to find that the area had satisfied the requirements under the 1-hour standard whether the 1-hour standard was deemed to be reinstated or whether the Court's decision on the petition for rehearing were modified to require something less than compliance with all applicable 1-hour requirements. Because EPA proposed to find that the area satisfied the requirements under either scenario, EPA is proceeding to finalize the redesignation and to conclude that the area met the requirements under the 1-hour standard applicable for purposes of redesignation under the 8-hour standard. These include the provisions of EPA's anti-backsliding rules, as well as the additional anti-backsliding provisions identified by the Court in its rulings. In its June 8, 2007 decision, the Court limited its vacatur so as to uphold those provisions of the anti-backsliding requirements that were not successfully challenged. Therefore, EPA finds that the area has met the anti-backsliding requirements, *see* 40 CFR 51.900 *et seq;* 70 FR 30592, 30604 (May 26, 2005) which apply by virtue of the area's classification for the 1-hour ozone NAAQS, as well as the four additional anti-backsliding provisions identified by the Court, or that such requirements are not applicable for purposes of redesignation. In addition, with respect to the requirement for transportation conformity under the 1-hour standard, the Court in its June 8 decision clarified that for those with 1-hour motor vehicle emissions budgets, anti-backsliding requires only that those 1-hour budgets must be used for 8-hour conformity determinations until replaced by 8-hour budgets. To meet this requirement, conformity determinations in such areas must continue to comply with the applicable requirements of EPA's conformity regulations at 40 CFR part 93. The Court clarified that the 1-hour conformity determinations are not required for anti-backsliding purposes.

II. Final Action

EPA is approving the Commonwealth of Pennsylvania's redesignation request, maintenance plan, and the 2002 base year emissions inventory because the requirements for approval have been satisfied. EPA has evaluated Pennsylvania's redesignation request that was submitted on March 27, 2007 and determined that it meets the redesignation criteria set forth in section 107(d)(3)(E) of the CAA. EPA believes that the redesignation request and monitoring data demonstrate that the Cambria Area has attained the 8-hour ozone standard. The final approval of this redesignation request will change the designation of the Cambria Area from nonattainment to attainment for the 8-hour ozone standard. EPA is approving the maintenance plan for the Cambria Area submitted on March 27, 2007 as a revision to the Pennsylvania SIP. EPA is also approving the MVEBs submitted by PADEP in conjunction with its redesignation request. In addition, EPA is approving the 2002 base year emissions inventory as a revision to the Pennsylvania SIP submitted by PADEP on March 27, 2007. In this final rulemaking, EPA is notifying the public that we have found

that the MVEBs for nitrogen oxides (NO_X) and volatile organic compounds (VOCs) in the Cambria Area for the 8-hour ozone maintenance plan are adequate and approved for conformity purposes. As a result of our finding, the Cambria Area must use the MVEBs from the submitted 8-hour ozone maintenance plan for future conformity determinations. The adequate and approved MVEBs are provided in the following table:

ADEQUATE AND APPROVED MOTOR VEHICLE EMISSIONS BUDGETS IN TONS PER DAY (TPD)

Budget year	NO_X	VOC
2009	3.8	5.6
2018	2.3	2.7

The Cambria Area is subject to the CAA's requirement for the basic nonattainment areas until and unless it is redesignated to attainment.

III. 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. Redesignation of an area to attainment under section 107(d)(3)(e) of the Clean Air Act does not impose any new requirements on small entities. Redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on sources. 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 final 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). Because this action affects the status of a geographical area, does not impose any new requirements on sources, or allows the state to avoid adopting or implementing other requirements, 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 requirement, 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 approves a state rule implementing a Federal standard.

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. Redesignation is an action that affects the status of a geographical area and does not impose any new requirements on sources. 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 October 1, 2007. 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 redesignation of the Cambria Area to attainment for the 8-hour ozone NAAQS, the associated maintenance plan, the 2002 base year emission inventory, and the MVEBs identified in the maintenance plan, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects

40 CFR Part 52

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

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Dated: July 18, 2007.

James W. Newsom,

Acting 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 NN—Pennsylvania

■ 2. In § 52.2020, the table in paragraph (e)(1) is amended by adding an entry for the 8-hour Ozone Maintenance Plan and 2002 Base Year Emissions Inventory for Johnstown (Cambria County), Pennsylvania at the end of the table to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(e) * * *

(1) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
*	*	*	*	*
8-Hour Ozone Maintenance Plan and 2002 Base Year Emissions Inventory.	Johnstown (Cambria County)	03/27/07	08/01/07 [Insert page number where the document begins].	

PART 81—[AMENDED]

■ 1. The authority citation for prt 81 continues to read as follows:

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

■ 2. In § 81.339, the table entitled ''Pennsylvania-Ozone (8-Hour Standard)'' is amended by revising the entry for the Johnstown, PA, Cambria County to read as follows:

§ 81.339 Pennsylvania.

* * * * *

PENNSYLVANIA—OZONE (8-HOUR STANDARD)

Designated area	Designation [a]		Category/classification	
	Date [1]	Type	Date [1]	Type
* *	*	* *	*	*
Johnstown, PA: Cambria County	08/01/07	Attainment.		
* *	*	* *	*	*

[a] Includes Indian County located in each county or area, except otherwise noted.
[1] This date is June 15, 2004, unless otherwise noted.

* * * * *

[FR Doc. E7–14745 Filed 7–31–07; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52 and 81

[EPA–R03–OAR–2007–0245; FRL–8446–9]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Redesignation of the Altoona 8-Hour Ozone Nonattainment Area to Attainment and Approval of the Area's Maintenance Plan and 2002 Base Year Inventory

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. The Pennsylvania Department of Environmental Protection (PADEP) is requesting that the Altoona 8-hour ozone nonattainment area (''Altoona Area'' or ''Area'') be redesignated as attainment for the 8-hour ozone ambient air quality standard (NAAQS). The Area is comprised of Blair County, Pennsylvania. EPA is approving the ozone redesignation request for Altoona Area. In conjunction with its redesignation request, PADEP submitted a SIP revision consisting of a maintenance plan for Altoona Area that provides for continued attainment of the 8-hour ozone NAAQS for at least 10 years after redesignation. EPA is approving the 8-hour maintenance plan. PADEP also submitted a 2002 base year inventory for the Altoona Area which EPA is approving. In addition, EPA is approving the adequacy determination for the motor vehicle emission budgets (MVEBs) that are identified in the Altoona Area maintenance plan for purposes of transportation conformity, and is approving those MVEBs. EPA is approving the redesignation request, and the maintenance plan and the 2002 base year emissions inventory as revisions to the Pennsylvania SIP in accordance with the requirements of the Clean Air Act (CAA).

DATES: *Effective Date:* This final rule is effective on August 1, 2007 pursuant to the authority of 5 U.S.C. 553(d)(1).

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2007–0245. All documents in the docket are listed in the *www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (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 through *www.regulations.gov* or in hard copy for public inspection 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 Pennsylvania Department of Environment Protection, Bureau of Air Quality Control, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

FOR FURTHER INFORMATION CONTACT: Amy Caprio, (215) 814–2156, or by e-mail at *caprio.amy@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On June 7, 2007 (72 FR 31495), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Pennsylvania. The NPR proposed approval of Pennsylvania's redesignation request, a SIP revision that establishes a maintenance plan for the Altoona Area that provides for continued attainment of the 8-hour ozone NAAQS for at least 10 years after redesignation, and a 2002 base year emissions inventory. The formal SIP revisions were submitted by

PADEP on February 8, 2007. Other specific requirements of Pennsylvania's redesignation request SIP revision for the maintenance plan and the rationales for EPA's proposed actions are explained in the NPR and will not be restated here. No public comments were received on the NPR.

However, on December 22, 2006, the U.S. Court of Appeals for the District of Columbia Circuit vacated EPA's Phase 1 Implementation Rule for the 8-hour Ozone Standard. (69 FR 23951, April 30, 2004). *South Coast Air Quality Management Dist.* v. *EPA,* 472 F.3d 882 (D.C. Cir. 2006). On June 8, 2007, in *South Coast Air Quality Management Dist.* v. *EPA,* Docket No. 04–1201, in response to several petitions for rehearing, the D. C. Circuit clarified that the Phase 1 Rule was vacated only with regard to those parts of the rule that had been successfully challenged. Therefore, the Phase 1 Rule provisions related to classifications for areas currently classified under subpart 2 of Title I, part D of the Act as 8-hour nonattainment areas, the 8-hour attainment dates and the timing for emissions reductions needed for attainment of the 8-hour ozone NAAQS remain effective. The June 8 decision left intact the Court's rejection of EPA's reasons for implementing the 8-hour standard in certain nonattainment areas under subpart 1 in lieu of subpart 2. By limiting the vacatur, the Court let stand EPA's revocation of the 1-hour standard and those anti-backsliding provisions of the Phase 1 Rule that had not been successfully challenged. The June 8 decision reaffirmed the December 22, 2006 decision that EPA had improperly failed to retain measures required for 1-hour nonattainment areas under the anti-backsliding provisions of the regulations: (1) Nonattainment area New Source Review (NSR) requirements based on an area's 1-hour nonattainment classification; (2) Section 185 penalty fees for 1-hour severe or extreme nonattainment areas; and (3) measures to be implemented pursuant to section 172(c)(9) or 182(c)(9) of the Act, on the contingency of an area not making reasonable further progress toward attainment of the 1-hour NAAQS, or for failure to attain that NAAQS.

In addition the June 8 decision clarified that the Court's reference to conformity requirements for anti-backsliding purposes was limited to requiring the continued use of 1-hour MVEBs until 8-hour budgets were available for 8-hour conformity determinations, which is already required under EPA's conformity regulations. The Court thus clarified that 1-hour conformity determinations are not required for anti-backsliding purposes.

For the reasons set forth in the proposal, EPA does not believe that the Court's rulings alter any requirements relevant to this redesignation action so as to preclude redesignation, and do not prevent EPA from finalizing this redesignation. EPA believes that the Court's December 22, 2006 and June 8, 2007 decisions impose no impediment to moving forward with redesignation of this area to attainment, because even in light of the Court's decisions, redesignation is appropriate under the relevant redesignation provisions of the Act and longstanding policies regarding redesignation requests.

In its proposal, EPA proposed to find that the area had satisfied the requirements under the 1-hour standard whether the 1-hour standard was deemed to be reinstated or whether the Court's decision on the petition for rehearing were modified to require something less than compliance with all applicable 1-hour requirements. Because EPA proposed to find that the area satisfied the requirements under either scenario, EPA is proceeding to finalize the redesignation and to conclude that the area met the requirements under the 1-hour standard applicable for purposes of redesignation under the 8-hour standard. These include the provisions of EPA's anti-backsliding rules, as well as the additional anti-backsliding provisions identified by the Court in its rulings. In its June 8, 2007 decision the Court limited its vacatur so as to uphold those provisions of the anti-backsliding requirements that were not successfully challenged. Therefore, EPA finds that the area has met the anti-backsliding requirements, *see* 40 CFR 51.900 *et seq;* 70 FR 30592, 30604 (May 26, 2005) which apply by virtue of the area's classification for the 1-hour ozone NAAQS, as well as the four additional anti-backsliding provisions identified by the Court, or that such requirements are not applicable for purposes of redesignation. In addition, with respect to the requirement for transportation conformity under the 1-hour standard, the Court in its June 8 decision clarified that for those areas with 1-hour MVEBs, anti-backsliding requires only that those 1-hour budgets must be used for 8-hour conformity determinations until replaced by 8-hour budgets. To meet this requirement, conformity determinations in such areas must continue to comply with the applicable requirements of EPA's conformity regulations at 40 CFR Part 93. The court clarified that 1-hour conformity determinations are not required for anti-backsliding purposes.

II. Final Action

EPA is approving the Commonwealth of Pennsylvania's redesignation request, maintenance plan, and the 2002 base year emissions inventory because the requirements for approval have been satisfied. EPA has evaluated Pennsylvania's redesignation request that was submitted on February 8, 2007 and determined that it meets the redesignation criteria set forth in section 107(d)(3)(E) of the CAA. EPA believes that the redesignation request and monitoring data demonstrate that the Altoona Area has attained the 8-hour ozone standard. The final approval of this redesignation request will change the designation of the Altoona Area from nonattainment to attainment for the 8-hour ozone standard. EPA is approving the maintenance plan for the Altoona Area submitted on February 8, 2007 as a revision to the Pennsylvania SIP. EPA is also approving the MVEBs submitted by PADEP in conjunction with its redesignation request. In addition, EPA is approving the 2002 base year emissions inventory submitted by PADEP on February 8, 2007 as a revision to the Pennsylvania SIP. In this final rulemaking, EPA is notifying the public that we have found that the MVEBs for volatile organic compounds (VOC) and nitrogen oxides (NO_X) in the Altoona Area for the 8-hour ozone maintenance plan are adequate and approved for conformity purposes. As a result of our finding, the Altoona Area must use the MVEBs from the submitted 8-hour ozone maintenance plan for future conformity determinations. The adequate and approved MVEBs are provided in the following table:

ADEQUATE AND APPROVED MOTOR VEHICLE EMISSIONS BUDGETS IN TONS PER SUMMER DAY (TPSD)

Budget year	VOC	NO_X
2009	4.2	6.5
2018	2.8	3.3

The Altoona Area is subject to the CAA's requirement for the basic nonattainment areas until and unless it is redesignated to attainment.

III. 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. Redesignation of an area to attainment under section 107(d)(3)(e) of the Clean Air Act does not impose any new requirements on small entities. Redesignation is an action that affects the status of a geographical area and does not impose any new regulatory requirements on sources.

Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4). This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). Because this action affects the status of a geographical area, does not impose any new requirements on sources, or allows the state to avoid adopting or implementing other requirements, 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 requirement, 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 approves a state rule implementing a Federal standard.

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. Redesignation is an action that affects the status of a geographical area and does not impose any new requirements on sources. 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 October 1, 2007. 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 redesignation of the Altoona Area to attainment for the 8-hour ozone NAAQS, the associated maintenance plan, the 2002 base year emission inventory, and the MVEBs identified in the maintenance plan, may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects

40 CFR Part 52

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

40 CFR Part 81

Air pollution Control, National Parks, Wilderness Areas.

Dated: July 16, 2007.

Donald S. Welsh,

Regional Administrator, Region III.

■ 40 CFR parts 52 and 81 are 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 NN—Pennsylvania

■ 2. In (§ 52.2020, the table in paragraph (e)(1) is amended by adding an entry for ''8-hour Ozone Maintenance Plan and the 2002 Base Year Emissions Inventory'' to the end of the table to read as follows:

§ 52.2020 Identification of plan.

* * * * *

(e) * * *

(1) * * *

Name of non-regulatory SIP revision	Applicable geographic area	State submittal date	EPA approval date	Additional explanation
*	*	*	*	*
8-Hour Ozone Maintenance Plan and 2002 Base Year Emissions Inventory.	Blair County	02/08/07	08/01/07 [Insert page number where the document begins].	

PART 81—[AMENDED]

■ 3. The authority citation for Part 81 continues to read as follows:

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

■ 4. In § 81.339, the table entitled ''Pennsylvania—Ozone (8-Hour Standard)'' is amended by revising the entry for ''Altoona, PA: Blair County'' to read as follows:

§ 81.339 Pennsylvania.

* * * * *

PENNSYLVANIA—OZONE (8-HOUR STANDARD)

Designated area	Designation[a]		Category/Classification	
	Date[1]	Type	Date[1]	Type
* *	*	* *	*	*
Altoona, PA: Blair County	08/01/07	Attainment.		
* *	*	* *	*	*

[a] Includes Indian County located in each county or area, except otherwise noted.
[1] This date is June 15, 2004, unless otherwise noted.

* * * * *

[FR Doc. E7–14560 Filed 7–31–07; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2006–0209; FRL–8139–1]

Rimsulfuron; Pesticide Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes a tolerance for residues of rimsulfuron in or on almond, hulls; fruit, citrus group 10; fruit, pome, group 11; fruit, stone, group 12; grape; nut, tree, group 14; and pistachio. E.I. duPont de Nemours and Company, Inc. requested this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA).

DATES: This regulation is effective August 1, 2007. Objections and requests for hearings must be received on or before October 1, 2007, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2006–0209. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov web site to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Vickie Walters, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–5704; e-mail address:*walters.vickie@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

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

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

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

B. How Can I Access Electronic Copies of This Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of the FFDCA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request

a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2006–0209 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before October 1, 2007.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2006–0209, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Building), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of July 14, 2006 (71 FR 40100) (FRL–8058–5), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 5F7019) by E.I. duPont de Nemours and Company, Laurel Run Plaza, P.O. Box 80038, Wilmington, DE 19880–0038. The petition requested that 40 CFR 180.478 be amended by establishing a tolerance for residues of the herbicide rimsulfuron, *N*-((4,6-dimethoxypyrimidin-2-yl)aminocarbonyl)-3-(ethylsulfonyl)-2-pyridinesulfonamide, in or on almond hulls, citrus/pome/stone fruit crop group, grapes, pistachios and tree nut crop group at 0.01 parts per million (ppm). That notice included a summary of the petition prepared by E.I. duPont de Nemours and Company, Inc, the registrant. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has determined that the data support a tolerance of 0.09 ppm for almond, hulls.

Based on Agency procedures concerning commodity names, the Agency is correcting the terminology for pending commodities and crop groups to read almond, hulls; fruit, citrus, group 10; fruit, pome, group 11; fruit, stone, group 12; grape; nut, tree, group 14, and pistachio.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of the FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of the FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of the FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .'' These provisions were added to the FFDCA by the Food Quality Protection Act (FQPA) of 1996.

Consistent with FFDCA section 408(b)(2)(D), and the factors specified in section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerance for residues of rimsulfuron on almond, hulls at 0.09 ppm; fruit, citrus, group 10 at 0.01 ppm; fruit, pome, group 11 at 0.01 ppm; fruit, stone, group 12 at 0.01 ppm; grape at 0.01 ppm; nut, tree, group 14 at 0.01 ppm; and pistachio at 0.01 ppm. EPA's assessment of exposures and risks associated with establishing the tolerance follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by rimsulfuron as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov*. The referenced document is entitled *Rimsulfuron: Human Health Risk Assessment for Proposed Uses on Almonds, Citrus Fruits, Grapes, Pistachio, Pome Fruit, Stone Fruit, and Tree Nuts* and is available in the docket established by this action, which is described under **ADDRESSES**, and is identified as EPA–HQ–OPP–2006–0209–0002.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, the toxicological level of concern (LOC) is derived from the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) is sometimes used for risk assessment. Uncertainty/safety factors (UF) are used in conjunction with the LOC to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic risks by comparing aggregate exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the LOC by all applicable uncertainty/safety factors. Short-, intermediate- and long-term risks are evaluated by comparing aggregate exposure to the LOC to ensure that the margin of exposure (MOE) called for by the product of all applicable uncertainty/safety factors is not exceeded.

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk and estimates risk in terms of the probability of occurrence of additional adverse cases. Generally, cancer risks are considered non-threshold. For more information on the general principles, EPA uses in risk characterization and a

complete description of the risk assessment process, see *http://www.epa.gov/fedrgstr/EPA-PEST/1997/November/Day-26/p30948.htm*.

A summary of the toxicological endpoints for rimsulfuron used for human risk assessment can be found at *www.regulations.gov* in document *Rimsulfuron, Human Health Risk Assessment for Proposed Uses on Almonds, Citrus Fruits, Grapes, Pistachio, Pome Fruit, Stone Fruit, and Tree Nuts* at page 21 in Document 0002 in Docket ID EPA–HQ–OPP–2006–0209.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to rimsulfuron, EPA considered exposure under the petitioned-for tolerances as well as all existing rimsulfuron tolerances in 40 CFR 180.478. EPA assessed dietary exposures from rimsulfuron in food as follows:

i. *Acute exposure*. Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure. No such effects were identified in the toxicological studies for rimsulfuron; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment, EPA used the food consumption data from the USDA 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA assumed all foods for which there are tolerances were treated and contain tolerance-level residues. Anticipated residues or estimates of percent crop treated (PCT) were not used.

iii. *Cancer*. Rimsulfuron is classified as a ''not likely to be carcinogenic to humans'' based on acceptable chronic/carcinogenic studies in rats and mice. Therefore, a cancer exposure assessment was not performed.

2. *Dietary exposure from drinking water*. The Agency lacks sufficient monitoring data to complete a comprehensive dietary exposure analysis and risk assessment for rimsulfuron in drinking water. Because the Agency does not have comprehensive monitoring data, drinking water concentration estimates are made by reliance on simulation or modeling taking into account data on the environmental fate characteristics of rimsulfuron. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the First Index Reservoir Screening Tool (FIRST) and Screening Concentrations in Groundwater (SCI-GROW) models, the estimated drinking water concentrations (EDWCs) of rimsulfuron for acute exposures are estimated to be 5.596 parts per billion (ppb) for surface water and 0.016 ppb for ground water. The EDWCs for chronic exposures are estimated to be 0.120 ppb for surface water and 0.016 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For chronic dietary risk assessment, the water concentration of value 0.120 ppb was used to access the contribution to drinking water.

3. *From non-dietary exposure*. The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Rimsulfuron is not registered for use on any sites that would result in residential exposure.

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

Unlike other pesticides for which EPA has followed a cumulative risk approach based on a common mechanism of toxicity, EPA has not made a common mechanism of toxicity finding as to rimsulfuron and any other substances and rimsulfuron does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has not assumed that rimsulfruon has a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408 of FFDCA provides that EPA shall apply an additional (10X) tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor. In applying this provision, EPA either retains the default value of 10X when reliable data do not support the choice of a different factor, or, if reliable data are available, EPA uses a different additional FQPA safety factor value based on the use of traditional uncertainty/safety factors and/or special FQPA safety factors, as appropriate.

2. *Prenatal and postnatal sensitivity*. In the prenatal developmental toxicity study in rats, no developmental toxicity was seen at the highest dose tested. In the prenatal developmental toxicity study in rabbits, and in the 2–generation reproduction study in rats, developmental/offspring toxicity were seen in the presence of maternal/systemic toxicity. Consequently, there is no evidence (quantitative or qualitative) of increased susceptibility following prenatal and postnatal exposures.

3. *Conclusion*. EPA has determined that reliable data show that it would be safe for infants and children to reduce the FQPA safety factor to 1X. That decision is based on the following findings:

i. The toxicity database for rimsulfuron is complete.

ii. There is no indication that rimsulfuron is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional uncertainty factors to account for neurotoxicity.

iii. There is no evidence that rimsulfuron results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2–generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed based on 100% CT and tolerance-level residues. Conservative ground water and surface water modeling estimates were used. These assessments will not underestimate the exposure and risks posed by rimsulfuron.

E. Aggregate Risks and Determination of Safety

Safety is assessed for acute and chronic risks by comparing aggregate exposure to the pesticide to the aPAD and cPAD. The aPAD and cPAD are calculated by dividing the LOC by all applicable uncertainty/safety factors.

For linear cancer risks, EPA calculates the probability of additional cancer cases given aggregate exposure. Short-, intermediate- and long-term risks are evaluated by comparing aggregate exposure to the LOC to ensure that the MOE called for by the product of all applicable uncertainty/safety factors is not exceeded.

1. *Acute risk*. The existing data showed no indication that rimsulfuron could cause adverse effects in the U.S. population or any population subgroups based on a single dose. Therefore, there is not a concern for acute dietary exposure to the general population or any population subgroup.

2. *Chronic risk*. Using the exposure assumptions described in Unit III.C.ii. for chronic exposure, EPA has concluded that exposure to rimsulfuron from food and water will utilize <1% of the cPAD for the U.S. population, and for each of the population subgroups including the most highly exposed population subgroup (children 1-2 years old). There are no residential uses for rimsulfuron that result in chronic residential exposure to rimsulfuron. Based on the use pattern, chronic residential exposure to residues of rimsulfuron is not expected.

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

Rimsulfuron is not registered for use on any sites that would result in residential exposure. Therefore, the aggregate risk is the sum of the risk from food and water.

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

Rimsulfuron is not registered for use on any sites that would result in residential exposure. Therefore, the aggregate risk is the sum of the risk from food and water, which do not exceed the Agency's level of concern.

5. *Aggregate cancer risk for U.S. population*. Rimsulfuron is classified as a ''not likely human carcinogen.'' Therefore, EPA does not expect that rimsulfuron will pose a cancer risk to humans.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Currently, a high pressure liquid chromatography method exists for enforcement of tolerances for residues of rimsulfuron in or on corn, potato, and tomato commodities. Two LC/MS/MS methods have been proposed for enforcement of tolerances on pending crops and crop grouping. Because the extraction procedures do not differ significantly from the extraction procedures of the existing enforcement method, Agency method validation will not be required.

Adequate enforcement methodology (high pressure liquid chromatography MS/MS detection) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no Codex, Canadian, or Mexican MRLs established for residues of rimsulfuron in or on almond, hull; citrus fruit; pome fruit; stone fruit; tree nuts; grape; or pistachio.

V. Conclusion

Therefore, the tolerance is established for residues of rimsulfuron, *N*-((4,6-dimethoxypyrimidin-2-yl)aminocarbonyl)-3-(ethylsulfonyl)-2-pyridinesulfonamide in or on almond, hulls at 0.09 ppm; fruit, citrus, group 10 at 0.01 ppm; fruit, pome, group 11 at 0.01 ppm; fruit, stone, group 12 at 0.01 ppm; grape at 0.01 ppm; nut, tree, group 14 at 0.01 ppm; and pistachio at 0.01 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq*., nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq*.) do not apply.

This final rule directly regulates growers, food processors, food handlers and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000) do not apply to this rule. In addition, This rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq*., generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller

General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: July 16, 2007.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

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

PART 180—AMENDED

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

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

■ Section 180.478 is amended by alphabetically adding the following commodities to the table in paragraph (a) to read as follows:

§ 180.478 Rimsulfuron; tolerances for residues.

(a) * * *

Commodity	Parts per million
Almond, hulls	0.09
* * * *	*
Fruit, citrus, group 10	0.01
Fruit, pome, group 11	0.01
Fruit, stone, group 12	0.01
Grape	0.01
Nut, tree, group 14	0.01
Pistachio	0.01
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[FR Doc. E7–14543 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2004–0154; FRL–8139–5]

Bromoxynil, Diclofop-methyl, Dicofol, Diquat, Etridiazole, et al.; Tolerance Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is revoking certain tolerances for the herbicides bromoxynil, diclofop-methyl, and paraquat; the fungicide etridiazole (terrazole); the miticides dicofol and propargite; and the plant growth regulator and herbicide diquat. Also, EPA is removing duplicate tolerances for the herbicides bromoxynil, paraquat, and picloram; the fumigant phosphine; the miticide dicofol; and the insecticides fenbutatin-oxide and hydramethylnon. In addition, EPA is modifying certain tolerances for the insecticide hydramethylnon; the herbicides bromoxynil, paraquat, and triclopyr; the fungicides etridiazole, folpet, and triphenyltin hydroxide (TPTH); the miticides dicofol and propargite; and the plant growth regulator and herbicide diquat. Moreover, EPA is establishing new tolerances for the herbicides bromoxynil, paraquat, and picloram; the fungicides etridiazole, folpet, and TPTH; the miticides dicofol and propargite; the insecticide fenbutatin-oxide; and the plant growth regulator and herbicide diquat. The regulatory actions in this document are follow-up to the Agency's reregistration program under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and reassessment program under the Federal Food, Drug, and Cosmetic Act (FFDCA) section 408(q).

DATES: This regulation is effective October 30, 2007. Objections and requests for hearings must be received on or before October 1, 2007, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2004–0154. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov web site to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S-4400, One Potomac Yard (South Building), 2777 S. Crystal Drive, Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket telephone number is (703) 305-5805.

FOR FURTHER INFORMATION CONTACT: Joseph Nevola, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-8037; e-mail address: *nevola.joseph@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

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

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

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Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of the FFDCA, as amended by the Food Quality Protection Act (FQPA), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2004–0154 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before October 1, 2007.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2004–0154, by one of the following methods.

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S-4400, One Potomac Yard (South Building), 2777 S. Crystal Drive, Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket telephone number is (703) 305-5805.

II. Background

A. What Action is the Agency Taking?

In the **Federal Register** of August 4, 2004 (69 FR 47051) (FRL–7368–7), EPA issued a proposal to revoke, remove, modify, and establish certain specific tolerances for residues of the insecticides fenbutatin-oxide and hydramethylnon; the herbicides bromoxynil, diclofop-methyl, paraquat, picloram, and triclopyr; the fumigant phosphine; the fungicides etridiazole, folpet, and TPTH; the miticides dicofol and propargite, and the plant growth regulator and herbicide diquat. Also, the proposal of August 4, 2004 (69 FR 47051) (FRL–7368–7) provided a 60–day comment period which invited public comment for consideration and for support of tolerance retention under the FFDCA standards. In the **Federal Register** of October 6, 2004 (69 FR 59843) (FRL–7682–5), EPA extended the comment period from October 4, 2004 to October 18, 2004.

In this final rule, EPA is revoking, removing, modifying, and establishing specific tolerances for residues of bromoxynil, diclofop-methyl, dicofol, diquat, etridiazole, fenbutatin-oxide, folpet, hydramethylnon, paraquat, phosphine, picloram, propargite, TPTH, and triclopyr in or on commodities listed in the regulatory text of this document. However, while EPA also proposed on August 4, 2004 (69 FR 47051) to revoke and modify specific tolerances for iprodione, the Agency is not taking any action on iprodione tolerances in this document.

EPA is finalizing these tolerance actions in order to implement the tolerance recommendations made during the reregistration and tolerance reassessment processes (including follow-up on canceled or additional uses of pesticides). As part of these processes, EPA is required to determine whether each of the amended tolerances meets the safety standard of the FFDCA. The safety finding determination of ''reasonable certainty of no harm'' is discussed in detail in each Reregistration Eligibility Decision (RED) and Report of the Food Quality Protection Act (FQPA) Tolerance Reassessment Progress and Risk Management Decision (TRED) for the active ingredient. REDs and TREDs recommend the implementation of certain tolerance actions, including modifications, to reflect current use patterns, to meet safety findings and change commodity names and groupings in accordance with new EPA policy. Printed copies of many REDs and TREDs may be obtained from EPA's National Service Center for Environmental Publications (EPA/NSCEP), P.O. Box 42419, Cincinnati, OH 45242-2419, telephone: 1-800-490-9198; fax: 1-513-489-8695; internet at *http://www.epa.gov/ncepihom* and from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161, telephone: 1-800-553-6847 or (703) 605-6000; internet at *http://www.ntis.gov*. Electronic copies of REDs and TREDs are available on the internet at *http://www.regulations.gov* and *http://www.epa.gov/pesticides/reregistration/status.htm*.

In this final rule, EPA is revoking certain tolerances because either they are no longer needed or are associated with food uses that are no longer registered under FIFRA in the United States. Those instances where registrations were canceled were because the registrant failed to pay the required maintenance fee and/or the registrant voluntarily requested cancellation of one or more registered uses of the pesticide active ingredient. The tolerances revoked by this final rule are no longer necessary to cover residues of the relevant pesticides in or on domestically treated commodities or commodities treated outside but imported into the United States. It is EPA's general practice to issue a final rule revoking those tolerances and tolerance exemptions for residues of pesticide active ingredients on crop uses for which there are no active registrations under FIFRA, unless any person in comments on the proposal indicates a need for the tolerance or tolerance exemption to cover residues in or on imported commodities or domestic commodities legally treated.

EPA has historically been concerned that retention of tolerances that are not necessary to cover residues in or on legally treated foods may encourage misuse of pesticides within the United States.

Generally, EPA will proceed with the revocation of these tolerances on the grounds discussed in this Unit if one of the following conditions applies:

1. Prior to EPA's issuance of a section 408(f) order requesting additional data or issuance of a section 408(d) or (e) order revoking the tolerances on other grounds, commenters retract the comment identifying a need for the tolerance to be retained.

2. EPA independently verifies that the tolerance is no longer needed.

3. The tolerance is not supported by data that demonstrate that the tolerance meets the requirements under FQPA.

This final rule does not revoke those tolerances for which EPA received comments stating a need for the tolerance to be retained. In response to the proposal published in the **Federal Register** of August 4, 2004 (69 FR 47051) (FRL–7368–7), EPA received comments during the 60–day public comment period, as follows:

1. *General—comment by private citizen.* A comment was received from a private citizen on August 15, 2004

which expressed a general concern for chemicals and their toxic effects. In addition, the private citizen stated ''I oppose and object to the use/approval/sale of this product'' in reference to bromoxynil and diclofop methyl. Also, the individual stated opposition to increasing any tolerances due to a concern about the sale of more product.

Agency response. Section 408(g) of the FFDCA, 21 U.S.C. 346a(g) and the implementing regulations at 40 CFR part 178, establish procedures for formally challenging EPA rulemakings establishing tolerances or exemptions from tolerances. This formal challenge is initiated through the filing of ''objections'' with EPA. The procedures for filing objections are summarized in this final rule under the section titled ''Objections and Hearing Requests.'' As is made clear in that section, all objections must be in writing, and must be mailed or delivered to EPA's Hearing Clerk within 60 days of the publication of the final rule.

Because the communication of August 15, 2004 was sent to the public docket of the proposed rule, EPA concludes that the communication does not intend to initiate the formal procedures for objecting under 40 CFR part 178 to the tolerance actions made herein. The communication from the private citizen from New Jersey is considered by EPA to be a ''comment'' rather than an ''objection.'' In order to file an objection, one must follow the procedures as explained in the previous paragraph and set forth in 40 CFR part 178.

The comment of August 15, 2004 did not refer to any specific scientific studies which supported the reregistration of any active ingredient, or Agency decision document which supported or addressed the reregistration eligibility of any active ingredient.

Section 4 of FIFRA directs EPA to make decisions about the future use of older pesticides. Under the pesticide reregistration program, EPA examines health and safety data for pesticide active ingredients initially registered before November 1, 1984, and determines whether they are eligible for reregistration to ensure that they meet current scientific and regulatory standards. During reregistration, EPA considers the human health and ecological effects of pesticides and addresses actions to reduce risks that are of concern.

Of 612 cases subject to reregistration, about 40% have been canceled for various reasons, including request for voluntary cancellation by the registrant, cancellation by EPA because required fees were not paid, or cancellation by EPA because unacceptable risk existed that could not be reduced by other actions such as voluntary cancellation of selected uses or changes in the way the pesticide is used.

Reducing pesticide risks is an important aspect of the reregistration program. In developing REDs, EPA works with stakeholders including pesticide registrants, growers and other pesticide users, environmental and public health interests, as well as the States, U.S. Department of Agriculture (USDA), and other Federal agencies, and others to develop voluntary measures or regulatory controls needed to effectively reduce risks of concern. Such options include voluntary cancellation of pesticide products or deletion of uses, declaring certain uses ineligible or not yet eligible, restricting use of products to certified applicators, limiting the amount or frequency of use, improving use directions and precautions, adding more protective clothing and equipment requirements, requiring special packaging or engineering controls, requiring no-treatment buffer zones, employing environmental and ecological safeguards, and other measures.

Also, for all pesticides with food uses, EPA is reassessing tolerances (pesticide residue limits in food) to ensure that they met the safety standard of section 408 of the FFDCA, 21 U.S.C. 346a, as amended by the FQPA of 1996. Under FFDCA, EPA must make a determination that pesticide residues remaining in or on food are safe; that is, that there is reasonable certainty that no harm will result from aggregate exposure to the pesticide residue from dietary and other sources. EPA has integrated reregistration and tolerance reassessment to most effectively accomplish the goals of both programs.

At the end of the reregistration process, after EPA has issued a RED and declared a pesticide reregistration case eligible for reregistration, individual end-use products that contain pesticide active ingredients included in the case still must be reregistered. During this product reregistration, EPA sends registrants a DCI notice requesting any product specific data and specific revised labeling needed to complete reregistration for each of the individual pesticide products covered by the RED. Based on the results of EPA's review of these data and labeling, products found to meet FIFRA and FFDCA standards may be reregistered.

2. *Bromoxynil—comment by the People's Republic of China (PRC).* After the public comment period extension had ended on October 18, 2004, EPA received comment from the PRC, forwarded by the U.S. Department of Commerce's National Institute of Standards and Technology, on November 3, 2004. The PRC asked for information concerning Good Agricultural Practice (GAP) basis data for the use of bromoxynil on garlic and onion.

Agency response. The Agency proposed no action on the existing tolerances in 40 CFR 180.324 for bromoxynil on garlic or onion, dry bulb. Information on study data which support the bromoxynil RED are available in the OPP public docket for the proposed rule of August 4, 2004 (69 FR 47051), OPP-2004-0154, and on the reregistration status website at *http://www.epa.gov/pesticides/reregistration/status.htm.* The crop field trial references for garlic are MRIDs 42331002 and 42540602, and for onion, dry bulb are MRIDs 42350701 and 42747601. The bromoxynil residues of concern on garlic and onion, dry bulb were below the limit of quantitation (LOQ) of 0.02 parts per million (ppm), which support their current tolerance levels at 0.1 ppm.

Because flax straw is no longer a regulated feed item, the tolerance for bromoxynil residue is no longer needed. Therefore, EPA is revoking the tolerance in 40 CFR 180.324(a)(1) for ''flax, straw.'' Also, EPA is removing the commodity tolerances in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''corn, stover'' which was previously termed corn, fodder (dry) in the RED; ''corn, fodder (green);'' and ''corn, grain'' because these tolerances are no longer needed since their uses are covered by the existing tolerances for corn, field, stover and corn, grain, field. Further, based on field trial data that indicate residues of bromoxynil as high as 0.14 ppm in or on corn stover, the Agency determined that the tolerance for corn, field, stover should be increased to 0.2 ppm and a tolerance should be established for corn, pop, stover at 0.2 ppm. Therefore, EPA is increasing the tolerance in 40 CFR 180.324(a)(1) on ''corn, field, stover'' from 0.1 ppm to 0.2 ppm and establishing a tolerance for residues of bromoxynil in or on ''corn, pop, stover'' at 0.2 ppm.

Since the proposal of August 4, 2004 (69 FR 47051), EPA published a final rule in the **Federal Register** on February 10, 2005 (70 FR 7044) (FRL–7690–6) that removed expired time-limited tolerances for emergency exemptions, including those for bromoxynil on timothy, hay and timothy, forage in 40 CFR 180.324(b) and reserved that section.

Based on field trial data that indicate residues of bromoxynil in or on alfalfa hay as high as 0.38 ppm and to conform tolerance nomenclature to current Agency practice, the Agency determined that the tolerance for alfalfa, seedling should be revised into alfalfa, forage and alfalfa, hay, and the tolerance on alfalfa, hay should be increased to 0.5 ppm. Therefore, EPA is revising the commodity tolerance ''alfalfa, seedling'' (shown in paragraph (a)(1) as alfalfa, seeding) in 40 CFR 180.324(a)(1) at 0.1 ppm to ''alfalfa, forage,'' and ''alfalfa, hay'' and maintaining the tolerance on alfalfa, forage at 0.1 ppm, while increasing the tolerance on alfalfa, hay to 0.5 ppm.

Based on field trial data that indicate residues of bromoxynil in or on grass forage and hay as high as 2.9 ppm and 2.4 ppm, respectively, the Agency determined that the tolerances for grass forage and hay should be increased to 3.0 ppm. Therefore, EPA is revising the commodity terminologies ''canarygrass, annual, seed'' and ''canarygrass, annual, hay'' (formerly grass, canary, annual, straw) in 40 CFR 180.324(a)(1) to ''grass, forage'' and ''grass, hay,'' respectively, and increasing each of their tolerances from 0.1 ppm to 3.0 ppm.

Based on field trial data that indicate residues of bromoxynil in or on barley straw as high as 3.9 ppm, and translating barley data to oat straw, the Agency determined that the tolerances for barley straw and oat straw should be increased to 4.0 ppm. Therefore, EPA is increasing the tolerances in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''barley, straw'' from 0.1 ppm to 4.0 ppm, and ''oat, straw'' from 0.1 ppm to 4.0 ppm.

Based on field trial data that indicate residues of bromoxynil in or on wheat forage and straw as high as 0.6 ppm and 1.2 ppm, respectively, and translating wheat data to rye, the Agency determined that the tolerances for both rye and wheat forage should be increased to 1.0 ppm, and both rye and wheat straw should be increased to 2.0 ppm. Therefore, EPA is increasing the tolerances in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''rye, forage'' from 0.1 ppm to 1.0 ppm; ''rye, straw'' from 0.1 ppm to 2.0 ppm; ''wheat, forage'' from 0.1 ppm to 1.0 ppm; and ''wheat, straw'' from 0.1 ppm to 2.0 ppm.

Based on field trial data that indicate residues of bromoxynil in or on barley forage, and translating barley data to oat, the Agency determined that the tolerance for oat forage should be increased to 0.3 ppm. Therefore, EPA is increasing the tolerance in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''oat, forage'' from 0.1 ppm to 0.3 ppm.

Based on field trial data that indicate residues of bromoxynil in or on sorghum forage and stover as high as 0.29 and 0.14 ppm, respectively, the Agency determined that the tolerances for sorghum forage and stover should be increased to 0.5 ppm and 0.2 ppm, respectively. Therefore, EPA is increasing the tolerances in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''sorghum, forage'' from 0.1 ppm to 0.5 ppm and revising the commodity terminology to ''sorghum, grain, forage;''and ''sorghum, grain, stover'' from 0.1 ppm to 0.2 ppm. The Agency determined that the increased tolerances are safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Based on field trial data that indicate residues of bromoxynil in or on grain of barley, corn, sorghum, and wheat at <0.02 ppm and translating barley data to oat grain and rye grain, the Agency determined that the grain tolerances for barley; field corn; oat; rye; sorghum; and wheat should be decreased to 0.05 ppm and a tolerance should be established for corn, pop, grain at 0.05 ppm. Therefore, EPA is decreasing the tolerances in 40 CFR 180.324(a)(1) from 0.1 ppm to 0.05 ppm, for the following: ''barley, grain;'' ''oat, grain;'' ''rye, grain;'' ''sorghum, grain;'' ''wheat, grain;'' and ''corn, grain, field;'' and also revising the terminolgy for ''corn, grain, field'' to read ''corn, field, grain.'' Also in 40 CFR 180.324(a)(1), EPA is establishing a tolerance for residues of bromoxynil in or on ''corn, pop, grain'' at 0.05 ppm.

Because residues of bromoxynil are detectable in aspirated grain fractions of wheat (highest), corn, and sorghum, the Agency determined that a tolerance on the aspirated fractions of grain should be established at 0.3 ppm. Therefore, EPA is establishing a tolerance in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''grain, aspirated fractions'' at 0.3 ppm.

Based on residue data for hay of wheat and barley that indicate residues of bromoxynil as high as 3.2 ppm for wheat, but not exceeding 9.0 ppm for barley, and translating barley data to oat hay, the Agency determined that tolerances should be established for wheat hay at 4.0 ppm, barley hay at 9.0 ppm, and oat, hay at 9.0 ppm. Therefore, EPA is establishing tolerances in 40 CFR 180.324(a)(1) for residues of bromoxynil in or on ''barley, hay'' at 9.0 ppm, ''oat, hay'' at 9.0 ppm, and ''wheat, hay'' at 4.0 ppm.

The 1998 Bromoxynil RED recommended that the tolerance for corn, forage, field (green) be revised to corn, field, forage and increased from 0.1 ppm to 0.3 ppm based on residue data for corn forage. However, at that time, no tolerance for corn, forage, field (green) existed in 40 CFR 180.324(a)(1). Therefore, EPA is establishing a tolerance in 40 CFR 180.324(a)(1) for ''corn, field, forage'' at 0.3 ppm.

In addition, EPA is revising commodity terminology in 40 CFR 180.324 to conform to current Agency practice as follows: ''mint hay'' to ''peppermint, hay'' and ''spearmint, hay.''

The Agency did not propose in a notice for comment to revise the tolerance nomenclature for bromoxynil in 40 CFR 180.324(a)(1) from onion, dry bulb to onion, bulb, as is current Agency practice. However, section 553(b)(3)(B) of the Administrative Procedure Act provides that notice and comment is not necessary ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Consequently, for good cause, EPA is revising the tolerance in 40 CFR 180.324(a)(1) from onion, dry bulb to onion, bulb. The reason for taking this action is because such action has no practical impact on the use of or exposure to the pesticide active ingredient, bromoxynil, in or on that commodity and is made such that the tolerance terminology will conform to current Agency practice.

3. *Dicofol—comment by the PRC.* After the public comment period extension had ended on October 18, 2004, EPA received comment from the PRC, forwarded by the U.S. Department of Commerce's National Institute of Standards and Technology, on November 3, 2004. The PRC expressed concern that the GAP alone is insufficient as the basis for EPA's determination for proposing to establish a tolerance for dicofol residues in milk at 22.0 ppm in the absence of risk assessment support.

Also, the PRC was concerned about EPA's proposal to reduce the tolerances for residues of dicofol on nuts from 5.0 ppm to 0.1 ppm and the Agency's determination to translate data from pecan field trials to other nuts such as chestnut and walnut. In addition, the PRC cited nut tolerance levels for dicofol of 3.0 ppm in Canada, 1.0 ppm in Korea, and 5.0 ppm for almond in Australia.

Agency response. EPA is redesignating the dicofol tolerance

expression for plant commodities in 40 CFR 180.163(a) to (a)(1), separately from the animal tolerances, and to revise the expression in terms of the combined residues of 1,1-bis(4-chlorophenyl)-2,2,2-trichloroethanol and 1-(2-chlorophenyl)-1-(4-chlorophenyl)-2,2,2-trichloroethanol. Because dicofol metabolites are the residues of concern for animals, EPA is proposing to redesignate animal tolerances separately from plant tolerances, from 40 CFR 180.163(a) to (a)(2) and for tolerances to be expressed in terms of the combined residues of 1,1-bis(4-chlorophenyl)-2,2,2-trichloroethanol and its metabolites, 1-(2-chlorophenyl)-1-(4-chlorophenyl)-2,2,2-trichloroethanol, 1,1-bis(4-chlorophenyl)-2,2-dichloroethanol, and 1-2(-chlorophenyl)-1-(4-chlorophenyl)-2,2-dichloroethanol.

As stated in the proposal of August 4, 2004 (69 FR 47051), based on ruminant metabolism and feeding data, the Agency determined that the tolerance for milk should reflect dicofol residues of 0.75 ppm in whole milk corrected by a factor of 30x to account for concentration in milk fat from whole milk such that 22.0 ppm is appropriate (tolerance is based on milk fat). However, the Agency acknowledges that on August 4, 2004 (69 FR 47051) it proposed to establish a tolerance for ''milk'' as shown in the dicofol RED, but that the appropriate definition for the tolerance commodity should be termed ''milk, fat (reflecting 0.75 ppm in whole milk).'' The appropriate level for that tolerance definition is 22.0 ppm. Therefore, EPA is establishing a tolerance in 40 CFR 180.163(a)(2) for milk, fat (reflecting 0.75 ppm in whole milk) at 22.0 ppm.

The Agency proposed reducing the nut tolerances based on both pecan and walnut field trials that showed residues of dicofol were non-detectable and determined that 0.1 ppm is appropriate. Pecan, chestnut, and walnut are among commodities included in 40 CFR 180.41 under the tree nut crop group 14. The Agency considers pecans and almonds as representative commodities for that crop group. The Agency determined that the data translated to other nuts and that the tolerances for butternut, chestnut, filbert, hickory nut, macadamia nut, pecan, and walnut should be at 0.1 ppm. The Agency notes that there is a Codex maximum residue limit (MRL) for dicofol residues on pecan at 0.01 ppm which is at or above the limit of detection. Both the Codex MRL on pecan and proposed U.S. tolerance for nuts are lower than the MRLs cited by the PRC. Different MRLs among countries for a specific pesticide residue on a given commodity may be due to use patterns reflecting different pest and disease pressures. Therefore, EPA is decreasing the tolerances in 40 CFR 180.163(a)(1) on ''nut, macadamia'' from 5 ppm to 0.1 ppm;'' ''butternut'' from 5 ppm to 0.1 ppm, ''chestnut'' from 5 ppm to 0.1 ppm, ''filbert'' from 5 ppm to 0.1 ppm, ''nut, hickory'' from 5 ppm to 0.1 ppm, ''pecan'' from 5 ppm to 0.1 ppm, and ''walnut'' from 5 ppm to 0.1 ppm, all based on available data.

EPA is revoking the commodity tolerances in 40 CFR 180.163(a)(1) for residues of dicofol in or on ''fig'' because the registration for that use was canceled in October 1989 due to non-payment of annual registration maintenance fees. Also, EPA is removing ''hazelnuts'' because this tolerance is covered by the tolerance on filbert. The Agency did not propose in a notice for comment to revise the tolerance nomenclature for dicofol in 40 CFR 180.163(a)(1) from filbert to hazelnut, as is current Agency practice. However, section 553(b)(3)(B) of the Administrative Procedure Act provides that notice and comment is not necessary ''when the agency for good cause finds (and incorporates the findings and a brief statement of the reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Consequently, for good cause, EPA is revising the tolerance terminology in 40 CFR 180.163(a)(1) from filbert to hazelnut. The reason for taking this action is because such action has no practical impact on the use of or exposure to the pesticide active ingredient, dicofol, in or on that commodity and is made such that the tolerance terminology will conform to current Agency practice. In addition, the tolerance on ''hay, spearmint'' in 40 CFR 180.163(a) was removed on June 29, 2007 (72 FR 35663) (FRL-8131-3).

Based on field trial data that indicate residues of dicofol were as high as 6.7 ppm in or on apples and in one duplicate sample 10.8 ppm in or on pears (6.8 ppm in pears for the other duplicate sample), the Agency determined that a crop group tolerance of 10.0 ppm is appropriate. Therefore, EPA is combining the commodity tolerances for ''apple,'' ''crabapple,'' ''pear,'' and ''quince,'' each at 5 ppm in 40 CFR 180.163(a)(1) under the crop group terminology ''fruit, pome, group 11'' and increasing the tolerance to 10.0 ppm.

Based on field trial data that indicate residues of dicofol were as high as 0.84 ppm in or on plums, 3.08 ppm in or on cherries, and 3.79 ppm in or on peaches, the Agency determined that a crop group tolerance of 5.0 ppm is appropriate. Therefore, EPA is combining the commodity tolerances for ''apricot'' at 10 ppm; ''cherry'' at 5 ppm, ''nectarine'' at 10 ppm, ''peach'' at 10 ppm, and ''plum, prune, fresh'' at 5 ppm, in 40 CFR 180.163(a)(1) under the crop group terminology ''fruit, stone, group 12'' and decreasing the tolerance to 5.0 ppm.

EPA is combining the commodity tolerances for ''blackberry,'' ''boysenberry,'' ''dewberry,'' ''loganberry,'' and ''raspberry,'' each at 5 ppm in 40 CFR 180.163(a)(1) under the crop subgroup terminology ''caneberry subgroup 13A'' and maintaining the tolerance at 5 ppm, based on new field trials.

Based on field trial data that indicate residues of dicofol were as high as 0.35 ppm in or on melons, 0.45 ppm in or on cucumbers, and 1.05 ppm in or on summer squash, the Agency determined that a crop group tolerance of 2.0 ppm is appropriate. Therefore, EPA is combining the commodity tolerances for ''cantaloupe,'' ''cucumber,'' ''melon,'' ''muskmelon,'' ''pumpkin,'' ''squash, summer;'' ''squash, winter;'' and ''watermelon,'' each at 5 ppm in 40 CFR 180.163(a)(1) under the crop group terminology ''vegetable, cucurbit, group 9'' and decreasing the tolerance to 2.0 ppm.

Based on field trial data that show that residues of dicofol were as high as 1.34 ppm in or on lemon, 3.55 ppm in or on oranges, and 5.26 ppm in or on grapefruit, the Agency determined that a crop group tolerance of 6.0 ppm is appropriate. Therefore, EPA is combining the commodity tolerances for ''grapefruit,'' ''kumquat,'' ''lemon,'' ''lime,'' ''orange, sweet'' and ''tangerine'' in 40 CFR 180.163(a)(1), each at 10 ppm, under the commodity terminology ''fruit, citrus, group 10'' and decreasing the tolerance to 6.0 ppm.

Based on field trial data that indicate residues of dicofol were as high as 0.46 ppm in or on tomatoes and 1.15 ppm in or on peppers, the Agency determined that a crop group tolerance of 2.0 ppm is appropriate. Therefore, EPA is combining the commodity tolerances for ''eggplant,'' ''pepper,'' ''pimento,'' and ''tomato'' in 40 CFR 180.163(a)(1), each at 5 ppm, under the crop group terminology ''vegetable, fruiting, group 8'' and decreasing the tolerance to 2.0 ppm, based on new field trials.

Based on field trial data that indicate residues of dicofol as high as 0.46 ppm in or on dry beans and 2.09 ppm in or on succulent beans, the Agency has determined that the appropriate tolerances are 0.5 ppm for dry beans and

3.0 ppm for succulent beans. Therefore, EPA is decreasing the tolerances in 40 CFR 180.163(a)(1) on ''bean, dry, seed'' from 5.0 ppm to 0.5 ppm, and combining ''bean, snap, succulent'' and ''bean, lima, succulent'' into ''bean, succulent'' and decreasing the tolerance from 5.0 ppm to 3.0 ppm.

Based on field trial data that indicate residues of dicofol as high as 64.3 ppm on dried hops, the Agency has determined that the tolerance should be for dried hops at 65.0 ppm. Therefore, EPA is increasing the tolerance in 40 CFR 180.163(a)(1) for ''hop'' from 30 ppm to 65.0 ppm and revising the commodity tolerance to ''hop, dried cones'' because the raw agricultural commodity (RAC) is redefined. The Agency determined that the increased tolerance is safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Because available data show that residues of dicofol were as high as 9.8 ppm on strawberries, the Agency determined that the tolerance should be at 10.0 ppm. Therefore, EPA is increasing the tolerance in 40 CFR 180.163(a)(1) for ''strawberry'' from 5 ppm to 10.0 ppm. The Agency determined that the increased tolerance is safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Based on highest average field trial (HAFT) residues of 5.54 ppm on apples, 3.16 ppm on oranges, 0.06 ppm on cotton, 3.02 ppm on grapes, 17.6 ppm on mint, 29.1 ppm on plucked tea leaves, and available processing data showing average concentration factors of 6.6x in wet apple pomace, 3.7x in dried orange pulp, 62.8x in orange oil, 4.9x in refined cotton oil, 6.6x in raisins, 1.6x in mint oil, and 1.6x in dried tea, the Agency determined that tolerances for dicofol are warranted as follows: wet apple pomace at 38 ppm, dried citrus pulp at 12 ppm, citrus oil at 200 ppm, refined cotton oil at 0.5 ppm, raisins at 20.0 ppm, peppermint oil at 30 ppm, spearmint oil at 30 ppm, tea, plucked tea leaves at 30.0 ppm, and dried tea at 50 ppm. Therefore, EPA is increasing the tolerance in 40 CFR 180.163(a)(1) for ''tea, dried'' from 45 ppm to 50.0 ppm and establishing tolerances in 40 CFR 180.163 (a)(1) for ''apple, wet pomace'' at 38.0 ppm, ''citrus, dried pulp'' at 12.0 ppm, ''citrus, oil'' at 200.0 ppm, ''cotton, refined oil'' at 0.5 ppm, ''grape, raisin'' at 20.0 ppm, ''peppermint, oil'' at 30.0 ppm, ''spearmint, oil'' at 30.0 ppm, and ''tea, plucked leaves'' at 30.0 ppm.

In the dicofol RED, the Agency recommended the establishment of a tolerance on prunes (currently termed plum, prune, dried) at 3.0 ppm. However, a new tolerance for the processed commodity prunes as ''plum, prune, dried'' at 3.0 ppm is not needed because that use is covered by the combination of stone fruits into a group tolerance at 5.0 ppm, as described above.

Based on hen metabolism and feeding data, and residues in cottonseed meal (20% diet X 0.1 ppm residue), the Agency has determined that tolerances should be established at 0.1 ppm for poultry fat, meat, and meat byproducts. The tolerance for eggs should be decreased to 0.05 ppm for compatibility with Codex. Therefore, EPA is establishing tolerances in 40 CFR 180.163(a)(2) for ''poultry, fat;'' ''poultry, meat;'' and ''poultry, meat byproducts;'' each at 0.1 ppm and ''egg'' at 0.05 ppm.

Based on ruminant metabolism and feeding data, the Agency determined that tolerances for fat of cattle, goats, hogs, horses and sheep should be established at 50.0 ppm; meat and meat byproducts, except liver of cattle, goats, hogs, horses and sheep should be established at 3.0 ppm; and liver of cattle, goats, hogs, horses and sheep should be established at 5.0 ppm. Therefore, EPA is establishing tolerances in 40 CFR 180.163(a)(2) for the following: ''cattle, meat;'' ''cattle, meat byproducts, except liver;'' ''goat, meat;'' ''goat, meat byproducts, except liver;'' ''hog, meat;'' ''hog, meat byproducts, except liver;'' ''horse, meat;'' ''horse, meat byproducts, except liver;'' ''sheep, meat;'' and ''sheep, meat byproducts, except liver;'' each at 3.0 ppm; ''cattle, liver;'' ''goat, liver;'' ''hog, liver;'' ''horse, liver;'' and ''sheep, liver;'' each at 5.0 ppm; and ''cattle, fat;'' ''goat, fat;'' ''hog, fat;'' ''horse, fat;'' and ''sheep, fat;'' each at 50.0 ppm.

EPA is revising commodity terminology in 40 CFR 180.163 to conform to current Agency practice as follows: ''hay, peppermint'' to ''peppermint, hay.''

4. *Iprodione*. EPA will not take action on iprodione tolerances at this time based on comments and additional submitted data. EPA will respond to comments about iprodione that were received during the public comment period and address iprodione tolerance actions in a future notice to be published in the **Federal Register**.

5. *Paraquat—comment by Syngenta Crop Protection*. On September 9, 2004, Syngenta Crop Protection Inc. requested that the Agency consider the inclusion of commodities from berries group 13 in its proposed revision of the small fruit group tolerance for paraquat into individual tolerances for cranberry and grape. Syngenta stated that berry data was submitted years ago and berry uses appear on active registrations for paraquat dichloride.

Agency response. EPA proposed to revise the crop group tolerance for small fruit but inadvertently proposed to revise that group into individual tolerances only for cranberry and grape, and maintain these tolerances at 0.05 ppm. However, the old terminology of ''small fruit'' not only includes cranberry and grape, but also blackberry, blueberry, boysenberry, currant, dewberry, elderberry, gooseberry, huckleberry, loganberry, raspberry, strawberry, and youngberry. In 40 CFR 180.41, berry group 13 includes blackberry (blackberry includes boysenberry, dewberry, and youngberry), blueberry, currant, elderberry, gooseberry, huckleberry, loganberry, and raspberry. Consequently, revising small fruit into the individual tolerances for cranberry, grape, and strawberry, as well as maintaining a tolerance on berry group 13, would cover the commodity uses under the old terminology of small fruit. The Agency agrees with Syngenta that berry uses have active registrations. Some tolerance actions proposed for paraquat on August 4, 2004 (69 FR 47051) have already been made final or revised to different tolerance levels in a final rule published in the **Federal Register** on September 6, 2006 (71 FR 52487)(FRL–8089–3), where EPA established and revised certain tolerances in 40 CFR 180.205 on paraquat in response to multiple petition requests by Syngenta Crop Protection Inc. In the final rule of September 6, 2006 (71 FR 52487), EPA established tolerances in 40 CFR 180.205 at 0.05 ppm on berry group 13, cranberry, and grape. A tolerance already existed on strawberry at 0.25 ppm. However, the tolerance on the obsolete commodity terminology ''fruit, small'' was inadvertently not revoked and currently remains as a duplicate tolerance that is no longer needed and should be revoked. Consequently, EPA is following up on the proposed rule of August 4, 2004 (69 FR 47051), which included a proposal to remove the small fruit tolerance in 40 CFR 180.205(a) by proposing to revise that crop group tolerance (an obsolete nomenclature) into multiple tolerance definitions that would cover commodity uses previously associated with small fruit. Because multiple tolerances (berry group 13, cranberry, grape, and strawberry) have

been established to cover the small fruit uses, EPA is following-up by revoking the tolerance in 40 CFR 180.205(a) on fruit, small in this final rule.

Other tolerance actions proposed on August 4, 2004 (69 FR 47051) have also been made final or revised to different tolerance levels. In the final rule of September 6, 2006 (71 FR 52487), EPA increased the tolerances in 40 CFR 180.205(a) on kidney of cattle, goats, hogs, horses, and sheep, each from 0.3 ppm to 0.5 ppm, which harmonize with Codex MRLs; hop, dried cones from 0.2 ppm to 0.5 ppm; sorghum, forage, forage and sorghum, grain, forage from 0.05 ppm to 0.1 ppm; soybean, forage from 0.05 ppm to 0.4 ppm; decreased the tolerance in 40 CFR 180.205(a) on ''beet, sugar, tops'' from 0.5 ppm to 0.05 ppm; and established tolerances in 40 CFR 180.205(a) for soybean hay at 10.0 ppm, soybean hulls at 4.5 ppm; and soybean seed at 0.7 ppm; fruit, pome, group 11 at 0.05 ppm; fruit, stone, group 12 at 0.05 ppm; barley, straw at 1.0 ppm; wheat, forage at 0.5 ppm; and wheat, straw at 50.0 ppm.

In the final rule of September 6, 2006 (71 FR 52487), the Agency inadvertently did not revoke the individual tolerances in 40 CFR 180.205 at 0.05 ppm on apple and pear when it established the fruit, pome, group 11 tolerance at 0.05 ppm; the individual tolerances at 0.05 ppm on apricot, cherry, nectarine, peach, and plum, prune, fresh when it established the fruit, stone, group 12 tolerance at 0.05 ppm; and the individual tolerances at 0.05 ppm on broccoli, cabbage, Chinese cabbage, cauliflower, and collards when it established the vegetable, brassica, leafy, group 5 tolerance at 0.05 ppm. Also, in the **Federal Register** of December 6, 2006 (71 FR 70670) (FRL–8100–3), EPA corrected a typographical error in the codification section on page 52494 of the final rule of September 6, 2006 (71 FR 52487) regarding the commodity terminology name ''fruit, stone, group 12.'' The notice of August 4, 2004 (69 FR 47051) proposed to combine specific individual tolerances into their respective crop groups (including fruit, pome, group 11, fruit, stone, group 12, and vegetable, brassica, leafy, group 5), with the effect of removing those specific individual tolerances since their uses were to be covered by the group tolerances. Because these group tolerances were established, their respective individual tolerances are no longer needed. Consequently, EPA is following-up on the proposed rule of August 4, 2004 (69 FR 47051), which included proposals to combine specific existing tolerances into group tolerances for fruit, pome, group 11, fruit, stone, group 12, and vegetable, brassica, leafy, group 5; and thereby remove those individual tolerances. Because these group tolerances have been established, EPA is following-up by revoking the tolerances in 40 CFR 180.205 on apple; pear; apricot; cherry; nectarine; peach; plum, prune, fresh; broccoli; cabbage; cabbage, chinese; cauliflower; and collards in this final rule. In addition, EPA is correcting the commodity terminology in 40 CFR 180.205 for the group 5 tolerance from vegetable, Brassica leafy, group 5 to vegetable, brassica, leafy, group 5, which was the group name proposed on August 4, 2004 (69 FR 47051).

Also, in the final rule of September 6, 2006 (71 FR 52487), EPA inadvertently did not revoke the individual tolerances in 40 CFR 180.205 at 5.0 ppm on alfalfa, birdsfoot trefoil, and clover, when it established the animal feed, nongrass, group 18, forage and animal feed, nongrass, group 18, hay tolerances at 75.0 ppm and 210.0 ppm, respectively. These individual tolerances are no longer needed. Consequently, EPA is following up on the proposed rule of August 4, 2004 (69 FR 47051), which included proposals to increase the tolerances for alfalfa forage, birdsfoot trefoil forage, and clover forage from 5.0 ppm to 75.0 ppm and combine them under the terminology animal feed, nongrass, group 18, forage and increase alfalfa hay, birdsfoot trefoil hay, and clover hay from 5.0 ppm to 210.0 ppm and combine them under the terminology animal feed, nongrass, group 18, hay. Because these group tolerances have been established, EPA is following-up by revoking the individual tolerances in 40 CFR 180.205(a) on alfalfa, birdsfoot trefoil, and clover.

In addition, in the final rule of September 6, 2006 (71 FR 52487), EPA inadvertently established a tolerance in 40 CFR 180.205 on soybean, seed at 0.7 ppm, but should have revised the existing tolerance on soybean to soybean, seed (a nomenclature change that is current Agency practice) and increased it from 0.05 ppm to 0.7 ppm (based on a new use pattern in the petition) to avoid creating a duplicate tolerance. Consequently, there now exists a duplicate tolerance; i.e., soybean at 0.05 ppm, which EPA proposed to increase in the rule of August 4, 2004 (69 FR 47051). That duplicate tolerance is not needed since the use on soybean should be covered by the established soybean, seed tolerance at the appropriate level of 0.7 ppm. Further, section 553(b)(3)(B) of the Administrative Procedure Act provides that notice and comment is not necessary ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Consequently, for good cause, while EPA is maintaining the tolerance on soybean, seed at 0.7 ppm, the Agency is revoking the tolerance on soybean at 0.05 ppm in 40 CFR 180.205(a). The reason for taking this action is because such action has no practical impact on the use of or exposure to the pesticide active ingredient, paraquat, in or on that commodity; i.e., the use is covered by the existing tolerance on soybean, seed at 0.7 ppm, which the Agency considers to be at the appropriate level.

Also, in the final rule of September 6, 2006 (71 FR 52487), EPA inadvertently did not revoke the individual tolerances in 40 CFR 180.205 on bean, snap, succulent at 0.05 ppm, when it established the tolerance on vegetable, legume, edible podded, subgroup 6A at 0.05 ppm; bean, lima, succulent and pea, succulent, both at 0.05 ppm, when it established the tolerance on pea and bean, succulent shelled, subgroup 6B at 0.05 ppm; and bean, dry, seed and pea, dry, seed, both at 0.3 ppm, when it established the tolerance on pea and bean, dried shelled, except soybean, subgroup 6C, except guar bean. These established subgroup tolerances cover the uses of the aforementioned individual tolerances, which are no longer needed, and therefore, which should be revoked. In order to provide notice and comment, the Agency intends to address proposing the revocation of these individual tolerances in 40 CFR 180.205 for bean, snap, succulent; bean, lima, succulent; pea, succulent; bean, dry, seed; and pea, dry, seed in a future publication in the **Federal Register**.

Moreover, in the final rule of September 6, 2006 (71 FR 52487), EPA established a tolerance in 40 CFR 180.205 on nut, tree, group 14 at 0.05 ppm, but should have revised the existing tolerance at 0.05 ppm on nut to nut, tree, group 14 (a nomenclature change that is current Agency practice). Also, EPA established a tolerance on vegetable, cucurbit, group 9 at 0.05 ppm, but should have revised the existing tolerance at 0.05 ppm on cucurbits to vegetable, cucurbit, group 9 (a nomenclature change that is current Agency practice). Consequently, since the uses are covered by other tolerances, the duplicate tolerances on cucurbits and nut are no longer needed and should be revoked. In order to provide notice and comment, the Agency intends to address proposing the

revocation of the tolerances in 40 CFR 180.205(a) on cucurbits and nut in a future publication in the **Federal Register**.

Finally, in the final rule of September 6, 2006 (71 FR 52487), EPA established tolerances in 40 CFR 180.205 that were not proposed on August 4, 2006. These include barley hay; cotton, gin byproducts; ginger; grain, aspirated fractions; okra; and wheat hay; and increased the tolerances on cotton, undelinted seed, onion, dry bulb (and revised it to onion, bulb); and wheat grain.

EPA is revoking the tolerance in 40 CFR 180.205(a) on ''mint, hay, spent'' because it is no longer recognized as a raw agricultural commodity, and therefore the tolerance is no longer needed. Also, EPA is removing the ''(N)'' designation from all entries to conform to current Agency administrative practice (''N'' designation means negligible residues), and revising the commodity terminology ''fruit, citrus'' to ''fruit, citrus, group 10;'' and redefining the commodity terminology for ''bean, forage'' to ''cowpea, forage'' and ''bean, hay'' to ''cowpea, hay.'' However, EPA will not revoke the tolerance on mint, hay in 40 CFR 180.205 because the Agency incorrectly based its revocation in the paraquat RED on mint hay no longer being a raw agricultural commodity. While ''mint hay'' is an obsolete commodity terminology, it should be revised to peppermint, tops and spearmint, tops, which EPA will address in a future publication in the **Federal Register**.

Based on field trial data that indicate residues of paraquat as high as 90 ppm in or on rangeland grass forage (which should be revised to grass, forage) and 40 ppm in or on pasture grass hay (which should be revised to grass, hay), the Agency determined that the tolerances should be increased to 90 ppm for grass forage and 40 ppm for grass hay. Therefore, EPA is revising the commodity terminologies in 40 CFR 180.205(a) for ''grass, pasture'' to ''grass, forage'' and increasing the tolerance from 5 ppm to 90.0 ppm; and ''grass, range'' to ''grass, hay'' and increasing the tolerance from 5 ppm to 40.0 ppm. The Agency determined that the increased tolerances are safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Based on a reassessed pineapple tolerance of 0.05 ppm and pineapple processing data that indicate an average concentration factor of 4.5x in dried bran, the Agency determined that a tolerance should be established for pineapple process residue (a wet-waste byproduct from the fresh cut product line, which usually contains pineapple bran) at 0.25 ppm. Therefore, EPA is establishing a tolerance in 40 CFR 180.205(a) for ''pineapple, process residue'' at 0.25 ppm.

Based on a reassessed sugarcane tolerance of 0.5 ppm and sugarcane processing data that indicate an average concentration factor of 5.5x in blackstrap molasses, the Agency determined that a tolerance should be established for sugarcane molasses at 3.0 ppm. Therefore, EPA is establishing a tolerance in 40 CFR 180.205(a) for ''sugarcane, molasses'' at 3.0 ppm.

On September 21, 2001 (66 FR 48593) (FRL–6799–2), EPA published a final rule in the **Federal Register** which in 40 CFR 180.205(a) established tolerances for ''corn, field, stover'' and ''corn, pop, stover'' at 10.0 ppm; ''corn, field, grain'' and ''corn, pop, grain'' at 0.1 ppm; and ''corn, field, forage'' at 3.0 ppm; based on proposed tolerances in petition 5F1625 submitted by Zeneca Ag. Products and to harmonize corn, field, grain and corn, pop, grain with the Codex MRL of 0.1 ppm for maize. In the September 2001 final rule, EPA also stated that in the food additive petition 5H5088, Zeneca had proposed a food additive tolerance for ''corn flour'' at 0.1 ppm which was subsequently withdrawn since EPA determined that the tolerance for corn, field, grain at 0.1 ppm is adequate to cover residues in corn flour.

EPA is revising commodity terminologies in 40 CFR 180.205(a) from ''corn, fresh (inc. sweet corn), kernel plus cob with husks removed'' to ''corn, sweet, kernel plus cob with husks removed;'' and ''guar bean'' to ''guar.''

In the proposed rule of August 4, 2004 (69 FR 47051)(FRL–7368–7), EPA stated that peanut hay is no longer considered to be a significant livestock feed commodity. In fact, peanut hay is considered by the Agency to be a significant livestock feed item as shown at *http://www.epa.gov/opptsfrs/OPPTS_Harmonized/860_Residue_Chemistry_Test_Guidelines/Series/* in the Residue Chemistry Test Guidelines OPPTS 860.1000 Table 1. Therefore, the Agency will not revoke the tolerance but rather will maintain the tolerance level at 0.5 ppm in 40 CFR 180.205, which is consistent with the paraquat RED.

6. *Propargite—comment by the PRC.* After the public comment period extension had ended on October 18, 2004, EPA received comment from the PRC, forwarded by the U.S. Department of Commerce's National Institute of Standards and Technology, on November 3, 2004. The PRC cited an evaluation from a Joint FAO/WHO Meeting on Pesticide Residues (JMPR) Evaluations of Pesticide Residues in Food for 2002, and stated that it recommends a maximum limit of 100.0 ppm for residues of propargite on dry hops and quoted a GAP data under U.S. supervision GAP (1.7 kilograms active ingredient/hectare (kg ai/ha) to the growing crop at an interval of 14 days). Also, the PRC commented on the tolerance levels for residues of propargite on garlic and nut, tree, group.

Agency response. Since the time of the proposed rule of August 4, 2004 (69 FR 47051), the Codex Alimentarius Commission adopted an MRL for propargite on hops, dry at 100.0 milligrams/kilogram (mg/kg). The 2002 JMPR report cites a GAP for the United States with an application rate as 1.8 kg ai/ha (about 1.6 lb active ingredient/acre (ai/A)) and states that the meeting recommends a new maximum propargite residue level for hops (dry) at 100.0 mg/kg (100.0 ppm). The JMPR report is available at the website address *http://www.fao.org/ag/agp/agpp/PesticidJMPR/JMPRreports.htm*.

In the **Federal Register** on December 13, 2006 (71 FR 74802) (FRL–8064–3), the Agency finalized tolerance nomenclature changes including a revision of ''hop, dried cone'' to ''hop, dried cones.'' Currently in 40 CFR 180.259, there are tolerances for propargite on both hop at 15.0 ppm and dried hops at 30.0 ppm. On August 4, 2004 (69 FR 47051), the Agency proposed no action on the existing tolerance level for propargite residues on hop, dried cones at 30.0 ppm, consistent with the propargite RED. On September 22, 1992, Uniroyal submitted a hops processing study for use of propargite treated hops in typical beer brewing operations. Field trials on hops had used a wettable powder formulation where the label calls for two applications of 1.5 lb ai/A per year. Residues in dried hops did not exceed the existing tolerance of 30.0 ppm following either two applications to hops at 0.9X (1.35 lb ai/A) or three applications at 1.5X (2.25 lb ai/A), both with a PHI of 14 days. Hence, no change in the tolerance level for dried hops was recommended by the Agency in the propargite RED.

Moreover, the beer processing study (MRID 42486301 Ball, J. (1992) Omite CR on Hops: Beer Processing Study: Lab Project Number: RP–90043: ML91–0271UNI: IR#90–747. Unpublished study prepared by Uniroyal Chemical Company, Inc. 369 p.) used hops bearing measurable residues up to 22.5 ppm propargite on dried hop cones from

1.5X treated green hops and demonstrated that propargite residues were not detected in beer (<0.01 ppm). However, at the time of the propargite RED, Codex had a value of 30 mg/kg on dried hops. EPA agrees with the commenter that the 100 mg/kg MRL on dried hops for propargite, established by Codex, is appropriate based on the data reviewed by the 2002 JMPR. However, because EPA did not propose any action on hops, dried cones in 40 CFR 180.259 for propargite on August 4, 2004 (69 FR 47051), the Agency will not take action on that tolerance in this document. Therefore, EPA intends to propose increasing the tolerance on hop, dried cones to harmonize with the Codex MRL in a future publication in the **Federal Register**.

Also, the tolerance definition of the raw agricultural commodity (RAC) for hops is dried cones (PR Notice 93–12; December 23, 1993). Therefore, because the RAC for hops is dried hops, whose use is covered by the existing tolerance at 30.0 ppm, EPA is revoking the tolerance in 40 CFR 180.259(a) on hop at 15.0 ppm.

Also, in response to the comment, there is no tolerance in 40 CFR 180.259 for propargite on garlic. According to 40 CFR 180.1(g), on tolerance definitions, a tolerance on onions or onions (dry bulb only) would cover garlic; however, there is also no tolerance in 40 CFR 180.259 for propargite on onion. In the proposed rule of August 4, 2004 (69 FR 47051), the Agency did not propose any action on the existing tolerances in 40 CFR 180.259 for propargite residues on almond and walnut, whose U.S. tolerance levels of 0.1 ppm harmonize with the Codex MRLs of 0.1 mg/kg. The representative commodities for the tree nut group are almond and pecan. There is no pecan tolerance and no tree nut group tolerance for propargite. Both the almond and almond hulls tolerances were recommended in the propargite RED to be maintained at their current tolerance levels based on available data where treated almonds were harvested at 28 days, because a 28–day preharvest interval (PHI) is specified on active product labels.

Based on available data, EPA determined that there is no reasonable expectation of finite residues of propargite in poultry meat and meat byproducts. These tolerances are no longer needed under 40 CFR 180.6(a)(3). Therefore, EPA is revoking the commodity tolerances in 40 CFR 180.259(a) for residues of propargite in or on ''poultry, meat'' and ''poultry, meat byproducts.'' Also, EPA is revoking the tolerance in 40 CFR 180.259(a) for residues of propargite in or on ''citrus, dried pulp'' because residues do not concentrate in dried pulp based on a citrus processing study, and therefore the tolerance is no longer needed. In addition, EPA is revoking the tolerance in 40 CFR 180.259 for residues of propargite in or on ''peanut, hulls'' because it is no longer considered to be a significant livestock feed commodity and therefore the tolerance is no longer needed. The tolerance for peanut forage, which had been proposed for revocation, was removed on December 13, 2006 (71 FR 74802) (FRL–8064–3), when EPA finalized certain tolerance nomenclature changes, including the revision of the tolerance in 40 CFR 180.259 on peanut, forage to peanut, hay, which then became a duplicate tolerance (covered by an existing tolerance for peanut hay).

Based on field trial data that indicate propargite residues as high as 8.3 ppm in or on oranges and 3.8 ppm in or on sorghum grain, the Agency determined that the tolerances should be increased to 10.0 ppm for oranges and decreased to 5.0 ppm for sorghum grain. Therefore, EPA is increasing the tolerance in 40 CFR 180.259(a) on ''orange, sweet'' from 5 ppm to 10.0 ppm and revising the terminology to ''orange,'' and decreasing the tolerance on ''sorghum, grain'' from 10 ppm to 5.0 ppm. The Agency determined that the increased tolerance is safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Based on HAFT residues of 4 ppm (residue range 1.6 ppm to 8.3 ppm) in oranges and available processing data showing an average concentration factor of 7.0x in orange oil, the Agency determined that a tolerance should be established for propargite on citrus oil at 30 ppm. Therefore, EPA is establishing a tolerance in 40 CFR 180.259(a) for residues of propargite in ''citrus, oil'' at 30.0 ppm.

Available processing data indicate that propargite residues do not concentrate in aspirated grain fractions of sorghum, but do concentrate in aspirated grain fractions of field corn as high as 0.35 ppm. The Agency determined that a tolerance should be established for aspirated grain fractions at 0.4 ppm. Therefore, EPA is establishing a tolerance in 40 CFR 180.259(a) for residues of propargite in or on ''grain, aspirated fractions'' at 0.4 ppm.

In order to conform to current Agency practice, in 40 CFR 180.259(a), EPA is revising ''corn, forage'' to ''corn, field, forage'' and ''corn, sweet, forage;'' ''corn, grain'' to ''corn, field, grain'' and ''corn, pop, grain;'' ''mint'' to ''peppermint, tops'' and ''spearmint, tops;'' and ''sorghum, forage'' to ''sorghum, grain, forage.''

In the proposed rule of August 4, 2004 (69 FR 47051), EPA stated that peanut hay is no longer considered to be a significant livestock feed commodity. In fact, peanut hay is considered by the Agency to be a significant livestock feed item as shown at *http://www.epa.gov/opptsfrs/OPPTS_Harmonized/860_Residue_Chemistry_Test_Guidelines/Series/* in the Residue Chemistry Test Guidelines OPPTS 860.1000 Table 1. However, registration labels prohibit the feeding of propargite-treated peanut hay to livestock as stated in the propargite RED. Nevertheless, because in the proposed rule of August 4, 2004 (69 FR 47051) the Agency did not identify the feeding restriction as a basis for proposing revocation of the peanut hay tolerance, the Agency will take no action on it in this document. EPA intends to address proposing the revocation of the tolerance for residues of propargite in or on peanut, hay in a future document to be published in the **Federal Register**.

No comments were received by the Agency concerning the following.

7. *Diclofop-methyl*. As noted in the September 2000 RED, uses of diclofop-methyl on lentils and dry peas have been deleted from registered labels. The use on lentils may have been canceled since 1985. Therefore, EPA is revoking the tolerances in 40 CFR 180.385 for lentil, seed and pea seeds (dry).

Also, in support of tolerance reassessment, the registrant developed a new enforcement method HRAV-14 gas liquid chromatogragphy/electron capture detector (HRAV-14 GLC/ECD) and subjected a ruminant metabolism study to independent laboratory validation. However, EPA has not yet determined that the newly submitted method is valid. The current FDA enforcement method for diclofop-methyl is the Pesticide Analytical Manual (PAM)-Volume II, which does not detect a metabolite of concern, diclofop acid. Therefore, at this time, EPA will not establish any new tolerances that are recommended in the diclofop-methyl RED. The Agency will address establishing such tolerances in a future document in the **Federal Register**.

8. *Diquat dibromide*. The Diquat dibromide RED was completed in July 1995 and the existing tolerances were reassessed according to the FQPA standard in the April 2002 TRED. EPA has determined that the tolerance expression in 40 CFR 180.226(a)(1) should be amended by defining diquat as both a plant growth regulator and

herbicide. Therefore, EPA is amending the tolerance expression in 40 CFR 180.226(a)(1) to read '' ... residues of the plant growth regulator and herbicide diquat ... ''.

On July 1, 2003, (68 FR 39427) (FRL–7308–9) EPA revised potato, waste, dried in 40 CFR 180.226(a)(1) to read potato, processed potato waste, but should have revised it to read potato, processed potato waste, dried. Processed, dried potato waste is no longer a significant animal feed item. Therefore, EPA is revoking the tolerances for potato, processed potato waste in § 180.226(a)(1) and processed, dried potato waste in § 180.226(a)(6) because the associated commodities are no longer significant animal feed items and these tolerances are therefore no longer needed.

In order to achieve compatibility with CODEX (see Unit III., below), EPA is increasing the tolerances in 40 CFR 180.226(a)(1) for egg and fat, meat, and meat byproducts of cattle, goats, hogs, horses, poultry, and sheep, from 0.02 ppm to 0.05 ppm.

Available data indicate that residues of diquat in fish and shellfish will exceed the established tolerances at current maximum registered use patterns. In order to cover all residues of diquat which may occur as a result of the currently registered uses, increasing the tolerances to 2.0 ppm for fish and 20.0 ppm for shellfish is appropriate. Therefore, EPA is increasing the tolerances in 40 CFR 180.226(a)(2)(i) for residues of diquat on ''fish'' from 0.1 ppm to 2.0 ppm and ''shellfish'' from 0.1 ppm to 20.0 ppm. The Agency determined that the increased tolerances are safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

The available data concerning diquat residues following irrigation indicate that residues in or on blackberry, cowpea, orange, strawberry, mustard greens, pasture grass, and tomato may exceed the current tolerances for the respective crop groups and that tolerances should be increased to 0.05 ppm for citrus fruits, small fruits, fruiting vegetables, legume vegetables, and Brassica leafy vegetables, and to 0.20 ppm for grass forage. Therefore, EPA is increasing the tolerances in 40 CFR 180.226(a)(2)(i) for residues of diquat on ''fruit, citrus, group 10'' from 0.02 ppm to 0.05 ppm; ''vegetable, fruiting, group 8'' from 0.02 ppm to 0.05 ppm; ''vegetable, leafy'' from 0.02 ppm to 0.05 ppm and revising the terminology to read ''vegetable, leafy, except brassica, group 4'' and ''vegetable, brassica, leafy, group 5;'' and by increasing the tolerance level for ''vegetable, seed and pod'' from 0.02 ppm to 0.05 ppm; and ''grass, forage'' from 0.1 ppm to 0.2 ppm and revising the terminology to read ''grass, forage, fodder and hay, group 17.'' Also, EPA is increasing the tolerance in 40 CFR 226(a)(2)(i) for residues of diquat on ''fruit, small'' from 0.02 ppm to 0.05 ppm. Instead of revising the terminology to read ''fruit, small and berry group,'' as was proposed, EPA is revising the terminology consistent with the Agency response made in this document to a comment on paraquat; i.e., the old terminology of small fruit for diquat will be separated into individual tolerances for cranberry, grape, and strawberry, as well as berry group 13, each at 0.05 ppm. The Agency determined that the increased tolerances are safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

While no data are available for the miscellaneous commodities avocado, cottonseed, hops, and sugarcane for which tolerances currently exist, the Agency determined that data for other crops could be translated. Based on the highest residues found in other irrigated crops resulting from irrigation with water containing diquat residues, the Agency determined that tolerances of 0.20 ppm are appropriate for avocado, cottonseed, hops, and sugarcane. Therefore, EPA is increasing the tolerances in 40 CFR 180.226(a)(2)(i) for residues of diquat in or on ''avocado,'' ''cotton, undelinted seed,'' and ''sugarcane, cane;'' each from 0.02 ppm to 0.2 ppm, and ''hop, dried cones'' from 0.02 ppm to 0.2 ppm. The Agency determined that the increased tolerances are safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Because available data show that residues of diquat were as high as 1.6 ppm on sorghum grain and 0.16 ppm on soybean, the Agency determined that tolerances should be established for sorghum grain at 2.0 ppm, and both soybean and foliage of legume vegetables at 0.2 ppm. Therefore, EPA is establishing tolerances in 40 CFR 180.226(a)(1) for residues of diquat in or on ''sorghum, grain, grain'' at 2.0 ppm, ''soybean, seed'' at 0.2 ppm, and increasing the tolerance in 40 CFR 180.226(a)(2)(i) on ''vegetable, foliage of legume, group 7'' from 0.1 ppm to 0.2 ppm. The Agency determined that the increased tolerance is safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

In addition, soybean processing data indicate that residues of diquat concentrated about 3x in soybean hulls processed from soybean bearing detectable residues. No concentration of residues was observed in other soybean processed fractions. Based on a recommended tolerance of 0.2 ppm for soybean and a concentration factor of about 3x in soybean hulls, the Agency determined that a tolerance of 0.6 ppm is appropriate for residues of diquat on soybean hulls. Therefore, EPA is establishing a tolerance for residues of diquat in § 180.226(a)(3) for ''soybean, hulls'' at 0.6 ppm.

Based on field trial data on alfalfa grown for seed that show residues of diquat were as high as 2.4 ppm, the Agency determined that a tolerance of 3.0 ppm is appropriate and should be established. Therefore, EPA is establishing a tolerance in § 180.226(a)(1) for ''alfalfa, seed'' at 3.0 ppm. Also, in the diquat TRED, EPA recommended the establishment of a tolerance on clover seed at 2.0 ppm. However, a tolerance for ''clover, seed'' is not needed because clover seed is no longer considered by the Agency to be a significant food or feed item.

EPA is revising commodity terminology to conform to current Agency practice as follows: in 40 CFR 180.226(a)(2)(i), ''grain, crop'' to read ''grain, cereal, group 15'' and ''grain, cereal, forage, fodder and straw, group 16.''

While the Agency did propose to revise tolerance terminology from coffee to coffee, bean in 40 CFR 180.226(a)(3), the Agency did not propose in a notice for comment to revise that tolerance on coffee to coffee, bean, green, as is current Agency practice. However, section 553(b)(3)(B) of the Administrative Procedure Act provides that notice and comment is not necessary ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Consequently, for good cause, EPA is revising the tolerance in 40 CFR 180.226(a)(3) from coffee to coffee, bean, green. The reason for taking this action is because such action has no practical impact on the use of or exposure to the pesticide active ingredient, diquat, in or on that commodity and is made such that the tolerance terminology will conform to current Agency practice.

9. *5-Ethoxy-3-(trichloromethyl)-1,2,4-thiadiazole (etridiazole or terrazole).* Based on available data, EPA determined that there is no reasonable

expectation of finite residues of etridiazole and its metabolites on or in animal livestock commodities. These tolerances are no longer needed under 40 CFR 180.6(a)(3). Therefore, EPA is revoking the commodity tolerances in 40 CFR 180.370(a) for residues of etridiazole and its monoacid metabolite in or on ''cattle, fat;'' ''cattle, meat byproducts;'' ''cattle, meat;'' ''egg;'' ''goat, fat;'' ''goat, meat byproducts;'' ''goat, meat;'' ''hog, fat;'' ''hog, meat byproducts;'' ''hog, meat;'' ''horse, fat;'' ''horse, meat byproducts;'' ''horse, meat;'' ''milk;'' ''poultry, fat;'' ''poultry, meat byproducts;'' ''poultry, meat;'' ''sheep, fat;'' ''sheep, meat byproducts;'' and ''sheep, meat.''

Since 1989, there have been no active registrations for etridiazole use on strawberries and therefore the tolerance is no longer needed. Consequently, EPA is revoking the tolerance for strawberry in 40 CFR 180.370.

The Agency determined that metabolism data at exaggerated rates of etridiazole seed treatments on cotton, soybean, and wheat would support seed treatment uses on barley, beans, corn, cotton, peanuts, peas, safflower, sorghum, soybeans, and wheat. Residues of etridiazole per se were non-detectable on soybeans and wheat, but as high as 0.06 ppm on cotton. Residues of the monoacid metabolite are expected not to exceed 0.04 ppm based on the metabolism data from seed treated at 1-fold amounts. Based on these data, the Agency determined that appropriate tolerances for combined residues of etridiazole and its monoacid metabolite for treated seed should be set at the combined limit of quantitation (0.1 ppm) of the available enforcement method. Therefore, EPA is increasing the tolerances in 40 CFR 180.370 for ''wheat, grain'' from 0.05 ppm to 0.1 ppm, and ''corn, field, grain'' from 0.05 ppm to 0.1 ppm. Also, EPA is decreasing the tolerance in 40 CFR 180.370 for ''cotton, undelinted seed'' from 0.20 ppmto 0.1 ppm based on available data. In addition, based on available data, EPA is establishing tolerances in 40 CFR 180.370 at 0.1 ppm for ''barley, grain;'' ''barley, hay;'' ''cotton, gin byproducts;'' ''peanut;'' ''safflower, seed;'' ''sorghum, grain, forage;'' ''sorghum, grain, grain;'' ''vegetable, foliage of legume, group 7;'' and ''vegetable, legume, group 6.'' The Agency determined that the increased tolerances are safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

In order to conform to current Agency practice, in 40 CFR 180.370, EPA is proposing to revise ''corn, forage'' to read ''corn, field, forage'' and ''corn, sweet, forage,'' and ''corn, stover'' to read ''corn, field, stover'' and ''corn, sweet, stover.''

In the proposed rule of August 4, 2004 (69 FR 47051), EPA stated that peanut hay is no longer considered to be a significant livestock feed commodity. In fact, peanut hay is considered by the Agency to be a significant livestock feed item as shown at *http://www.epa.gov/opptsfrs/OPPTS_Harmonized/860_Residue_Chemistry_Test_Guidelines/Series/* in the Residue Chemistry Test Guidelines OPPTS 860.1000 Table 1. Therefore, the Agency intends to address proposing the establishment of a tolerance for residues of etridiazole and its monoacid metabolite in or on peanut hay in a future document to be published in the **Federal Register**.

Also in the proposed rule of August 4, 2004 (69 FR 47051), the Agency noted the registrant's support of the tomato tolerance in 40 CFR 180.370 for import purposes and the lack of a FIFRA registration because at the time of the RED, the registrant had committed to provide additional data in order to maintain the tomato tolerance for import purposes. However, since the RED, EPA approved several section 24(c) FIFRA registrations for regional domestic use of etridiazole on tomatoes. Consequently, EPA will not amend the tolerance in 40 CFR 180.370 on tomato with a statement regarding the lack of a FIFRA registration.

10. *Fenbutatin-oxide.* The Fenbutatin-oxide RED was completed in September 1994 and the existing tolerances were reassessed according to the FQPA standard in the May 2002 TRED. EPA determined that in order to better harmonize with Codex, the fenbutatin-oxide (hexakis (2-methyl-2-phenylpropyl) distannoxane) tolerance expression for plants should include the parent compound only. Therefore, in 40 CFR 180.362(a), EPA is recodifying plant tolerances in § 180.362(a)(1) and animal tolerances in § 180.362(a)(2). Moreover, EPA is revising the tolerance expression such that tolerances in § 180.362(a)(1) are established for residues of hexakis (2-methyl-2-phenylpropyl) distannoxane and tolerances in § 180.362(a)(2) are established for the combined residues of hexakis (2-methyl-2-phenylpropyl) distannoxane and its organotin metabolites dihydroxybis(2-methyl-2-phenylpropyl)stannane, and 2-methyl-2-phenylpropylstannoic acid.

Also, EPA is removing the tolerance in 40 CFR 180.362 for ''plum, prune'' because that tolerance is no longer needed since that use is covered by the dried plum tolerance. In addition, EPA is revising the commodity tolerance terminology ''plum'' to read ''plum, prune, fresh.''

Because available data for almond, pecan, and walnut support a crop group tolerance; EPA is reassigning their individual tolerances in 40 CFR 180.362 into a group tolerance ''nut, tree, group 14'' and maintaining the tolerance at 0.5 ppm.

The Agency determined that a tolerance on apple wet pomace should be established at 100 ppm because available apple processing data indicate that combined fenbutatin-oxide residues of concern concentrate 1.7x in wet pomace. Based on that processing data, EPA is establishing a tolerance in 40 CFR 180.362(a)(1) for ''apple, wet pomace'' at 100.0 ppm.

In addition, EPA is revising commodity terminology in 40 CFR 180.362 to conform to current Agency practice as follows: ''fruit, citrus'' to read ''fruit, citrus, group 10.''

11. *Folpet.* EPA is recodifying the tolerance for ''avocado'' at 25 ppm from 40 CFR 180.191(a) into 40 CFR 180.191(c) as a tolerance with regional registration because the use of folpet on avocados is limited to the state of Florida, and there is no need for a national tolerance. Additional residue data would be required to establish a tolerance for folpet use on avocados outside the state of Florida.

With the exception of ''avocado'' and ''hop, dried cones,'' the registrant is supporting the remaining folpet tolerances for import purposes only and EPA is designating them as import tolerances with no U.S. registrations. These import tolerances are based on the best available field trial and storage stability data and assume use at a maximum single and seasonal application rate, minimum PHI, and minimum retreatment interval for each crop. For some commodities, the import tolerances should be lower than the old tolerance with a U.S. registration because the import tolerances are based on different use information than that on which the previous tolerances were based. Therefore, EPA is modifying certain tolerances for folpet to reflect the best available foreign field trial data. Therefore, use of folpet outside the United States should not exceed the maximum use rate, minimum preharvest interval, and retreatment interval specified herein. Any use pattern exceeding these maximum single and seasonal application rates, minimum PHIs, and minimum retreatment intervals may result in residues exceeding U.S. tolerance levels.

Available field trial data indicate that folpet residues ranged up to 3.67 ppm in or on apples harvested 7 to 10 days following the last of several applications (14 day retreatment interval) at 0.8 ppm to 3.59 kg ai/ha. Based on the available residue field trial data, the Agency determined that a tolerance of 5 ppm on apple is appropriate provided that use directions do not exceed a maximum single application rate of 3.6 kg ai/ha, a maximum seasonal application rate of 10.8 kg ai/ha, a minimum PHI of 10 days, and a treatment interval of 14 days. Therefore, EPA is decreasing the tolerance in 40 CFR 180.191(a) on ''apple'' from 25.0 ppm to 5.0 ppm.

Foreign field trial data on cranberries indicate that folpet residues ranged up to 11.2 ppm in or on cranberries harvested 30 days following the last of three broadcast applications (separated by a 12– to 14–day retreatment interval) at 5.0 Kilogram active ingredient/hectare/application (kg a.i./ha/application). Although the submitted data do not reflect the maximum label use pattern of folpet on cranberries (which is limited to only two applications and not three applications as tested here), the Agency accepted the current field trial data and determined that a tolerance of 15 ppm is appropriate on cranberries. Therefore, EPA is decreasing the tolerance in 40 CFR 180.191(a) for ''cranberry'' from 25.0 ppm to 15.0 ppm.

Foreign field trial data on onions indicate that folpet residues ranged up to 0.406 ppm in or on dry bulb onions harvested 7 days following the last of either three or four applications (with a 7–day retreatment interval) of folpet at either 1.5– or 1.95 kg ai/ha per application. Based on the available residue field trial data, the Agency determined that a tolerance of 2.0 ppm is appropriate on dry bulb onions provided that the use directions do not exceed a maximum application rate of 1.95 kg ai/ha, a minimum PHI of 7 days, and a 7–day retreatment interval. Therefore, EPA is decreasing the tolerance in 40 CFR 180.191(a) for ''onion, dry bulb'' from 15.0 ppm to 2.0 ppm.

Foreign field trial data on strawberries indicate that folpet residues ranged up to 2.56 ppm in or on strawberries harvested 2 days following the last of four applications at 1.25 kg ai/ha per application. Based on the available residue field trial data, the Agency determined that a tolerance of 5 ppm on strawberries is appropriate provided the use directions do not exceed a maximum of four applications per season at up to 1.25 kg ai/application, and specify a retreatment interval of 7 days and a preharvest interval of 2 days. Therefore, EPA is decreasing the tolerance in 40 CFR 180.191(a) for ''strawberry'' from 25.0 ppm to 5.0 ppm.

Foreign field trial data on grapes indicate that folpet residues ranged up to 38.3 ppm in or on grapes harvested 14 days following the last of five applications (with a 5– to 7–day retreatment interval) at 1.49 kg ai/ha per application. Based on the available residue field trial data, the Agency determined that a tolerance of 50 ppm on grape is appropriate provided that use rates do not exceed a maximum single application rate of 1.5 kg ai/ha, a maximum seasonal rate of 8.0 kg ai/ha, a minimum PHI of 7 days, and a 7–day retreatment interval. Therefore, EPA is increasing the tolerance in 40 CFR 180.191(a) for ''grape'' from 25 ppm to 50.0 ppm. The Agency has determined that the increased tolerance is safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to folpet residues.

No U.S. registration exists for use of folpet on raisins. However, grape processing data show that the average concentration factor from grapes to raisins for folpet residues is 1.9x. Based on an average concentration factor of 1.9x and a HAFT of 38.3 ppm, the Agency determined that for import purposes a tolerance of 80.0 ppm should be established for grape, raisin. Therefore, EPA is establishing a tolerance in 40 CFR 180.191(a) for ''grape, raisin'' at 80.0 ppm.

Tolerances for ''lettuce'' and ''tomato'' will be maintained at the current level of 50.0 ppm and 25.0 ppm, respectively, for import purposes only. There are no U.S. registrations for use of folpet on these commodities.

Foreign field trials for cucumbers harvested 3 to 7 days following the last of several applications indicate residues of folpet up to 0.699 ppm at an application rate up to 1.75 kg/ai/ha. Therefore, EPA has determined that a tolerance of 2.0 ppm is appropriate for imported cucumbers, provided that use of folpet outside the United States does not exceed a maximum single application rate of 1.75 kg ai/ha, a maximum seasonal application rate of 8.0 kg ai/ha, a minimum preharvest interval of at least 3 days, and a minimum retreatment interval of at least 7 days. Also, foreign field trials for melons harvested 7 days following the last of up to 6 applications at a maximum application rate of 1.75 kg ai/ha (with a 5– to 7–day retreatment interval) indicate residues of folpet up to 2.3 ppm. Therefore, EPA has determined that a tolerance of 3.0 ppm is appropriate for imported melons, provided that use of folpet outside the United States does not exceed a maximum single application rate of 1.75 kg ai/ha, a maximum seasonal application rate of 10.5 kg ai/ha, a minimum preharvest interval of at least 7 days, and a minimum retreatment interval of at least 7 days. Based on the available residue field trial data, the Agency has determined that the tolerances on cucumber and melon should be decreased from 15.0 ppm to 2.0 ppm and from 15.0 ppm to 3.0 ppm, respectively. Therefore, EPA is decreasing the tolerances in 40 CFR 180.191(a) on cucumber to 2.0 ppm and melon to 3.0 ppm.

The Agency did not propose in a notice for comment to revise the tolerance nomenclature for folpet in 40 CFR 180.191(a) from onion, dry bulb to onion, bulb, as is current Agency practice. However, section 553(b)(3)(B) of the Administrative Procedure Act provides that notice and comment is not necessary ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Consequently, for good cause, EPA is revising the tolerance terminology in 40 CFR 180.191(a) from onion, dry bulb to read onion, bulb. The reason for taking this action is because such action has no practical impact on the use of or exposure to the pesticide active ingredient, folpet, in or on that commodity and is made such that the tolerance terminology will conform to current Agency practice.

Since the folpet RED was completed in 1999, a tolerance for the purpose of importation was established in 40 CFR 180.191(a) for ''hop, dried cones'' (68 FR 10377, March 5, 2003)(FRL–7296–2) and later, based on the Agency's approval of a petition for a FIFRA registration regarding folpet use on U.S. grown hop, dried cones, the tolerance for hop, dried cones was amended to delete the statement regarding the lack of a FIFRA registration on August 25, 2004 (69 FR 52182) (FRL–7369–1.

12. *Hydramethylnon (Pyrimidinone)*. EPA is increasing the following commodity tolerances in 40 CFR 180.395(a): ''grass (pasture and rangeland)'' from 0.05 ppm to 2.0 ppm and revising the terminology to ''grass, forage'' and ''grass, hay;'' based on available field trial data which show residues of hydramethylnon above the current tolerance level and label amendments which reflect parameters of use patterns for which field trials are available; (i.e., reflect a 0 day post

harvest interval) since the Agency no longer allows a PHI restriction on grass. The tolerance for ''grass hay (pasture and rangeland)'' was recommended to be increased from 0.05 ppm to 0.1 ppm, based on available field trial data previously discussed and label amendments which reflect a 0 day post harvest interval. However, because the terminology should be revised to ''grass, hay,'' that tolerance at 0.1 ppm is no longer needed since it would be a duplicate covered by the proposed tolerance at 2.0 ppm. Therefore, EPA is removing the tolerance in 40 CFR 180.395(a) for grass hay (pasture and rangeland).

After the hydramethylnon RED was completed in 1998, a permanent tolerance was established in 40 CFR 180.395(a) on pineapple (68 FR 48302, August 13, 2003)(FRL–7319–5). Since the proposal of August 4, 2004 (69 FR 47051), the time-limited tolerance for hydramethylnon residues on pineapple in 40 CFR 180.395(b), for section 18 emergency exemptions, expired on June 30, 2005. The Agency did not propose in a notice for comment to remove the text and table with the expired tolerance and reserve 40 CFR 180.395(b). However, section 553(b)(3)(B) of the Administrative Procedure Act provides that notice and comment is not necessary ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Consequently, for good cause, EPA is removing the text and table from 40 CFR 180.395(b) and reserving that section for emergency exemptions in this document. The reason for taking this action is because such action has no practical impact on the use of or exposure to the pesticide active ingredient, hydramethylnon, since the sole time-limited tolerance in 40 CFR 180.395(b) had expired and, as it no longer needs to be codified in that section, should be removed for the sake of clarity.

13. *Phosphine*. EPA is removing the commodity tolerance in 40 CFR 180.225(a)(1) for residues of phospine in or on ''pimento;'' because under 40 CFR 180.1(g) this tolerance is covered by the existing tolerance for pepper.

14. *Picloram*. The Picloram RED was completed in March 1995 and the existing tolerances were reassessed according to the FQPA standard when new tolerances were established on January 5, 1999 (64 FR 418)(FRL–6039–4). Because the tolerances at 3.0 ppm in 40 CFR 180.292(a)(3) for residues of picloram in or on barley, milled fractions (exc flour); oat, groats/rolled oats (previously known as oat, milled fractions (exc flour)); and wheat, milled fractions (exc flour) are duplicates covered by the tolerances at 3.0 ppm in 40 CFR 180.292(a)(2), there is no longer a need for them and therefore, EPA is removing the tolerances in 40 CFR 180.292(a)(3) for residues of picloram in or on barley, milled fractions (exc flour); oat, groats/rolled oats, and wheat, milled fractions (exc flour).

Because the time-limited tolerances on aspirated grain fractions, sorghum grain, forage, and stover for indirect or inadvertent residues in 40 CFR 180.292(d) all expired on December 31, 2000, there is no longer a need to codify them in that part. Therefore, EPA is amending 40 CFR 180.292(d) by removing the existing paragraph and table of expired tolerances, and reserving the paragraph designation.

Based on the concentration of picloram residues in the aspirated grain fractions of wheat, EPA is establishing tolerances in 40 CFR 180.292(a)(1) for ''grain, aspirated fractions'' at 4.0 ppm.

In order to conform to current Agency practice, in 40 CFR 180.292(a)(2), EPA is revising ''barley, milled fractions (exc flour)'' to read ''barley, pearled barley;'' and ''wheat, milled fractions (exc flour)'' to read ''wheat, bran;'' ''wheat, germ;'' ''wheat, middlings;'' and ''wheat, shorts.''

EPA will not take action on the tolerance in 40 CFR 180.292(a)(1) for ''grass, forage'' or establish a tolerance for ''grass, hay'' at this time due to label and data issues. However, the Agency intends to clarify these issues with the registrants.

15. *Triclopyr*. EPA has determined that the residue which should be regulated in grass and rice commodities and milk, poultry, and eggs is triclopyr per se. The Agency has also determined that the residue which should be regulated in meat and meat byproducts are the combined residues of triclopyr and the metabolite 3,5,6-trichloro-2-pyridinol (TCP). Therefore, EPA is revising the tolerance expression in 40 CFR 180.417(a)(1) to reflect residues of triclopyr per se as a result of the application/use of butoxyethyl ester of triclopyr and triethylamine salt of triclopyr. In addition, EPA is recodifying tolerances for ''egg,'' ''milk,'' ''poultry, fat;'' ''poultry, meat byproducts, except kidney;'' ''poultry, meat;'' ''rice, grain;'' and ''rice, straw;'' from 40 CFR 180.417(a)(2) to (a)(1).

Also, EPA is amending the tolerance expression in 40 CFR 180.417(a)(2) to reflect the combined residues of the herbicide triclopyr ((3,5,6-trichloro-2-pyridinyl)oxy) acetic acid and its metabolite 3,5,6-trichloro-2-pyridinol (TCP) as a result of the application/use of butoxyethyl ester of triclopyr or the triethylamine salt of triclopyr.

Since the time of the Triclopyr RED, the Agency has determined that a proposal by the registrant to increase the tolerance for ''grass, forage'' from 500 ppm to 700 ppm is acceptable provided that registrations specify a maximum application rate of 2 lb. acid equivalents (ae)/A per annual growing season. The dietary risk assessment performed as part of the triclopyr RED supports this increase. The current tolerances on meat commodities are adequate to cover residues that may occur from grazing areas treated at 2 lb. ae/A. Therefore, EPA is increasing the tolerance in 40 CFR 180.417(a)(1) on ''grass, forage'' to 700.0 ppm. Also, the Agency is revising in 40 CFR 180.417(a)(1) the commodity terminology ''grass, forage, hay'' to read ''grass, hay'' and decreasing the tolerance from 500.0 ppm to 200.0 ppm, based on available data and label amendments. The Agency determined that the increased tolerance is safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Since the triclopyr RED was completed in 1997, tolerances were established in 40 CFR 180.417(a)(1) for ''fish'' and ''shellfish'' (67 FR 58712, September 18, 2002)(FRL–7196–7).

16. *Triphenyltin hydroxide (TPTH)*. Since TPTH residues of concern in plant and animal commodities have been determined to include TPTH and its monophenyltin (MPTH) and diphenyltin (DPTH) hydroxide and oxide metabolites, EPA is revising the tolerance definition in 40 CFR 180.236 in terms of the combined residues of TPTH and its MPTH and DPTH hydroxide and oxide metabolites, expressed in terms of parent TPTH.

Based on available ruminant feeding data that indicate combined TPTH-regulated residues as high as 1.15 ppm in kidney and 3.7 ppm in liver, the Agency determined that the appropriate tolerances for kidney and liver of cattle, goats, horses, and sheep are 2.0 ppm and 4.0 ppm, respectively. Therefore, EPA is increasing the tolerances in 40 CFR 180.236 for ''cattle, liver;'' ''goat, liver;'' ''horse, liver;'' and ''sheep, liver;'' each from 0.05 ppm to 4.0 ppm, ''cattle, kidney;'' ''goat, kidney;'' ''horse, kidney;'' and ''sheep, kidney;'' each from 0.05 ppm to 2.0 ppm. The Agency determined that the increased tolerances are safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Also, because available ruminant feeding data show combined TPTH-regulated residues as high as 0.14 ppm in fat and 0.34 ppm in meat, the Agency determined that the appropriate tolerances should be established for fat and meat of cattle, goats, horses, and sheep at 0.2 ppm and 0.5 ppm, respectively. Moreover, based on non-detectable levels and combined LOQs of 0.02 ppm for each metabolite, the Agency determined that a tolerance should be established for milk at 0.06 ppm. Therefore, EPA is establishing tolerances in 40 CFR 180.236 for ''cattle, fat;'' ''goat, fat;'' ''horse, fat;'' and ''sheep, fat;'' each at 0.2 ppm; ''cattle, meat;'' ''goat, meat;'' ''horse, meat;'' and ''sheep, meat;'' each at 0.5 ppm, and ''milk'' at 0.06 ppm.

The ruminant feeding data was also used by the Agency to reassess tolerances for swine. EPA determined that tolerances for hog kidney and liver should be increased to 0.3 ppm (the combined LOQs of 0.1 ppm for residues in kidney, liver and fat), and that these separate tolerances should be combined as hog, meat byproducts. In addition, EPA determined that tolerances should also be established for hog fat at 0.3 ppm (the combined LOQs of 0.1 ppm for each metabolite), and in hog meat at 0.06 ppm (the combined LOQs of 0.02 ppm for each metabolite). Therefore, EPA is revising the commodity tolerances in 40 CFR 180.236 for ''hog, kidney'' and ''hog, liver'' at 0.05 ppm into the commodity tolerance ''hog, meat byproducts'' and increasing the tolerance to 0.3 ppm, and establishing tolerances for ''hog, fat'' at 0.3 ppm and ''hog, meat'' at 0.06 ppm. The Agency determined that the increased tolerance is safe; i.e., there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue.

Based on available field trial data that show combined TPTH-regulated residues as high as 9.7 ppm, the Agency determined that a tolerance should be established at 10.0 ppm for beet, sugar, tops. Therefore, EPA is establishing a tolerance in 40 CFR 180.236 for ''beet, sugar, tops'' at 10.0 ppm.

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

EPA may issue a regulation establishing, modifying, or revoking a tolerance under FFDCA section 408(e). In this final rule, EPA is establishing, modifying, and revoking tolerances to implement the tolerance recommendations made during the reregistration and tolerance reassessment processes, and as follow-up on canceled uses of pesticides. As part of these processes, EPA is required to determine whether each of the amended tolerances meets the safety standards under FFDCA. The safety finding determination is found in detail in each Post-FQPA RED and TRED for the active ingredient. REDs and TREDs recommend the implementation of certain tolerance actions, including modifications to reflect current use patterns, to meet safety findings, and change commodity names and groupings in accordance with new EPA policy. Printed and electronic copies of the REDs and TREDs are available as provided in Unit II.A.

EPA has issued post-FQPA REDs for bromoxynil, diclofop-methyl, dicofol, etridiazole (terrazole), folpet, hydramethylnon, iprodione, paraquat, phosphine (aluminum and magnesium phosphide), propargite, triclopyr, and triphenyltin hydroxide (TPTH), and TREDs for diquat and fenbutatin-oxide, whose REDs were both completed prior to FQPA. Also, EPA issued a RED prior to FQPA for picloram and in 1999 made a safety finding which reassessed its tolerances according to the FFDCA standard, maintaining them when new tolerances were established as noted in Unit II.A. REDs and TREDs contain the Agency's evaluation of the data base for these pesticides, including statements regarding additional data on the active ingredients that may be needed to confirm the potential human health and environmental risk assessments associated with current product uses, and REDs state conditions under which these uses and products will be eligible for reregistration. The REDs and TREDs recommended the establishment, modification, and/or revocation of specific tolerances. RED and TRED recommendations such as establishing or modifying tolerances, and in some cases revoking tolerances, are the result of assessment under the FFDCA standard of ''reasonable certainty of no harm.'' However, tolerance revocations recommended in REDs and TREDs that are made final in this document do not need such assessment when the tolerances are no longer necessary.

EPA's general practice is to revoke tolerances for residues of pesticide active ingredients on crops for which FIFRA registrations no longer exist and on which the pesticide may therefore no longer be used in the United States. EPA has historically been concerned that retention of tolerances that are not necessary to cover residues in or on legally treated foods may encourage misuse of pesticides within the United States. Nonetheless, EPA will establish and maintain tolerances even when corresponding domestic uses are canceled if the tolerances, which EPA refers to as ''import tolerances,'' are necessary to allow importation into the United States of food containing such pesticide residues. However, where there are no imported commodities that require these import tolerances, the Agency believes it is appropriate to revoke tolerances for unregistered pesticides in order to prevent potential misuse.

When EPA establishes tolerances for pesticide residues in or on raw agricultural commodities, the Agency gives consideration to possible pesticide residues in meat, milk, poultry, and/or eggs produced by animals that are fed agricultural products (for example, grain or hay) containing pesticides residues (40 CFR 180.6). If there is no reasonable expectation of finite pesticide residues in or on meat, milk, poultry, or eggs, then tolerances do not need to be established for these commodities (40 CFR 180.6(b) and 180.6 (c)).

C. When Do These Actions Become Effective?

These actions become effective 90 days following publication of this final rule in the **Federal Register**. EPA has delayed the effectiveness of these actions to ensure that all affected parties receive notice of EPA's actions. Consequently, the effective date is October 30, 2007. For this final rule, the tolerances that were revoked because registered uses did not exist concerned uses which have been canceled, in some cases, for many years. The Agency believes that existing stocks of pesticide products labeled for the uses associated with the tolerance revocations have been completely exhausted and that treated commodities have had sufficient time for passage through the channels of trade.

Any commodities listed in the regulatory text of this document that are treated with the pesticides subject to this final rule, and that are in the channels of trade following the tolerance revocations, shall be subject to FFDCA section 408(1)(5), as established by the FQPA. Under this section, any residues of these pesticides in or on such food shall not render the food adulterated so long as it is shown to the satisfaction of the Food and Drug Administration that: (1) The residue is present as the result of an application or use of the pesticide at a time and in a manner that was lawful under FIFRA, and (2) the residue does not exceed the level that was authorized at the time of the application or use to be present on the food under a tolerance or exemption from tolerance. Evidence to show that food was lawfully treated may include

records that verify the dates that the pesticide was applied to such food.

III. Are There Any International Trade Issues Raised by this Final Action?

In making its tolerance decisions, EPA seeks to harmonize U.S. tolerances with international standards whenever possible, consistent with U.S. food safety standards and agricultural practices. EPA considers the international Maximum Residue Limits (MRLs) established by the Codex Alimentarius Commission, as required by Section 408(b)(4) of the FFDCA. The Codex Alimentarius is a joint U.N. Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however, FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level in a notice published for public comment. EPA's effort to harmonize with Codex MRLs is summarized in the tolerance reassessment section of individual REDs and TREDs, and in the Residue Chemistry document which supports the RED and TRED, as mentioned in the proposed rule cited in Unit II.A. Specific tolerance actions in this rule and how they compare to Codex MRLs (if any) are discussed in Unit II.A.

IV. Statutory and Executive Order Reviews

In this final rule EPA establishes tolerances under FFDCA section 408(e), and also modifies and revokes specific tolerances established under FFDCA section 408. The Office of Management and Budget (OMB) has exempted these types of actions (i.e., establishment and modification of a tolerance and tolerance revocation for which extraordinary circumstances do not exist) from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866 due to its lack of significance, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104-4). Nor does it require any special considerations as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994); or OMB review or any other Agency action under Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-13, section 12(d) (15 U.S.C. 272 note). Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency previously assessed whether establishment of tolerances, exemptions from tolerances, raising of tolerance levels, expansion of exemptions, or revocations might significantly impact a substantial number of small entities and concluded that, as a general matter, these actions do not impose a significant economic impact on a substantial number of small entities. These analyses for tolerance establishments and modifications, and for tolerance revocations were published on May 4, 1981 (46 FR 24950) and on December 17, 1997 (62 FR 66020), respectively, and were provided to the Chief Counsel for Advocacy of the Small Business Administration. Taking into account this analysis, and available information concerning the pesticides listed in this rule, the Agency hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. In a memorandum dated May 25, 2001, EPA determined that eight conditions must all be satisfied in order for an import tolerance or tolerance exemption revocation to adversely affect a significant number of small entity importers, and that there is a negligible joint probability of all eight conditions holding simultaneously with respect to any particular revocation. (This Agency document is available in the docket of the proposed rule, as mentioned in Unit II.A. Furthermore, for the pesticides named in this final rule, the Agency knows of no extraordinary circumstances that exist as to the present revocations that would change EPA's previous analysis. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This final rule directly regulates growers, food processors, food handlers and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. For these same reasons, the Agency has determined that this rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This rule will not have substantial direct effects on tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

V. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller

General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

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

Dated: July 23, 2007.

Debra Edwards,

Director, Office of Pesticide Programs.

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

PART 180—AMENDED

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

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

■ 2. Section 180.163 is amended by revising the section heading and paragraph (a) to read as follows:

§ 180.163 1,1-Bis(4-chlorophenyl)-2,2,2-trichloroethanol; tolerances for residues.

(a) *General.* (1) Tolerances for the combined residues of the insecticide dicofol, 1,1-bis(4-chlorophenyl)-2,2,2-trichloroethanol and 1-(2-chlorophenyl)-1-(4-chlorophenyl)-2,2,2-trichloroethanol in or on raw agricultural commodities are established as follows:

Commodity	Parts per million
Apple, wet pomace	38.0
Bean, dry, seed	0.5
Bean, succulent	3.0
Butternut	0.1
Caneberry subgroup 13A	5.0
Chestnut	0.1
Citrus, dried pulp	12.0
Citrus oil	200.0
Cotton, refined oil	0.5
Cotton, undelinted seed	0.1
Fruit, citrus, group 10	6.0
Fruit, pome, group 11	10.0
Fruit, stone, group 12	5.0
Grape	5.0
Grape, raisin	20.0
Hazelnut	0.1
Hop, dried cones	65.0
Nut, hickory	0.1
Nut, macadamia	0.1
Pecan	0.1
Peppermint, hay	25.0
Peppermint, oil	30.0
Spearmint, oil	30.0
Spearmint, tops	25.0
Strawberry	10.0
Tea, dried	50.0
Tea, plucked leaves	30.0
Vegetable, cucurbit, group 9	2.0
Vegetable, fruiting, group 8	2.0
Walnut	0.1

(2) Tolerances for the combined residues of the insecticide dicofol, 1,1-bis(4-chlorophenyl)-2,2,2-trichloroethanol, 1-(2-chlorophenyl)-1-(4-chlorophenyl)-2,2,2-trichloroethanol, 1,1-bis(4-chlorophenyl)-2,2-dichloroethanol, and 1-(2-chlorophenyl) -1-(4-chlorophenyl)-2,2-dichloroethanol in or on raw agricultural commodities are established as follows:

Commodity	Parts per million
Cattle, fat	50.0
Cattle, liver	5.0
Cattle, meat	3.0
Cattle, meat byproducts, except liver	3.0
Egg	0.05
Goat, fat	50.0
Goat, liver	5.0
Goat, meat	3.0
Goat, meat byproducts, except liver	3.0
Hog, fat	50.0
Hog, liver	5.0
Hog, meat	3.0
Hog, meat byproducts, except liver	3.0
Horse, fat	50.0
Horse, liver	5.0
Horse, meat	3.0
Horse, meat byproducts, except liver	3.0
Milk, fat (reflecting 0.75 ppm in whole milk)	22.0
Poultry, fat	0.1
Poultry, meat	0.1
Poultry, meat byproducts	0.1
Sheep, fat	50.0
Sheep, liver	5.0
Sheep, meat	3.0
Sheep, meat byproducts, except liver	3.0

* * * * *

■ 3. Section 180.191 is amended by revising paragraph (a) and by adding text to paragraph (c) after the paragraph heading to read as follows:

§ 180.191 Folpet; tolerances for residues.

(a) *General.* Tolerances are established for the fungicide folpet (*N*-(trichloromethylthio)phthalimide) in or on raw agricultural commodities as follows:

Commodity	Parts per million
Apple[1]	5.0
Cranberry [1]	15.0
Cucumber [1]	2.0
Grape [1]	50.0
Grape, raisin [1]	80.0
Hop, dried cones	120.0
Lettuce [1]	50.0
Melon [1]	3.0
Onion, bulb [1]	2.0
Strawberry [1]	5.0
Tomato [1]	25.0

[1] No U.S. registrations.

* * * * *

(c) *Tolerances with regional registration.* Tolerances with regional registrations as defined in § 180.1(m) are established for the fungicide folpet (*N*-(trichloromethylthio)phthalimide) in or on the following raw agricultural commodity:

Commodity	Parts per million
Avocado	25.0

* * * * *

■ 4. Section 180.205 is amended by revising the table in paragraph (a) to read as follows:

§180.205 Paraquat; tolerances for residues.

(a) * * *

Commodity	Parts per million
Acerola	0.05
Almond, hulls	0.5
Animal feed, nongrass, group 18, forage	75.0
Animal feed, nongrass, group 18, hay	210.0
Artichoke, globe	0.05
Asparagus	0.5
Avocado	0.05
Banana	0.05
Barley, grain	0.05
Barley, hay	3.5
Barley, straw	1.0
Bean, dry, seed	0.3
Bean, lima, succulent	0.05
Bean, snap, succulent	0.05
Beet, sugar	0.5
Beet, sugar, tops	0.05
Berry group 13	0.05
Cacao bean	0.05
Carrot, roots	0.05
Cattle, fat	0.05
Cattle, kidney	0.5
Cattle, meat	0.05
Cattle, meat byproducts, except kidney	0.05
Coffee, bean, green	0.05
Corn, field, forage	3.0
Corn, field, grain	0.1
Corn, field, stover	10.0
Corn, pop, grain	0.1
Corn, pop, stover	10.0
Corn, sweet, kernel plus cob with husks removed	0.05

Commodity	Parts per million
Cotton, gin byproducts	110.0
Cotton, undelinted seed	3.5
Cowpea, forage	0.1
Cowpea, hay	0.4
Cranberry	0.05
Cucurbits	0.05
Egg	0.01
Endive	0.05
Fig	0.05
Fruit, citrus, group 10	0.05
Fruit, pome, group 11	0.05
Fruit, stone, group 12	0.05
Ginger	0.1
Goat, fat	0.05
Goat, kidney	0.5
Goat, meat	0.05
Goat, meat byproducts, except kidney	0.05
Grain, aspirated fractions	65.0
Grape	0.05
Grass, forage	90.0
Grass, hay	40.0
Guar	0.5
Guava	0.05
Hog, fat	0.05
Hog, kidney	0.5
Hog, meat	0.05
Hog, meat byproducts, except kidney	0.05
Hop, dried cones	0.5
Horse, fat	0.05
Horse, kidney	0.5
Horse, meat	0.05
Horse, meat byproducts, except kidney	0.05
Kiwifruit	0.05
Lentil, seed	0.3
Lettuce	0.05
Milk	0.01
Mint, hay	0.5
Nut	0.05
Nut, tree, group 14	0.05
Okra	0.05
Olive	0.05
Onion, bulb	0.1
Onion, green	0.05
Papaya	0.05
Passionfruit	0.2
Pea and bean, dried shelled, except soybean, subgroup 6C, except guar bean	0.3
Pea and bean, succulent shelled, subgroup 6B	0.05
Pea, dry, seed	0.3
Pea, field, hay	0.8
Pea, field, vines	0.2
Pea, succulent	0.05
Peanut	0.05
Peanut, hay	0.5
Persimmon	0.05
Pineapple	0.05
Pineapple, process residue	0.25
Pistachio	0.05
Potato	0.5
Rhubarb	0.05
Rice, grain	0.05
Rice, straw	0.06
Safflower, seed	0.05
Sheep, fat	0.05
Sheep, kidney	0.5
Sheep, meat	0.05
Sheep, meat byproducts, except kidney	0.05
Sorghum, forage, forage	0.1
Sorghum, grain	0.05
Sorghum, grain, forage	0.1
Soybean, forage	0.4
Soybean, hay	10.0
Soybean, hulls	4.5
Soybean, seed	0.7
Strawberry	0.25
Sugarcane, cane	0.5
Sugarcane, molasses	3.0
Sunflower, seed	2.0
Turnip, greens	0.05
Turnip, roots	0.05
Vegetable, brassica, leafy, group 5	0.05
Vegetable, cucurbit, group 9	0.05
Vegetable, fruiting, group 8	0.05
Vegetable, legume, edible podded, subgroup 6A	0.05
Wheat, forage	0.5
Wheat, grain	1.1
Wheat, hay	3.5
Wheat, straw	50.0

* * * * *

§ 180.225 [Amended]

■ 5. Section 180.225 is amended by removing the entry for ''pimento'' from the table in paragraph (a)(1).

■ 6. Section 180.226 is amended by revising paragraph (a)(1), the tables in paragraph (a)(2)(i) and (a)(3), and by removing paragraph (a)(6) to read as follows:

§ 180.226 Diquat; tolerances for residues.

(a) *General.* (1) Tolerances are established for residues of the plant growth regulator and herbicide diquat, (6,7-dihydrodipyrido (1,2-a:2′1′-c)pyrazinediium) derived from application of the dibromide salt and calculated as the cation in or on the following food commodities:

Commodity	Parts per million
Alfalfa, seed	3.0
Cattle, fat	0.05
Cattle, meat	0.05
Cattle, meat byproducts	0.05
Egg	0.05
Goat, fat	0.05
Goat, meat	0.05
Goat, meat byproducts	0.05
Hog, fat	0.05
Hog, meat	0.05
Hog, meat byproducts	0.05
Horse, fat	0.05
Horse, meat	0.05
Horse, meat byproducts	0.05
Milk	0.02
Potato	0.1
Poultry, fat	0.05
Poultry, meat	0.05
Poultry, meat byproducts	0.05
Sheep, fat	0.05
Sheep, meat	0.05
Sheep, meat byproducts	0.05
Sorghum, grain, grain	2.0
Soybean, seed	0.2

(2)(i) * * *

Commodity	Parts per million
Avocado	0.2
Berry group 13	0.05
Cotton, undelinted seed	0.2
Cranberry	0.05
Fish	2.0
Fruit, citrus, group 10	0.05
Fruit, pome, group 11	0.02
Fruit, stone, group 12	0.02
Grain, cereal, forage, fodder and straw, group 16	0.02
Grain, cereal, group 15	0.02
Grape	0.05
Grass, forage, fodder and hay, group 17	0.2
Hop, dried cones	0.2
Nut, tree, group 14	0.02
Shellfish	20.0
Strawberry	0.05
Sugarcane, cane	0.2
Vegetable, brassica, leafy, group 5	0.05
Vegetable, cucurbit, group 9	0.02
Vegetable, foliage of legume, group 7	0.2
Vegetable, fruiting, group 8	0.05
Vegetable, leafy, except brassica, group 4	0.05
Vegetable, root and tuber, group 1	0.02
Vegetable, seed and pod	0.05

* * * * *

(3) * * *

Commodity	Parts per million
Banana	0.05
Coffee, bean, green	0.05
Soybean, hulls	0.6

* * * * *

■ 7. Section 180.236 is revised to read as follows:

§ 180.236 Triphenyltin hydroxide; tolerances for residues.

(a) *General.* Tolerances are established for the combined residues of the fungicide triphenyltin hydroxide (TPTH) and its monophenyltin (MPTH) and diphenyltin (DPTH) hydroxide and oxide metabolites, expressed in terms of parent TPTH, in or on the following raw agricultural commodities:

Commodity	Parts per million
Beet, sugar, roots	0.05
Beet, sugar, tops	10.0
Cattle, fat	0.2
Cattle, kidney	2.0

Commodity	Parts per million
Cattle, liver	4.0
Cattle, meat	0.5
Goat, fat	0.2
Goat, kidney	2.0
Goat, liver	4.0
Goat, meat	0.5
Hog, fat	0.3
Hog, meat	0.06
Hog, meat byproducts	0.3
Horse, fat	0.2
Horse, kidney	2.0
Horse, liver	4.0
Horse, meat	0.5
Milk	0.06
Pecan	0.05
Potato	0.05
Sheep, fat	0.2
Sheep, kidney	2.0
Sheep, liver	4.0
Sheep, meat	0.5

(b) *Section 18 emergency exemptions.* [Reserved]

(c) *Tolerances with regional registrations.* [Reserved]

(d) *Indirect or inadvertent residues.* [Reserved]

■ 8. Section 180.259 is amended by revising the table in paragraph (a) to read as follows:

§ 180.259 Propargite; tolerances for residues.

(a) * * *

Commodity	Parts per million
Almond	0.1
Almond, hulls	55.0
Bean, dry, seed	0.2
Cattle, fat	0.1
Cattle, meat	0.1
Cattle, meat byproducts	0.1
Citrus, oil	30.0
Corn, field, forage	10.0
Corn, field, grain	0.1
Corn, pop, grain	0.1
Corn, stover	10.0
Corn, sweet, forage	10.0
Cotton, undelinted seed	0.1
Egg	0.1
Goat, fat	0.1
Goat, meat	0.1
Goat, meat byproducts	0.1
Grain, aspirated fractions	0.4
Grapefruit	5.0
Grape	10.0
Hog, fat	0.1
Hog, meat	0.1
Hog, meat byproducts	0.1
Hop, dried cones	30.0
Horse, fat	0.1
Horse, meat	0.1
Horse, meat byproducts	0.1
Lemon	5.0
Milk, fat (0.08 ppm in milk)	2.0
Nectarine	4.0
Orange	10.0
Peanut	0.1
Peanut, hay	10.0
Peppermint, tops	50.0
Poultry, fat	0.1
Potato	0.1
Sheep, fat	0.1
Sheep, meat	0.1
Sheep, meat byproducts	0.1
Sorghum, grain	5.0
Sorghum, grain, forage	10.0
Sorghum, grain, stover	10.0
Spearmint, tops	50.0
Tea, dried	10.0
Walnut	0.1

* * * * *

■ 9. Section 180.292 is amended by revising the tables in paragraphs (a)(1) and (2), removing paragraph (a)(3), and by removing the text from paragraph (d) and reserving the paragraph designation and heading to read as follows:

§ 180.292 Picloram; tolerances for residues.

(a) * * * (1) * * *

Commodity	Parts per million
Barley, grain	0.5
Barley, straw	1.0
Cattle, fat	0.2
Cattle, kidney	5.0
Cattle, liver	0.5
Cattle, meat	0.2
Cattle, meat byproducts, except kidney and liver	0.2
Egg	0.05
Goat, fat	0.2
Goat, kidney	5.0
Goat, liver	0.5
Goat, meat	0.2
Goat, meat byproducts, except kidney and liver	0.2
Grain, aspirated fractions	4.0
Grass, forage	80.0
Hog, fat	0.2
Hog, kidney	5.0
Hog, liver	0.5
Hog, meat	0.2
Hog, meat byproducts, except kidney and liver	0.2
Horse, fat	0.2
Horse, kidney	5.0
Horse, liver	0.5
Horse, meat	0.2
Horse, meat byproducts, except kidney and liver	0.2
Milk	0.05
Oat, forage	1.0
Oat, grain	0.5
Oat, straw	1.0
Poultry, fat	0.05
Poultry, meat	0.05
Poultry, meat byproducts	0.05
Sheep, fat	0.2
Sheep, kidney	5.0
Sheep, liver	0.5
Sheep, meat	0.2
Sheep, meat byproducts, except kidney and liver	0.2
Wheat, forage	1.0
Wheat, grain	0.5
Wheat, straw	1.0

(2) * * *

Commodity	Parts per million
Barley, pearled barley	3.0
Oat, groats/rolled oats	3.0
Wheat, bran	3.0
Wheat, germ	3.0
Wheat, middlings	3.0
Wheat, shorts	3.0

* * * * *

(d) *Indirect or inadvertent residues.* [Reserved]

■ 10. Section 180.324 is amended by revising the table in paragraph (a)(1) to read as follows:

§ 180.324 Bromoxynil; tolerances for residues.

(a) * * * (1) * * * *

Commodity	Parts per million
Alfalfa, forage	0.1
Alfalfa, hay	0.5
Barley, grain	0.05
Barley, hay	9.0
Barley, straw	4.0
Corn, field, forage	0.3
Corn, field, grain	0.05
Corn, field, stover	0.2
Corn, pop, grain	0.05
Corn, pop, stover	0.2
Flax, seed	0.1
Garlic	0.1
Grain, aspirated fractions	0.3
Grass, forage	3.0
Grass, hay	3.0
Oat, forage	0.3
Oat, grain	0.05
Oat, hay	9.0
Oat, straw	4.0
Onion, bulb	0.1
Peppermint, hay	0.1
Rye, forage	1.0
Rye, grain	0.05
Rye, straw	2.0
Sorghum, grain	0.05
Sorghum, grain, forage	0.5
Sorghum, grain, stover	0.2
Spearmint, hay	0.1
Wheat, forage	1.0
Wheat, grain	0.05
Wheat, hay	4.0
Wheat, straw	2.0

* * * * *

■ 11. Section 180.362 is amended by revising paragraph (a) to read as follows:

§ 180.362 Hexakis (2-methyl-2-phenylpropyl)distannoxane; tolerances for residues.

(a) *General.* (1) Tolerances are established for residues of hexakis (2-methyl-2-phenylpropyl)distannoxane in or on the following raw agricultural commodities:

Commodity	Parts per million
Almond, hulls	80.0
Apple	15.0
Apple, wet pomace	100.0
Cherry, sweet	6.0
Cherry, tart	6.0
Citrus, dried pulp	100.0
Citrus, oil	140.0
Cucumber	4.0
Eggplant	6.0
Fruit, citrus, group 10	20.0
Grape	5.0
Grape, raisin	20.0
Nut, tree, group 14	0.5
Papaya	2.0
Peach	10.0
Pear	15.0
Plum, prune, fresh	4.0
Plum, prune, dried	20.0
Strawberry	10.0

(2) Tolerances are established for the combined residues of hexakis (2-methyl-2-phenylpropyl)distannoxane and its organotin metabolites dihydroxybis(2-methyl-2-phenylpropyl)stannane, and 2-methyl-2phenylpropylstannoic acid in or on the following raw agricultural commodities:

Commodity	Parts per million
Cattle, fat	0.5
Cattle, meat	0.5
Cattle, meat byproducts	0.5
Egg	0.1
Goat, fat	0.5
Goat, meat	0.5
Goat, meat byproducts	0.5
Hog, fat	0.5
Hog, meat	0.5
Hog, meat byproducts	0.5
Horse, fat	0.5
Horse, meat	0.5
Horse, meat byproducts	0.5
Milk, fat	0.1
Poultry, fat	0.1
Poultry, meat	0.1
Poultry, meat byproducts	0.1
Sheep, fat	0.5
Sheep, meat	0.5
Sheep, meat byproducts	0.5

* * * * *

■ 12. Section 180.370 is amended by revising the table in paragraph (a) to read as follows:

§ 180.370 5-Ethoxy-3-(trichloromethyl)-1,2,4-thiadiazole; tolerances for residues.

(a) * * *

Commodity	Parts per million
Barley, grain	0.1
Barley, hay	0.1
Corn, field, forage	0.1
Corn, field, grain	0.1
Corn, field, stover	0.1
Corn, sweet, forage	0.1
Corn, sweet, stover	0.1
Cotton, gin byproducts	0.1
Cotton, undelinted seed	0.1
Peanut	0.1
Safflower, seed	0.1
Sorghum, grain, forage	0.1
Sorghum, grain, grain	0.1
Tomato	0.15
Vegetable, foliage of legume, group 7	0.1
Vegetable, legume, group 6	0.1
Wheat, forage	0.1
Wheat, grain	0.1
Wheat, straw	0.1

* * * * *

§ 180.385 [Amended]

■ 13. Section 180.385 is amended by removing from the table in paragraph (a) the entries for ''lentil, seed'' and ''pea seeds (dry)''.

■ 14. Section 180.395 is amended by revising the table in paragraph (a) and removing the text from paragraph (b), and reserving the paragraph designation and heading to read as follows:

§ 180.395 Hydramethylnon; tolerances for residues.

(a) * * *

Commodity	Parts per million
Grass, forage	2.0
Grass, hay	2.0
Pineapple	0.05

(b) *Section 18 emergency exemptions.* [Reserved]

* * * * *

■ 15. Section 180.417 is amended by revising paragraph (a) to read as follows:

§ 180.417 Triclopyr; tolerances for residues.

(a) *General.* (1) Tolerances for residues of the herbicide triclopyr per se, as a result of the application/use of butoxyethyl ester of triclopyr and triethyylamine salt of triclopyr, are established in or on the following raw agricultural commodities:

Commodity	Parts per million
Egg	0.05
Fish	3.0
Grass, forage	700.0
Grass, hay	200.0
Milk	0.01
Poultry, fat	0.1
Poultry, meat	0.1
Poultry, meat byproducts, except kidney	0.1
Rice, grain	0.3
Rice, straw	10.0
Shellfish	3.5

(2) Tolerances for the combined residues of the herbicide triclopyr ((3,5,6-trichloro-2-pyridinyl)oxy) acetic acid and its metabolite 3,5,6-trichloro-2 -pyridinol (TCP), as a result of the application/use of butoxyethyl ester of triclopyr or the triethylamine salt of triclopyr, are established in or on the following raw agricultural commodities:

Commodity	Parts per million
Cattle, fat	0.05
Cattle, kidney	0.5
Cattle, liver	0.5
Cattle, meat	0.05
Cattle, meat byproducts, except kidney and liver	0.05
Goat, fat	0.05
Goat, kidney	0.5
Goat, liver	0.5
Goat, meat	0.05
Goat, meat byproducts, except kidney and liver	0.05
Hog, fat	0.05
Hog, kidney	0.5
Hog, liver	0.5
Hog, meat	0.05
Hog, meat byproducts, except kidney and liver	0.05
Horse, fat	0.05
Horse, kidney	0.5
Horse, liver	0.5
Horse, meat	0.05
Horse, meat byproducts, except kidney and liver	0.05
Sheep, fat	0.05
Sheep, kidney	0.5
Sheep, liver	0.5
Sheep, meat	0.05
Sheep, meat byproducts, except kidney and liver	0.05

* * * * *

FR Doc. E7–14895 Filed 7–31–07; 8:45 am

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2007–0289; FRL–8136–6]

Quillaja Saponaria Extract; Exemption from the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of the biochemical pesticide *Quillaja saponaria* extract in or on all food commodities. Desert King

Chile, Ltd. submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of *Quillaja saponaria* extract.

DATES: This regulation is effective August 1, 2007. Objections and requests for hearings must be received on or before October 1, 2007, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0289. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov web site to view the docket index or access available documents. All documents in the docket are listed in the docket index available in regulations.gov. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Building), 2777 S. Crystal Drive, Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Driss Benmhend, Biopesticides and Pollution Prevention Division (7511P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–9525; e-mail address:*Benmhend.driss@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

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

- Crop production (NAICS 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 this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Access Electronic Copies of this Document?

In addition to accessing an electronic copy of this **Federal Register** document through the electronic docket at *http://www.regulations.gov*, you may access this ''**Federal Register**'' document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr*. You may also access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's pilot e-CFR site at *http://www.gpoaccess.gov/ecfr*.

C. Can I File an Objection or Hearing Request?

Under section 408(g) of the FFDCA, as amended by the FQPA, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. The EPA procedural regulations which govern the submission of objections and requests for hearings appear in 40 CFR part 178. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2007–0289 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk on or before October 1, 2007.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit your copies, identified by docket ID number EPA–HQ–OPP–2007–0289, by one of the following methods.

- *Federal eRulemaking Portal*:*http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Building), 2777 S. Crystal Drive, Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket telephone number is (703) 305–5805.

II. Background and Statutory Findings

In the **Federal Register** of March 15, 2006 (71 FR 13388) (FRL–7768–2), EPA issued a notice pursuant to section 408(d)(3) of the FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 5F6982) by Desert King Chile, Ltd., Antonio Bellet 77 OF.401, Providencia, Santiago, Chile 6640209 (submitted by Technology Sciences Group, Inc., 1101 17th St., NW., Suite 500, Washington, DC 20026.) The petition requested that 40 CFR part 180 be amended by establishing an exemption from the requirement of a tolerance for residues of *Quillaja saponaria* extract. The notice included a summary of the petition prepared by the petitioner Desert King Chile, Ltd. There were no comments received in response to the notice of filing.

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

section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .'' Additionally, section 408(b)(2)(D) of the FFDCA requires that the Agency consider ''available information concerning the cumulative effects of a particular pesticide's residues '' and ''other substances that have a common mechanism of toxicity.''

EPA performs a number of analyses to determine the risks from aggregate exposure to pesticide residues. First, EPA determines the toxicity of pesticides. Second, EPA examines exposure to the pesticide through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings.

III. Toxicological Profile

Consistent with section 408(b)(2)(D) of the FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness, and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Quillaja saponaria, commonly known as Soapbark tree, is a naturally occurring evergreen, originally native to the South American Andes regions. The active ingredient is a water extract from the bark of *Quillaja saponaria*. Extracts of *Quillaja saponaria* are commonly known as saponins, which belong to a group of naturally occurring glycosides produced mainly by plants that form soap-like foams in aqueous solutions. In general, saponins are found primarily in the tree bark and wood, and to a lesser extent in the leaves. They are comprised of a sugar moiety (typically glucose, galactose, glucuronic acid, xylose, rhamnose, or methylpentose) linked to a hydrophobic aglycone (sapogenin) at the C-3 (monodesmosidic) or at the C-3 and C-26 or C-28 (bidesmosidic) positions. Saponins are found in a wide variety of plants of diverse species and many are used in human food such as baked goods, candies, and soft drinks. Saponins can be used as a pesticide to inhibit the growth of pathogenic fungi and nematodes in grapes and food crops. Saponins extracted from *Quillaja saponaria* belong to the bidesmosidic group, and are widely used in human foods.

The Food and Drug Administration (FDA) has classified *Quillaja saponaria* extract as ''Generally Recognized as Safe'' (GRAS). *Quillaja* extract is used in beverages and other foods with no report of any adverse effects. Other saponins are widely used in commonly consumed human food, flavoring, herbs, and spices also with no report of any adverse effects. According to the World Health Organization (WHO 2002), the established Average Daily Intake (ADI) of saponins from food additives is about 5 milligrams/kilogram body weight (mg/kg bwt). This is much higher than 0.28 mg/kg bwt which represent the calculated average daily intake of*Quillaja* saponins when used as a pesticide to treat fruits and vegetables. Moreover, up to 100 mg saponin has been measured in a kg of sugar extracted from sugar beets (*Beta vulgaris*). According to the United States Department of Agriculture, the U.S. consumption of sugar and sweeteners from sugar beet is over 80 kg a year per capita, or 8,000 mg of saponins. Furthermore, soybean flour and soybean protein has been shown to contain up to 2.5% saponin, and it has been estimated that saponins comprise the pharmacologically active components of approximately 30% of all medicinal plants.

In summary, the daily human exposure and intake of saponins for consumed foods and additives and pharmaceutical products is much higher than what would be consumed from pesticidal exposure and uses of *Quillaja* saponins. This exposure has not resulted in any adverse effects on humans. As a result, the Agency has no concerns about dietary exposure of *Quillaja* saponins.

Comprehensive reviews and risk assessment have been conducted on *Quillaja* saponins with regard to its toxicity to human health and have concluded that these saponins have low acute toxicity.

1. *Acute toxicity*. *Quillaja* saponins are in Toxicity Category III for acute oral and acute dermal toxicity, Toxicity Category I for primary eye irritation, and Toxicity Category IV for acute inhalation toxicity and primary dermal irritation. *Quillaja* saponins are not dermal sensitizers. Based on the review and analysis of the guideline studies, no additional toxicity data are required to support food or non-food uses of this compound.

2. *Mutagenicity, developmental toxicity, and immunotoxicity*. The applicant requested waivers for the mutagenicity (OPPTS Harmonized Guideline 870.5100), developmental toxicity (OPPTS Harmonized Guideline 870.3700), and immunotoxicity (OPPTS Harmonized Guideline 870.7800). *Quillaja* extracts are used as emulsifiers in baked goods, candies, frozen dairy products, gelatins, and puddings. The active ingredient is not a mutagen nor is it related to any known classes of mutagens. Chronic feeding studies have demonstrated that *Quillaja* saponins are not carcinogenic in mice or rats fed up to 2,200 mg/kg in the diet. Saponins have been demonstrated to have anticarcinogenic properties and to stimulate the immune system. Dietary levels of *Quillaja* saponin (up to 700 ppm in feed) stimulated the immune systems of piglets fed for 20 days post-weaning (Ilsey et al., 2005). Based on the information provided, the request for waivers of mutagenicity, developmental toxicity, and immunotoxicity testing requirements was granted by the Agency.

3. *Subchronic toxicity*. The requirement for a 90–day feeding study (OPPTS Harmonized Guidelines 870.3100) was satisfied by submission of a study in which *Quillaja* extract was administered to 15 CFE rats at dietary concentrations equivalent to 0, 360, 1,180, or 2,470 mg/kg bwt/day for males and 0, 440, 1,370, or 3,030 mg/kg bwt/day for females for 13 weeks. Additional groups of 5 rats were administered 0, 2.0, or 4.0% test material for 2 weeks or 6 weeks for interim evaluations. There were no treatment-related effects on mortality, clinical signs, hematology and erythrocyte osmotic fragility, clinical chemistry, urinalysis, or gross and histologic pathology. The NOAEL for the study was the highest dose tested, 2,470 mg/kg bwt/day for males and 3,030 mg/kg bwt/day for females.

IV. Aggregate Exposures

In examining aggregate exposure, section 408 of the FFDCA directs EPA to consider available information concerning exposures from the pesticide residue in food and all other non-occupational exposures, including drinking water from ground water or surface water and exposure through pesticide use in gardens, lawns, or buildings (residential and other indoor uses).

A. Dietary Exposure

1. *Food*. The Agency is not concerned about dietary exposure to *Quillaja* saponins because humans consume it regularly without any reports of adverse

effects. Humans are regularly exposed to*Quillaja* saponins via their use as an FDA-approved flavoring agent and food additive. Undiluted *Quillaja saponaria* extracts are used in soft drinks at levels of 100–500 mg/kg (WHO, 2002). The Joint WHO/FAO Expert Committee on Food Additives (WHO, 2002) established an acceptable daily intake (ADI) of *Quillaja* saponins of up to 5 mg/kg/day. The mean intake of *Quillaja* extracts in the U.S. just from soft drinks (the major food use) is as much as 0.54 mg/kg/day, or 11% of the ADI (WHO, 2006). According to EPA's review and calculations using a maximum use rate for up to 6 applications per season, the exposure and average daily intake of *Quillaja* saponins from treated crops is estimated to be 0.28 mg/kg bwt. This amount is well below the established ADI of 5 mg/kg bwt (WHO, 2002). Even if the use of *Quillaja* saponins exceeds the maximum proposed use rate, the Agency is not concerned about dietary exposure because of the low toxicity of this active ingredient and the history of its use without any reports of adverse effects.

2. *Drinking water exposure*. No significant drinking water exposure and residues are expected to result from the pesticidal usage of *Quillaja* saponins, especially when compared to ubiquity of the naturally occurring saponins in the environment and their widespread use at higher concentrations in food items and beverages. Moreover, saponins are widely known to biodegrade quickly in the environment. As a result, dietary and drinking water exposure to *Quillaja's* saponins from product applications, are expected to be minimal.

B. Other Non-Occupational Exposure

There are no residential, school or day care uses proposed for this product. Since the proposed use pattern is for agricultural food crops, the potential for non-occupational, non-dietary exposures to *Quillaja* saponins by the general population, including infants and children, is highly unlikely.

1. *Dermal exposure*. Non-occupational dermal exposures to *Quillaja* saponins when used as a pesticide are expected to be negligible because it is limited to agricultural use.

2. *Inhalation exposure*. Non-occupational dermal exposures to *Quillaja* saponins when used as a pesticide are expected to be negligible because it is limited to agricultural use.

V. Cumulative Effects

Section 408(b)(2)(D)(v) of the FFDCA requires that, when considering whether to establish an exemption from a tolerance, the Agency consider ''available information concerning the cumulative effects of a particular pesticide's residues and other substances that have a common mechanism of toxicity.'' These considerations include the possible cumulative effects of such residues on infants and children. EPA has considered the potential for cumulative effects of *Quillaja* saponins and other substances in relation to a common mechanism of toxicity. Common mechanisms of toxicity are not relevant to a consideration of cumulative exposure to*Quillaja* saponins because the extract is not toxic to mammalian systems. Thus, the Agency does not expect any cumulative or incremental effects from exposure to residues of *Quillaja* saponins when applied/used as directed on the label and in accordance with good agricultural practices.

VI. Determination of Safety for U.S. Population, Infants, and Children

A. U.S. Population

There is reasonable certainty that no harm will result from aggregate exposure to residues of *Quillaja* saponins to the U.S. population, infants, and children. This includes all anticipated dietary exposures and all other exposures for which there is reliable information. The Agency arrived at this conclusion based on the low level of toxicity of*Quillaja* extract and the already widespread exposure to*Quillaja* saponins without any reported adverse effects on human health. The risks from aggregate exposure via oral, dermal and inhalation exposure are a compilation of three low-risk exposure scenarios and are negligible. Since there are no threshold effects of concern, the provision requiring an additional margin of safety does not apply. Moreover, *Quillaja* extracts are classified by the Food and Drug Administration (FDA) as 'Generally Recognized as Safe'' (GRAS), and are also a part of the human diet when used as emulsifiers in baked goods, candies, frozen dairy products, gelatin, and puddings (WHO, 2002). Humans have had frequent physical contact with *Quillaja saponaria* with no negative health effects. Therefore, the Agency has not used a margin of exposure (safety) approach to assess the safety of saponins of *Quillaja saponaria*.

B. Infants and Children

FFDCA section 408 provides that EPA shall apply an additional tenfold margin of exposure (also referred to as a margin of safety) for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database unless EPA determines that a different margin of exposure will be safe for infants and children. Margins of exposure are often referred to as uncertainty or safety factors. In this instance, based on all available information, the Agency concludes that *Quillaja saponaria* extract is non-toxic to mammals, including infants and children. Because there are no threshold effects of concern to infants, children, and adults when *Quillaja saponaria* extract is used as labeled, the provision requiring an additional margin of safety does not apply. As a result, EPA has not used a margin of exposure approach to assess the safety of *Quillaja* saponins.

VII. Other Considerations

A. Endocrine Disruptors

EPA is required under section 408(p) of the FFDCA, as amended by FQPA, to develop a screening program to determine whether certain substances (including all pesticide active and other ingredients) ''may have an effect in humans that is similar to an effect produced by a naturally occurring estrogen, or other such endocrine effects as the Administrator may designate.''

Quillaja saponins are not known endocrine disruptors nor is it related to any class of known endocrine disruptors. Thus, there is no impact via endocrine-related effects on the Agency's safety finding set forth in this final rule for *Quillaja* saponins.

B. Analytical Method

Through this action, the Agency proposes to establish an exemption from the requirement of a tolerance for the saponins extracted from *Quillaja* saponaria when used on fruit and vegetable crops. For the very same reasons that support the granting of this tolerance exemption, the Agency has concluded that an analytical method is not required for enforcement purposes for these proposed uses of *Quillaja saponins*.

C. Codex Maximum Residue Level

There are no codex maximum residue levels established for*Quillaja* saponins.

VIII. Conclusions

There are no human health concerns when this food use product containing*Quillaja* saponins is applied according to label use directions. The data submitted by applicant and reviewed by the Agency support the petition for an exemption from the requirement of a tolerance for*Quillaja* saponins on food when the product is applied/used as directed on the label

and in accordance with good agricultural practices.

IX. Statutory and Executive Order Reviews

This final rule establishes a tolerance under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this rule has been exempted from review under Executive Order 12866, this rule is not subject to Executive Order 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the exemption from the requirement of a tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 6, 2000) do not apply to this rule. In addition, This rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

X. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: July 15, 2007.

Debra Edwards,

Director, Office of Pesticide Programs.

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

PART 180—[AMENDED]

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

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

■ 2. Section 180.1278 is added to subpart D to read as follows:

§ 180.1278 Quillaja saponaria extract (saponins); exemption from the requirement of a tolerance.

Residues of the biochemical pesticide *Quillaja saponaria* extract (saponins) are exempt from the requirement of a tolerance in or on all food commodities.

[FR Doc. E7–14894 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WT Docket No. 00–230; FCC 07–52]

Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets

AGENCY: Federal Communications Commission.

ACTION: Final rule; clarification.

SUMMARY: In this document, the Federal Communications Commission (''Commission'') determines that, at this time, no further revisions are necessary with regard to the existing policies and rules relating to secondary markets in radio spectrum usage rights.

DATES: Effective August 1, 2007.

FOR FURTHER INFORMATION CONTACT: Paul Murray, Wireless Telecommunications Bureau, at (202) 418–7240, or via the Internet at *Paul.Murray@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Third Report and Order (hereinafter *Third Report and Order*) in WT Docket No. 00–230, adopted on April 6, 2007, and released on April 11, 2007. This order addresses comments filed in response to the Commission's Second Further Notice of Proposed Rulemaking (*Second Further Notice*) 69 FR 77560, December 27, 2004, in this docket. The full text of this document 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. The complete text may be purchased from the FCC's copy contractor, Best Copy & Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or 863–2893, facsimile (202) 863–2898, or via e-mail at *http://www.bcpiweb.com.* The full text is also available on the Commission's Web site at *http://www.fcc.gov.*

Paperwork Reduction Act

This *Third Report and Order* does not contain any new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. 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).

Synopsis of the Third Report and Order

I. Introduction

1. In the *Third Report and Order,* the Commission affirms the Commission's policies and rules regarding ''private commons'' arrangements. We decline to adopt additional technical requirements regarding devices that might be used within a private commons, finding that such requirements are both premature and unnecessary. In addition, we determine that the proposal for licensing underutilized spectrum to equipment manufacturers for development of private commons is beyond the scope of this proceeding.

II. Background

2. In the *Second Report and Order* portion of the *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking* in WT Docket No. 00–230, (*Second Report and Order, Order on Recon,* and *Second Further Notice,* respectively), the Commission took additional steps to facilitate the development of robust secondary markets in spectrum usage rights involving Wireless Radio Services. In particular, in the *Second Report and Order,* 69 FR 77521, December 27, 2004, the Commission established additional policies intended to facilitate the use of advanced technologies, including ''smart'' or ''opportunistic'' devices, which have the potential to increase access and use of unused licensed spectrum. First, the Commission clarified that its spectrum leasing rules permit ''dynamic'' spectrum leasing arrangements, whereby licensees and spectrum lessees may enter into more than one spectrum leasing arrangement involving the shared use of the same spectrum. Second, the Commission expanded the spectrum licensing framework to include a new ''private commons'' option. The ''private commons'' was intended as a means of allowing a licensee or spectrum lessee to make spectrum available to individual users or groups of users that do not fit squarely within the existing spectrum leasing framework or within the traditional end-user arrangements associated with the licensee's or lessee's network infrastructure. The Commission stated that it sought to provide for opportunistic uses of spectrum pursuant to the terms and conditions that licensees (and spectrum lessees) agree upon so long as these terms and conditions fall within the licensee's spectrum usage rights and are not inconsistent with applicable technical and other regulations imposed by the Commission to prevent harmful interference to other licensees.

3. By establishing a private commons a licensee (or spectrum lessee) may permit peer-to-peer communications by other users employing devices in a non-hierarchical network arrangement that does not utilize the licensee's (or spectrum lessee's) network infrastructure. The licensee (or lessee) authorizes other users to operate on the licensed frequencies employing particular devices that meet technical parameters specified by the licensee (or lessee). The technical parameters for these devices, in turn, enable users to operate in a manner designed to minimize interference concerns relating to other users in the licensed band. The Commission stated that the licensee (or lessee) must retain both *de facto* control of the use of the spectrum within the private commons and ''direct responsibility'' for the users' compliance with the Commission's rules. Further, as manager of the private commons, the licensee (or lessee) is required to notify the Commission about the private commons, and particular features associated with it, prior to permitting users to operate. Requirements pertaining to private commons arrangements are set forth in § 1.9080 of the Commission's rules.

4. In the *Second Further Notice,* the Commission sought comment on additional policies that could facilitate the development of advanced technologies, including whether additional revisions should be made to the private commons regulatory model. The Commission also sought comment on whether the private commons option established in the *Second Report and Order* sufficiently accommodates the wide variety of ways in which licensees (and spectrum lessees) and other users may wish to enter cooperative arrangements that employ ''smart'' or ''opportunistic'' devices. For example, the Commission asked whether it should adopt an approach to private commons that would allow intermediaries to facilitate transactions with users, design and set up communications networks for users or provide value-added services or applications. In addition, the Commission sought comment on the appropriate notification process for licensees or *de facto* transfer lessees that choose to offer a private commons to comply with the requirement that a licensee or spectrum lessee managing the private commons must notify the Commission prior to permitting users to begin operating within the private commons.

5. In response to the *Second Further Notice,* the Commission received comments from Cingular Wireless LLC (Cingular Wireless), CTIA—The Wireless Association (CTIA), and Gateway Communications, Inc. (Gateway). Cingular Wireless and CTIA sought clarification of certain aspects of the requirements pertaining to the licensee's or spectrum lessee's responsibility, as manager of the private commons, to ensure that users and devices used in a private commons arrangement comply with applicable Commission rules. Gateway proposed a new scheme for managing a private commons in cases of ''market failure.''

6. Cingular Wireless specifically asked for additional clarification regarding the circumstances under which the Commission would hold, and would not hold, the licensee (or lessee) ''directly responsible'' for users' interference in geographic areas outside of the private commons, in which they were not authorized to operate. For example, in the case of mobile opportunistic devices, Cingular Wireless argued that the Commission should evaluate a licensee's (or lessee's) compliance with its responsibilities based on the terms and conditions it establishes for operation within the private commons, and that non-compliance with these provisions should not result in liability to the licensee (or lessee). In addition, while agreeing that it may be ''beneficial or even necessary'' to require that smart devices used in the private commons include technologies enabling the private commons managers to shut down the devices if they were causing harmful interference, Cingular Wireless argued that imposing such a requirement at this time would be premature.

7. CTIA urged the Commission to adopt more detailed technical standards concerning private commons arrangements. Specifically, to ensure that a private commons device cannot be used outside of the licensed spectrum and geographic area of the licensee (or lessee) authorizing the use of its spectrum, CTIA recommended adoption of strict rules and suggested that any private commons device should contain an element of positive control, in the form of technical intelligence, that prevents it from operating in unauthorized spectrum or areas.

8. In response to the *Second Further Notice,* Gateway proposed that the Commission go beyond its secondary markets mechanisms and allow equipment manufacturers to file applications for authority to manage private commons using licensed

spectrum in geographic areas where there has been a ''market failure'' and spectrum is ''unwanted'' or ''underutilized.'' Gateway suggested that the Commission could issue licenses to equipment manufacturers in exchange for a reasonable one-time payment to the United States treasury, or for a modest spectrum use fee payable on an annual basis to the Commission, or even at no charge, but did not suggest how the Commission would decide among competing parties who might seek to obtain any such license. Gateway asserted that this new licensing mechanism of offering spectrum to equipment manufacturers would create new opportunities for small businesses and others to obtain access to spectrum for a variety of niche uses and services.

9. In reply comments, CTIA asserted that the Commission should reject Gateway's proposal as outside of the scope of the Commission's *Second Further Notice,* which sought comment only on the use of opportunistic devices in licensed spectrum, not comment on new ways to give an interested party an initial spectrum license for a private commons. Accordingly, the Commission cannot consider Gateway's proposal in this proceeding because doing so would violate the requirement for adequate notice under the Administrative Procedures Act (APA). CTIA further asserted that the proposal would create a new licensing scheme in violation of the requirements under section 309(j) of the Communications Act, as amended, which requires that the spectrum be subject to competitive bidding.

III. Third Report and Order

10. We determine that the requirements set forth in the *Second Report and Order* and codified in our rules, 47 CFR 1.9080, provide the right balance in encouraging the development of devices for operation within a private commons arrangement while at the same time placing the appropriate degree of responsibility on licensees (or spectrum lessees) to ensure that the users and devices do not cause harmful interference in areas outside of the private commons and the license authorization. Accordingly, we affirm the general policies and rules the Commission adopted for private commons, including the requirement that licensees (or spectrum lessees) retain both *de facto* control over use of the spectrum and direct responsibility for ensuring that users and the devices used within the private commons comply with the Commission technical and services rules under the license authorization, including those relating to interference. Because the licensees (or lessees) themselves, in their capacity as managers of private commons, exercise control under the license authorization and are responsible for establishing the technical parameters of the devices that would be used within the private commons, they must exercise their responsibilities so as to ensure compliance with the rules, including bearing direct responsibility for establishing parameters of use that prevent harmful interference beyond the private commons areas and the boundaries of their licenses.

11. Based on the scant record before us and the wide variety of ways in which a private commons could be implemented, we decline to modify our rules at this time to further detail the responsibilities placed on the managers of private commons. We are in no position, based on what is before us, to make any determination by rule, as Cingular Wireless requests, as to whether a particular mechanism may or may not be sufficient for a licensee (or spectrum lessee) to exercise its responsibilities in a given instance. Nor do we conclude that establishing strict technical rules or requirements, as requested by CTIA, is appropriate. We do not want to limit at this time the various means by which a licensee (or lessee) might fulfill its obligations as manager of a private commons. While a ''shut down'' mechanism may be effective, it is not the only conceivable means to ensure that a licensee (or lessee) exercises de facto control over the use of the spectrum and complies with the Commission's rules under the license authorization. We see no need at this time to limit other possible means that might be consistent with the Commission's private commons framework.

12. Finally, because Gateway's proposal is outside the scope of the Second Further Notice, and not a logical outgrowth of it, we will not address it in this proceeding. The *Second Further Notice* sought comment on ways to increase spectrum access through opportunistic uses of spectrum specifically within the context of the Commission's spectrum leasing policies and rules set forth in the proceeding addressing the development of secondary markets. The *Second Further Notice* did not contemplate revising the Commission's initial licensing rules. We note that the opportunities that Gateway sees for new uses of spectrum also exist within the private commons framework that the Commission has established in the *Second Report and Order.*

IV. Ordering Clauses

13. Pursuant to sections 1, 4(i), 301, 303(r), and 503 of the Communications Act, as amended, 47 U.S.C. 151, 154(i), 301, 303(r), and 503, *it is ordered that* this *Third Report and Order* is adopted. The Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of the *Third Report and Order,* including the Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E7–14768 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 15

[ET Docket No. 03–201; FCC 07–117]

Unlicensed Devices and Equipment Approval

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document dismisses two petitions for reconsideration of the rules adopted in this proceeding. It dismisses a petition filed by Warren C. Havens and Telesaurus Holdings GB LLC (''Havens'') requesting that the Commission suspend the rule changes adopted for unlicensed devices in the 902–928 MHz (915 MHz) band until such time as it completes a formal inquiry with regard to the potential effect of such changes to Location and Monitoring Service (LMS) licensees in the band. This document also dismisses a petition for reconsideration filed by Cellnet Technology (''Cellnet'') requesting that the Commission adopt spectrum sharing requirements in the unlicensed bands, *e.g.*, a ''spectrum etiquette,'' particularly in the 915 MHz band.

DATES: Effective August 31, 2007.

FOR FURTHER INFORMATION CONTACT: Hugh L. Van Tuyl, (202) 418–7506, e-mail: *Hugh.VanTuyl@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Memorandum Opinion and Order*, ET Docket No. 03–201, FCC 07–117, adopted June 19, 2007 and released June 22, 2007. The full text of this document is available on the Commission's Internet site at *http://www.fcc.gov.* It is also available for inspection and

copying during regular business hours in the FCC Reference Center (Room CY–A257), 445 12th Street., SW., Washington, DC 20554. The full text of this document also may be purchased from the Commission's duplication contractor, Best Copy and Printing Inc., Portals II, 445 12th St., SW., Room CY–B402, Washington, DC 20554; telephone (202) 488–5300; fax (202) 488–5563; e-mail *FCC@BCPIWEB.COM.*

Summary of the Memorandum Opinion and Order

1. The Commission dismissed two petitions for reconsideration of the rules adopted in the *Report and Order*, 69 FR 54027, September 7, 2004, in this proceeding. It dismissed a petition for reconsideration filed by Warren C. Havens and Telesaurus Holdings GB LLC (''Havens'') requesting that the Commission suspend the rule changes adopted for unlicensed devices in the 902–928 MHz (915 MHz) band until such time as it completes a formal inquiry with regard to the potential effect of such changes to Location and Monitoring Service (LMS) licensees in the band. The Commission also dismissed a petition for reconsideration filed by Cellnet Technology (''Cellnet'') requesting that the Commission adopt spectrum sharing requirements in the unlicensed bands, *e.g.*, a ''spectrum etiquette,'' particularly in the 915 MHz band.

2. Havens requested that the Commission suspend the rule changes adopted in this docket for unlicensed devices in the 915 MHz band until such time as the Commission completes a formal inquiry with regard to the potential effect of such changes to M–LMS licensees in the band and it determines either that there will be no material adverse effects or that it will allow counterbalancing changes (*e.g.*, waivers or forbearance of LMS rules) to maintain the balance between higher power LMS systems and unlicensed devices. Havens does not specify which particular rule changes it believes should be suspended. In support of this request, Havens asserts that it cannot ''efficiently or effectively'' comply with rule § 90.353(d) which requires that M–LMS licensees design, construct and field test their systems to minimize adverse effects on part 15 devices if unlicensed devices operating in the band change as a result of the new rules adopted in the *Report and Order.* It claims that the new rules will lead to increased spectrum use of the 915 MHz band by unlicensed devices and thus will adversely affect M–LMS systems by changing the ''regulatory coexistence'' between part 15 and LMS operations (*i.e.*, the balance of aggregate M–LMS systems and aggregate unlicensed devices) and by altering the premise of the ''safe harbor'' in rule § 90.361 (*i.e.*, that unlicensed devices would not operate in close proximity to M–LMS). Havens further alleges that the part 15 rule changes violate § 15.5 of the rules, which requires that unlicensed devices not interfere with licensed system operations.

3. The Commission declines to suspend the part 15 rule changes adopted in the *Report and Order* or consider modifying the M–LMS rules as requested by Havens. The Commission notes that Havens did not raise any objections to any proposals in the *Notice of Proposed Rule Making* (NPRM), 68 FR 68823, September 17, 2003, during the pendancy of this proceeding. A petition for reconsideration that relies on facts not previously presented to the Commission will be granted only if: The facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; the facts relied upon were unknown to the petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of due diligence have learned of the facts in question prior to such opportunity; or the Commission determines that consideration of the facts relied on is required in the public interest. Havens does not address why it did not previously participate in this proceeding or claim that any of these three conditions are met in this case.

4. The Commission's rules also require that a petition for reconsideration state with particularity the respects in which the petitioner believes the action taken should be changed. The Commission modified several part 15 rules that apply to unlicensed devices that may operate in the 915 MHz band, in addition to other frequency bands. Havens does not identify the particular rule changes that it believes should be suspended. Havens provides only a mere statement of belief that the rule changes in this proceeding will lead to increased use of part 15 devices in the 915 MHz band and thus will result in adverse effects on M–LMS operations. It provides no evidence or analysis to support this assertion. Finally, the Commission notes that Havens raised essentially the same arguments in its petition for reconsideration in ET Docket No. 99–231 concerning changes to the part 15 rules for spread spectrum devices. The Commission rejected these same arguments in that proceeding. Accordingly, the Commission dismissed the Havens petition.

5. The Commission recently initiated a proceeding to reexamine the rules for the M–LMS operating in the 904–909.75 MHz and 919.75–928 MHz portion of the 915 MHz band. *See Amendment of the Commission's Part 90 Rules in the 904–909.75 and 919.75–928 MHz Bands, Notice of Proposed Rulemaking* in WT Docket No. 06–49, 21 FCC Rcd 2809 (2006), 71 FR 15658, March 29, 2006. That proceeding was originated by the Commission partly in response to a 2002 petition for rule making filed by Progeny LMS, LLC requesting changes to these rules. That proceeding is the appropriate forum for Havens to address its concerns about the M–LMS rules, including the ''safe harbor'' rule regarding the operational relationship between part 15 unlicensed devices and part 90 M–LMS devices.

6. Cellnet requests reconsideration of the Commission's decision not to adopt a spectrum etiquette for unlicensed devices. Cellnet produces equipment for the automated reading of gas, water, and electric meters that uses spread spectrum transmitters operating on an unlicensed basis in the 915 MHz band. It states that the Commission should: Adopt a duty cycle limitation and other effective spectrum etiquette for any newly certified devices using digital modulation that operate in the 915 MHz band, and confirm in a public notice the obligation of all operators of unlicensed devices in this band authorized under part 15 to avoid causing harmful interference to licensed and unlicensed devices operating in the band and to work cooperatively with operators of any other devices that may be experiencing interference to resolve any such incidents. Cellnet states that these actions are necessary to assure that users taking advantage of newly authorized technical flexibility in this heavily encumbered band do not create the type of interference that will deny the continued effective use of this band by existing and future users. It submits that prior to the Commission's adoption of the new rules on which new entrants have relied on to operate at higher power and without effective duty cycles, the few problems that arose among devices operating in the band were readily resolved with cost effective engineering solutions by affected manufacturers and users.

7. The Commission's rules require that a petition for reconsideration and any supplement thereto shall be filed within thirty days from the date of public notice of such action. Further, the petition must state with particularity the respects in which the petitioner

believes the action taken should be changed. Cellnet's petition does not describe any specific rule changes that it wishes the Commission to make. It simply requests that the Commission adopt ''a duty cycle limitation and other effective spectrum etiquette,'' but does not recommend any specific duty cycle limitation or provide any technical details of what it believes would constitute an ''effective spectrum etiquette.'' After the 30 day reconsideration period, Cellnet made an *ex-parte* presentation to the Commission's staff describing a spectrum etiquette that it believes the Commission should require for digitally modulated spread spectrum transmitters operating in the 915 MHz band under § 15.247 of the rules. Because Cellnet's petition and subsequent filings do not satisfy the Commission's rules for specific relief and timeliness, the Commission dismissed its petition. Although the Commission dismissed Cellnet's petition, it is seeking comment on ideas for a spectrum etiquette in the 915 MHz band, in a *Further Notice of Proposed Rule Making.* This action will allow the Commission to fully consider Cellnet's suggestion to develop a spectrum etiquette that is a trade-off between transmission duration and output power, and also to address certain related issues that Cellnet did not discuss such as transition dates by which new equipment would have to comply.

Ordering Clauses

9. The petition for reconsideration filed by Havens is hereby dismissed. This action is taken pursuant to the authority contained in sections 4(i), 301, 302, 303(e), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302, 303(e), 303(f), and 303(r).

10. The petition for reconsideration filed by Cellnet Technology is hereby dismissed. This action is taken pursuant to the authority contained in sections 4(i), 301, 302, 303(e), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302, 303(e), 303(f), and 303(r).

Congressional Review Act

8. The Commission will not send a copy of the Memorandum Opinion and Order, pursuant to the Congressional Review Act. *See* 5 U.S.C. 801(a)(1)(A). The Congressional Review Act (CRA) was addressed in the Report and Order released in this proceeding, FCC 04–165, 69, FR 54027, September 7, 2004. The Memorandum Opinion and Order dismisses the petitions for reconsideration of the Report and Order.

List of Subjects in 47 CFR Part 15

Communications equipment.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E7–14882 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 22 and 27

[ET Docket No. 00–258; WT Docket No. 02–353; DA 07–1120]

Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands

ACTION: Final rule; announcement of effective date and public information collections approval.

SUMMARY: The Federal Communications Commission (FCC) received Office of Management and Budget (OMB) approval on June 25, 2007, pursuant to the Paperwork Act of 1995, Public Law 104–13, for the following information collections contained in 47 CFR 27.1166(a), (b) and (e); 27.1170; 27.1182(a), (b); and 27.1186, that were published at 71 FR 29818, 29836–40 (May 24, 2006). An agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid control number.

DATES: On June 25, 2007, OMB approved the information collections for 47 CFR 27.1166(a), (b) and (e); 27.1170; 27.1182(a), (b); and 27.1186, that were published at 71 FR 29818, 29836–40 (May 24, 2006). Accordingly, the effective date for the information collections contained in these rules is June 25, 2007.

FOR FURTHER INFORMATION CONTACT: Jennifer Mock, Broadband Division, Wireless Telecommunications Bureau at (202) 418–2483 or via the Internet at *Jennifer.Mock@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–1030.

OMB Approval Date: 6/25/2007.

OMB Expiration Date: 6/31/2010.

Title: Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands.

Form No.: N/A.

Estimated Annual Burden: 1,716 respondents; 29,147 annual burden hours; 2 hours per respondent; and $2,271,200 annual costs.

Needs and Uses: The *Ninth Report and Order (Ninth R&O)* adopted relocation procedures to govern the relocation of: (1) Broadband Radio Service (BRS) licensees in the 2150–2160/62 MHz band; and (2) Fixed Microwave Service (FS) licensees in the 2110–2150 MHz and 2160–2180 MHz bands. The *Ninth R&O* also adopted cost sharing rules that identify the reimbursement obligations for Advanced Wireless Service (AWS) and Mobile Satellite Service (MSS) entrants benefiting from the relocation of FS operations in the 2110–2150 MHz band 2160–2200 MHz band and AWS entrants benefiting from the relocation of BRS operations in the 2150–2160/62 MHz band. The adopted relocation and cost sharing procedures generally follow the Commission's relocation and cost sharing policies delineated in the *Emerging Technologies* proceeding, and as modified by subsequent decisions. These relocation policies are designed to allow early entry for new technology providers by allowing providers of new services to negotiate financial arrangements for reaccommodation of incumbent licensees, and have been tailored to set forth specific relocation schemes appropriate for a variety of different new entrants, including AWS, MSS, Personal Communications Service (PCS) licensees, 18 GHz Fixed Satellite Service (FSS) licensees, and Sprint Nextel. While these new entrants occupy different frequency bands, each entrant has had to relocate incumbent operations. The relocation and cost sharing procedures adopted in the *Ninth R&O* are designed to ensure an orderly and expeditious transition of, with minimal disruption to, incumbent BRS operations from the 2150–2160/62 MHz band and FS operations from the 2110–2150 MHz and 2160–2180 MHz bands, in order to allow early entry for new AWS licensees into these bands. In the *Ninth R&O* the FCC adopted disclosures related to negotiation and relocation of incumbent FS radio links and incumbent BRS systems, and for the registration of these relocation expenses with a clearinghouse, including documentation of reimbursable costs for FS and BRS relocations, documentation when a new AWS and MSS Ancillary Terrestrial Components (MSS/ATC) operators trigger a cost-sharing obligation, prior coordination notices to identify when a specific site will trigger a cost-sharing obligation, and retention of records by the clearinghouses. (Privately administered clearinghouses, selected by the FCC, will keep track of and administer the cost sharing obligations over the next 10–15 years as AWS and MSS-ATC operators build new stations that require them to

relocate incumbents.) In the *Clearinghouse Order*, ET Docket No. 00–258 and WT Docket No. 02–353, DA 07–1120, the FCC's Wireless Telecommunications Bureau (Bureau) requires the AWS clearinghouses to file reports with the FCC and to make disclosures between the clearinghouses. Separately, in a *Public Notice* issued jointly with the National Telecommunications and Information Administration (NTIA), 71 FR 28696 (May 17, 2006), 21 FCC Rcd 4730 (2006), the FCC set forth procedures for AWS licensees to coordinate with Federal Government operators in the 1.7 GHz band, and AWS licenses are granted with a special condition that requires coordination with Federal operators.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. E7–14803 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 22, 27 and 101

[ET Docket No. 00–258; WT Docket No. 02–353; DA 07–1120]

Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands

AGENCY: Federal Communications Commission.

ACTION: Final rule; interpretations and general waiver.

SUMMARY: The Wireless Telecommunications Bureau sets forth details of the duties and responsibilities of the clearinghouses that will administer the Commission's cost-sharing plan under the incumbent relocation procedures for the 2110–2200 MHz band. We also address several matters raised by commenters and issue interpretations and a general waiver that are intended to avoid confusion and unnecessary burdens.

DATES: The interpretations and general waiver are effective August 1, 2007.

FOR FURTHER INFORMATION CONTACT: Jennifer Mock, Broadband Division, Wireless Telecommunications Bureau at (202) 418–2483 or via the Internet at *Jennifer.Mock@fcc.gov*.

SUPPLEMENTARY INFORMATION: In the *AWS Relocation and Cost Sharing Report and Order,*[1] 71 FR 29818, (May 24, 2006), the Commission established procedures for the relocation of Broadband Radio Service (BRS) operations from the 2150–2160/62 MHz band and Microwave Service (FS) operations in the 2.1 GHz band, and adopted cost sharing rules to identify the reimbursement obligations for Advanced Wireless Service (AWS) and Mobile Satellite Service (MSS) entrants benefiting from the relocation of incumbent FS and/or BRS operations. The Commission also delegated authority to the Wireless Telecommunications Bureau (WTB or Bureau) to select one or more entities for the creation and management of a neutral, not-for-profit clearinghouse that would facilitate cost sharing among AWS and MSS entrants benefiting from the relocation of FS incumbents in the 2110–2150 MHz and 2160–2200 MHz bands and AWS entrants benefiting from the relocation of BRS incumbents in the 2150–60/62 MHz bands.[2] Mobile Satellite Service (MSS) operators are required to participate in the clearinghouse for Ancillary Terrestrial Component (ATC) base stations, *see e.g.*, 47 CFR 101.82(d), and may elect to submit claims for reimbursement to the AWS clearinghouse for FS links relocated due to interference from the MSS space-to-Earth operations.[3] The Commission stated that selection would be based on criteria established by the Bureau, and that the Bureau would publicly announce the criteria and solicit proposals from qualified parties.[4] The Commission also instructed the Bureau to solicit public comment on all proposals submitted and, after selecting the clearinghouse administrator(s), to announce the effective date of the cost sharing rules, including the filing requirements for reimbursement claims and relocation cost estimates.[5] In doing so, the Commission noted that the Bureau could select more than one clearinghouse.[6]

1. By *public notice* released on June 15, 2006 (*Clearinghouse PN*), 71 FR 38162 (July 5, 2006), the Bureau invited proposals from entities interested in serving as a neutral, not-for-profit clearinghouse responsible for facilitating cost sharing among entrants benefiting from the relocation of incumbent licensees in the 2.1 GHz bands.[7] The *Clearinghouse PN* also sought comment on whether more than one clearinghouse would be feasible, and required certifications that the entity would be able and willing to work with other clearinghouses if WTB selected more than one, as well as a certification that the entity is a not-for-profit organization and will retain its not-for-profit status during the term of its operations. We also sought comment on whether proposals that offer to administer cost sharing for both FS and BRS relocations are preferable to proposals that seek to administer cost sharing for only one of these relocation processes. We received two proposals and each proposed to administer cost sharing for both FS and BRS relocations.[8] Five parties filed

[1] Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Service to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, ET Docket No. 00–258, Service Rules for Advances Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02–353, *Ninth Report and Order and Order*, 21 FCC Rcd 4473 (2006) (*recon. pending*) (*AWS Relocation and Cost Sharing Report and Order*).

[2] *See AWS Relocation and Cost Sharing Report and Order* at para. 106–107. The Commission made no determination at the time as to whether a clearinghouse must provide administration for both FS and BRS-related cost sharing. *See id.* at n.374. However, the Commission recognized the efficiencies in a clearinghouse administering the cost sharing processes for the relocation of both FS and BRS incumbents in the subject bands. *See id.* at para. 106.

[3] *See AWS Relocation and Cost Sharing Report and Order* at para. 93–94.

[4] *See id.* at para. 83, 107.

[5] *See id.* at para. 83, 107. Claims for reimbursement are limited to relocation expenses incurred on or after the date when the first AWS license is issued in the relevant AWS band (start date). If a clearinghouse is not selected by that date, claims for reimbursement and notices of operation for activities that occurred after the start date but prior to the clearinghouse selection must be submitted to the clearinghouse within thirty calendar days of the selection date. *See* 47 CFR 27.1166.

[6] *See* 47 CFR 27.1178. *See also AWS Relocation and Cost Sharing Report and Order* at para. 107 (''we delegate to WTB the authority to select one or more entities to create and administer a neutral, not-for-profit clearinghouse'').

[7] *See* Wireless Telecommunications Bureau Opens Filing Window for Proposals to Develop and Manage the Clearinghouse that will Administer the Relocation Cost Sharing Plan for Licensees in the 2.1 GHz Bands, *Public Notice,* 21 FCC Rcd 6616 (WTB 2006) (*Clearinghouse PN*). The notice invited any entity interested in serving as a clearinghouse to submit a business plan detailing how it would perform the functions of a clearinghouse, including the following elements: a description of the entity proposing to be a clearinghouse and its qualifications; information regarding financial data, including a business plan that addresses how the entity intends to raise start-up funds and how much the entity plans to charge for individual transactions; whether the entity is interested in serving as a clearinghouse for FS relocations, BRS relocations, or both; a detailed description of accounting methods; a description of how the entity intends to remain impartial and how it will prevent any conflicts of interest; a description of how the entity intends to address concerns about confidentiality and a description of security measures the entity will take to safeguard submitted information; a description of how the entity intends to resolve disputes between parties; and an assessment of how long it would take the entity to become operational. *Id.*

[8] *See* CTIA—The Wireless Association® Clearinghouse Plan, filed July 17, 2006 (CTIA Plan); Clearinghouse Proposal of PCIA—The Wireless Infrastructure Association, filed July 17, 2006 (PCIA Plan).

comments related to those proposals, and PCIA filed reply comments.[9] As noted in the *Qualification PN,*[10] two commenters specifically supported designating PCIA as a clearinghouse[11] and one commenter specifically supported selecting CTIA.[12] Two commenters specifically supported designating both PCIA and CTIA as clearinghouses and none of the commenters opposed the selection of multiple clearinghouse administrators.[13]

2. On October 4, 2006, the Bureau concluded that the benefits of having two or more clearinghouses outweigh any disadvantages because offering participants a choice increases the incentive for all clearinghouses to operate in an efficient manner, thus benefiting the consumers of these services.[14] We also found CTIA and PCIA, the two entities that filed proposals, qualified to serve as clearinghouse administrators, and we advised them to begin preparing their clearinghouse operations.[15] As part of establishing the criteria for clearinghouses, the Bureau also stated that it would issue a subsequent Order setting forth details of the clearinghouses' duties and responsibilities.[16]

3. Unless the context requires otherwise in the paragraphs below and for convenience only, we refer to the ''FCC,'' the ''Bureau'' and ''WTB'' interchangeably. Also, for brevity, we refer to ''clearinghouse administrator(s)'' as the ''clearinghouse(s),'' and our references to AWS include MSS/ATC.

A. Duties and Responsibilities of the Clearinghouses

1. Scope; Representations and Acknowledgments

4. As a preliminary matter, we emphasize that the duties and responsibilities of the clearinghouses are set forth chiefly in the Commission's rules and policies adopted in the *AWS Relocation and Cost Sharing Report and Order.* To the extent permitted under our delegated authority, the instant Order clarifies the Commission's cost-sharing rules and policies, including the duties and responsibilities of the clearinghouses delineated therein. In accordance with the Commission's directive and delegation to the Bureau of authority to establish criteria for, and to select one or more, clearinghouse(s), we set forth details of the clearinghouses' duties and responsibilities below.

5. In the *Qualification PN,* the Bureau found CTIA and PCIA qualified to serve as clearinghouses after reviewing each entity's overall plan and the responsive record, but the Bureau did not thereby rule that all provisions of each plan were in accordance with the Commission's rules and policies. Rather, the Bureau relied on each entity's material representations regarding its organization, qualifications, start-up financing, accounting methods, commitment to provide non-discriminatory and impartial services, security measures to protect confidential information, and willingness and capability to cooperate with other clearinghouses in the coordination and sharing of information. Except for these material representations, we are aware that both plans and their projected implementation may need to be modified at some time(s) during the course of the administration of the cost-sharing plan. As such, we do not believe it is necessary to require either PCIA or CTIA to submit a revised plan to include these administrative details, at this juncture.

6. Each clearinghouse will administer the cost-sharing plan by, *inter alia,* determining the cost-sharing obligations of AWS and MSS/ATC entities for the relocation of fixed microwave service (FS) incumbents from the 2110–2150 MHz and the 2160–2200 MHz bands[17] and the cost sharing obligations of AWS entities for the relocation of BRS incumbents from the 2150–2160/62 MHz band.[18] Given the purpose of establishing a private, industry-based cost sharing plan, CTIA and PCIA are each advised that it is responsible for its acts and omissions and that the Commission and its employees, agents, and representatives are not responsible or liable for the actions or inaction of a clearinghouse. Additionally, CTIA and PCIA each must ensure that neither it nor any affiliated entity is a party to any memorandum of understanding or agreement with the FCC or other governmental entities that would interfere with or prohibit it from performing its duties hereunder.

2. Non-Discrimination and Impartiality

7. CTIA and PCIA must provide clearinghouse services on a non-discriminatory, impartial basis.[19] Specifically, if CTIA or PCIA has a direct affiliation with a class of relocators, licensees, operators, or other entities that provide services or products to clearinghouse users, the relationship must not affect the manner in which CTIA or PCIA performs clearinghouse services and the treatment of all relocators, licensees, or operators must be non-discriminatory. CTIA and PCIA may only refuse to provide clearinghouse services for good cause and must do so as soon as is practicable after receiving the request for service.

3. Multiple Clearinghouses; Data Exchange and Related Matters

8. To be qualified, CTIA and PCIA each had to certify that it would be able and willing to work with each other and other clearinghouses that may be selected by the FCC in the future. Cooperation among the clearinghouses includes, among other things, exchanging clearinghouse data. As a general matter, the clearinghouses must exchange clearinghouse data in a secure and timely manner as necessary to ensure that: (1) No clearinghouse participant is required to provide

[9] Comments were filed by Keller and Heckman LLP (Keller and Heckman), Association for Maximum Service Television Inc. (MSTV), Sprint Nextel Corporation (Sprint Nextel), T-Mobile USA, Inc. (T-Mobile), and The Wireless Communications Association International, Inc. (WCA). PCIA filed reply comments.

[10] *See* Wireless Telecommunications Bureau Finds CTIA and PCIA Qualified to Administer the Relocation Cost-Sharing Plan For Licensees in the 2.1 GHz Bands, *Public Notice,* DA 06–1984 (rel. October 4, 2006) (*Qualification PN*).

[11] *See Qualification PN* at 1, *citing* Keller and Heckman comments and MSTV comments.

[12] *See Qualification PN* at 2, *citing* T-Mobile comments.

[13] *See Qualification PN* at 2, *citing* Sprint Nextel comments at 2–3 and WCA comments at 2–3.

[14] *See Qualification PN* at 2.

[15] *Id.*

[16] *Id.*

[17] *See* 47 CFR 27.1162.

[18] See 47 CFR 27.1178.

[19] CTIA will establish an Advisory Panel made up of entities from the various affected services, *i.e.*, BRS, FS, AWS, and MSS, to provide policy guidance to the clearinghouse and ensure that parties affected by the cost-sharing and relocation processes have an adequate say in the mechanics of the operations. *See* CTIA Plan at 2. PCIA plans to establish the PCIA AWS Clearinghouse as a non-profit subsidiary with its own by-laws and Board of Directors. PCIA, as the incorporator, will select the initial Board of Directors and the Board will establish the general policies including dispute-resolution policies and will examine those policies from time to time to ensure that they are effective but will play no role in the actual dispute resolution process, which will be handled by the PCIA AWS Clearinghouse staff and dispute resolution experts. *See* PCIA Plan at 10, 15. The PCIA Plan includes further details by reference to the PCIA PCS Microwave Clearinghouse. ''To ensure fairness, any PCS company that either provides funding or pays a transaction fee becomes a member of the PCIA Microwave Clearinghouse. Membership benefits include participation in the election of the board of directors, who set policy around technical and procedural issues associated with relocation cost-sharing.'' PCIA Plan, Exhib. B at 2. See also PCIA Reply Comments at 2 (''PCIA is committed to working with all affected constituencies to ensure that the Commission's relocation cost-sharing rules are implemented in a smooth and efficient manner, on a competitive cost-effective basis that will benefit all affected interests'').

notices or other information relative to a given link or system to more than one clearinghouse; and (2) each clearinghouse has access to the data required to perform its duties. *See, e.g.*, 47 CFR 27.1168 and 27.1184. In the event a clearinghouse makes an error in the shared data, the erring clearinghouse shall be solely responsible for correcting the shared-data error as soon as is practicable.

9. The record reflects that CTIA and PCIA disagree as to certain details of the data exchange (and certain operational or business matters related to the disputed details of the data exchange).[20] Although the scope of this disagreement has narrowed over the past several months, CTIA and PCIA appear to have reached an impasse.[21] Accordingly, to move the cost-sharing process forward, we conclude that the Bureau must set forth additional details that will govern data exchange between the clearinghouses in the absence of a written agreement between CTIA and PCIA.

10. *Registration data.* CTIA avers that a clearinghouse should only be required to exchange registration data for a given relocation when an entity that shares in the cost of that relocation has paid-in-full and selected the other clearinghouse to administer its downstream reimbursement rights.[22] PCIA counters that the clearinghouses should exchange all registration data in real time so each clearinghouse has all of the data necessary to assist customers at any stage of the cost-sharing process.[23] CTIA responds that its proposal merely limits the exchange of registration data and emphasizes that its approach would not impede a party from entering a contract to receive assistance from a particular clearinghouse at any time.[24]

11. We find CTIA's distinction unpersuasive. If a party elects to contract with a clearinghouse, the subject clearinghouse will need access to the relevant registration data in order to provide meaningful assistance to the party.[25] In this connection, we will not second guess PCIA's assessment of the market, based on its experience administering the PCS Microwave Clearinghouse, that participants will seek assistance from a clearinghouse before they have reimbursement rights.[26] CTIA further contends that requiring the clearinghouses to exchange registration data will limit competitive opportunities because ''for the clearinghouses to be competitive, there must be some differentiation in the product offerings and services provided.''[27] It is our view that competition between the clearinghouses should be based on price, speed, and quality of service; [28] competition based on one clearinghouse's superior access to data submitted by licensees would tend to hamper or eliminate competition.

12. Based on our administrative experience generally and considering that CTIA and PCIA reached an impasse on this issue after several months of negotiation, we are concerned that requiring the clearinghouses to exchange registration data selectively at the time a contract is established with a customer will risk opening a door to disputes between the clearinghouses.[29] As such, we believe that establishing a bright-line process, under which the clearinghouses promptly exchange registration data for each relocation, will reduce the risk of confusion or disputes between the clearinghouses and among cost-sharing participants. Furthermore, promptly exchanging data for all registrations also provides an additional safeguard against data loss because both clearinghouses will have complete and current data.[30]

13. *Cost-sharing notices.* PCIA proposes that each clearinghouse should only issue notices of reimbursement obligations (cost-sharing notices) *to* its own customers (*i.e.*, communicate only with its customers) [31] while CTIA proposes that each clearinghouse should only issue cost-sharing notices on behalf of its own customers to any AWS licensee (which could include communications to another clearinghouse's customers).[32] PCIA also proposed that each clearinghouse should exchange, *i.e.*, copy, the other on all cost-sharing notices, as an additional check and courtesy, though it subsequently withdrew this request.[33] CTIA counters that clearinghouses ''are not to 'represent' parties in disputes'' and that clearinghouses are not created ''to recheck the administration of cost-sharing notifications by other clearinghouses.'' [34] PCIA responds that

[20] CTIA and PCIA reported their disagreement in October 2006 and the Bureau met with them several times. CTIA and PCIA also held several private meetings at which verbal and written proposals were exchanged in an attempt to reach an agreement. *See, e.g.*, CTIA *Ex Parte,* filed Oct. 19, 2006; PCIA *Ex Parte,* filed Oct. 20, 2006.

[21] *See, e.g.*, CTIA *Ex Parte,* filed Jan. 19, 2007, at 2–3 (stating that FCC should reject PCIA's latest proposal and that significant differences exist between the clearinghouses); PCIA *Ex Parte,* filed Dec. 29, 2006 (describing the disagreement with CTIA and stating that PCIA intends to continue advocating for its approach).

[22] *See CTIA Ex Parte,* filed Jan. 5, 2007, at 1; CTIA *Ex Parte* filed Dec. 21, 2006, at 1. CTIA also notes that the entity receiving a reimbursement is the entity contracting with and paying the clearinghouse. *See CTIA Ex Parte,* filed Jan. 19, 2007, Attachment at 1.

[23] PCIA *Ex Parte,* filed Dec. 21, 2006, at 1 (''[e]ach AWS licensee is subject to the cost-sharing rules and thus, should be entitled to assistance from the clearinghouse that it selects at any stage of the cost-sharing process.''). *See also PCIA Ex Parte,* filed Dec. 29, 2006 (''PCIA disagrees with CTIA's proposal to allow a participant to elect a clearinghouse only after it has cleared certain hurdles.'').

[24] *See, e.g.*, CTIA *Ex Parte,* filed Jan. 19, 2007, Attachment at 2 n.1, *citing* CTIA *Ex Parte,* filed Jan. 5, 2007, at 1 (''[t]here exists no impediment to a party receiving access to assistance in advance of transferring link registration data {between the clearinghouses]'').

[25] We note that CTIA and PCIA have elected to use a fee structure under which they will be compensated only when their customers have received reimbursement. We have no quarrel with this approach but find that the timing of the payments to the clearinghouses should not be a determining factor in our decision on when registration data must be exchanged given the Commission has not dictated a payment scheme.

[26] *See, e.g.*, PCIA *Ex Parte,* filed Jan. 26, 2007, at 2 (stating that it is not unusual for a cost sharing participant to require assistance from a clearinghouse when the particpant first enters the cost-sharing process. PCIA explains that assistance, among other things, involves providing the participant with a better understanding of the FCC's cost-sharing plan, the participant's role in the process, and the basis for its obligations. PCIA also notes that the clearinghouse also serves as a body of knowledge regarding cost-sharing procedures and rules and that the clearinghouse serves as the first-level of dispute resolution. *Id.* at 2–3, citing Ninth Report and Order, 21 FCC Rcd at 4510, 4532 para. 68, 122.

[27] *See, e.g.*, CTIA *Ex Parte,* filed Jan. 19, 2007, Attachment at 2.

[28] *See* PCIA *Ex Parte,* filed Jan. 26, 2007, at 4.

[29] CTIA claims that its proposal mirrors the process used for Wireless Local Numbering Portability (WLNP). *See* CTIA *Ex Parte,* filed Jan 19, 2007, at 2. (CTIA states that the Commission did not require sharing of all data between carriers to effectuate a change in carrier; ''[r]ather, customers were required to make a valid request of their contracted carrier that they desired to port their number to a new carrier.'' *Id.* at n.3, *citing http://www.fcc.gov/cgb/NumberPortability/welcome.html##FAQS.*) We note that the cited webpage actually states that ''[c]onsumers should contact their prospective new carrier, who will start the porting process. The new carrier will first confirm the consumer's identity and then make a porting request of the old carrier.'' Moreover, WLNP is not analogous to the AWS cost-sharing plan because WLNP requests are initiated by consumers voluntarily and expressly for the purpose of contracting with a new carrier whereas most of the data filed with the AWS clearinghouses is mandatory, either prior to operation or to preserve reimbursement rights under the cost-sharing plan. *See also* PCIA *Ex Parte,* filed Jan. 26, 2007, at 4.

[30] We emphasize that nothing in this Order prohibits the clearinghouses from reaching an agreement that revises the scope or schedule of the data exchange, assuming their agreement is consistent with our rules, because our concerns regarding disputes would be sufficiently addressed if both clearinghouses have agreed to such revisions. *See* para. 8, *supra.*

[31] PCIA *Ex Parte,* filed Jan. 11, 2007, at 1.

[32] See CTIA *Ex Parte,* filed Dec. 21, 2006, Attachment at 8.

[33] *See* PCIA *Ex Parte,* filed Jan. 26, 2007, at 4.

[34] CTIA *Ex Parte,* filed Jan. 19, 2007, at 2. CTIA requests that the Commission reject PCIA's (subsequently withdrawn) proposal that the

it does not suggest that a clearinghouse ''represents'' a party in a dispute, and that a clearinghouse's assistance [35] can resolve most disputes with an explanation of the cost-sharing rules and formula, which are objective and precise, thereby avoiding any danger of a clearinghouse favoring one participant over another.[36] Finally, CTIA and PCIA ask us to clarify that cost-sharing notices sent by electronic mail satisfy the requirement that such notices be in writing.[37]

14. We agree with CTIA that each clearinghouse should identify cost-sharing obligations and issue the notices of reimbursement for obligations owed to its customers to give effect to the market choice by each entity—relocators and downstream cost-sharers.[38] Under PCIA's proposal, by comparison, clearinghouse selections made by the relocator and/or the first or second cost-sharers could be negated by a later cost-sharer's selection of a different clearinghouse. Though we agree with PCIA that a clearinghouse does not merely notify participants of reimbursements due,[39] this is undeniably a core function of the clearinghouses, and we agree with CTIA that each participant's selection should be honored through the date of the sunset of the cost-sharing plan. We recognize that, in some situations, a clearinghouse will be issuing/sending cost-sharing notices (for reimbursement obligations owed to its customers) to customers of the other clearinghouse. Finally, we clarify as a general matter that cost-sharing notices sent by electronic mail satisfy the requirement in Section 27.1170 that such notices be in writing.

15. We further believe that clearinghouses cannot compete and cannot fully serve their customers if they do not possess complete information. Because a clearinghouse may send a notice on behalf of its own customer to a customer of the other clearinghouse, the second clearinghouse needs to be informed of the contents of the cost-sharing notice in order to complete its records. We believe that this can most readily be accomplished by requiring each clearinghouse to copy the other clearinghouse on all cost-sharing notices because this method will be more convenient for clearinghouse participants. Under CTIA's proposal, the second clearinghouse only would receive this information if its customer communicates the contents of any notices the participant receives. We believe this would place an unnecessary burden on clearinghouse participants, particularly when it should be relatively simple for the clearinghouses to exchange copies of cost-sharing notices electronically. This exchange will ensure that the clearinghouses use the same data and allows for early resolution of any mistakes or disagreements.

16. *Site-notice data.* CTIA asks us to clarify that § 27.1170's requirement to file site data ''with the clearinghouse'' is a requirement to file such data with both clearinghouses given that we have selected two clearinghouses.[40] PCIA opposes CTIA's request [41] and urges us to clarify that by filing a site notice with a particular clearinghouse, the filer is thereby selecting that clearinghouse's services including assistance for any cost-sharing obligations that may be triggered by the site notice and administration of any reimbursement rights that may arise in the future.

17. We decline both requests for clarification. We find no ambiguity in § 27.1170's requirement to file with a clearinghouse; nor is the Commission's intention made ambiguous by WTB's selection of multiple clearinghouses after the rule was adopted in the *AWS Relocation and Cost Sharing Report and Order.* Indeed, the *AWS Relocation and Cost Sharing Report and Order* makes clear that the Commission envisioned that the Bureau might select multiple clearinghouses.[42]

18. Regarding PCIA's request to clarify that participants select their clearinghouse by filing site notices, we agree that each stakeholder should have a choice of which clearinghouse to use—independent of other filers' choices relative to a given relocation.[43] Indeed, although CTIA and PCIA disagree as to timing, CTIA also ''advocates permitting participants to switch their clearinghouse at any time.'' [44] In this connection, we clarify that merely filing a site notice with a clearinghouse does not form a contract between the filer and the clearinghouse under the Commission's Rules, though a clearinghouse is free to offer its services to the participant and to present a contract.[45] We need not provide additional details in this Order because the formation of contracts is generally a matter of state and local law. However, we note that the record reflects that CTIA and PCIA agree that it is a simple matter to add a column for participants to designate its clearinghouse when filing site notices.[46]

19. Finally, CTIA and PCIA agree that there is no need to require site notices to include the polarization and emission designator of the relevant station because this data is not needed for clearinghouses to determine cost-sharing obligations.[47] CTIA's and PCIA's point is well taken, though modifying § 27.1170 to eliminate this data collection is beyond the scope of the Bureau's delegated authority. Nonetheless, given that both clearinghouses state that requiring new entrants to submit this data is unnecessary to administer the cost-sharing plan, we find that good cause exists for waiving the requirement that all site notices include this data in the first instance.[48] Accordingly, new entrants will be required to submit the polarization and/or emission designator of a given station to a clearinghouse only upon request.

20. *Operational matters.* Clearinghouses must exchange registration, site-notice data, and cost-sharing notices, electronically at least once per business day (if a clearinghouse has no new data it shall so indicate) and such data exchange shall include, but is not limited to, both the registration data required under 47 CFR 27.1166 and 1182, and the site-notice data required by and copies of cost-sharing notices issued under 47 CFR 27.1170 and 27.1186. We direct CTIA and PCIA, within ten (10) calendar days of the release of the instant Order, to establish the exact technical format of these required data exchanges and to report jointly to the Bureau that such an agreement has been

clearinghouses provide courtesy copies of cost-sharing notifications. Id. at 2–3.

[35] *See* note 26, supra.

[36] *See* PCIA *Ex Parte,* filed Jan. 26, 2007, at 3.

[37] *See* CTIA *Ex Parte,* filed Dec. 7, 2006, at 1; PCIA *Ex Parte,* filed Dec. 21, 2006, at 2.

[38] *See* CTIA *Ex Parte,* filed Dec. 21, 2006, Attachment at 8.

[39] *See* PCIA *Ex Parte,* filed Jan. 26, 2007, at 2.

[40] *See* CTIA *Ex Parte,* filed Dec. 7, 2007, at 2, *quoting* 47 CFR 27.1170. ''Inasmuch as the FCC has authorized two clearinghouses * * * the rule is ambiguous as to whether filing with one clearinghouse is sufficient * * * .'' *Id.,* CTIA *Ex Parte.*

[41] *See* PCIA *Ex Parte,* filed Dec. 21, 2006, at 2.

[42] *See, e.g.*, 47 CFR 27.1162 (WTB will select one or more entities to operate as a * * * clearinghouse(s).'' *See also* 47 CFR 27.1166(a) (''[t]o obtain reimbursement, an AWS relocator * * * must submit documentation * * * to the clearinghouse * * * .'').

[43] *See* PCIA *Ex Parte,* filed Dec. 21, 2006, at 3.

[44] *See* CTIA *Ex Parte,* filed Jan. 19, 2007, Attachment at 2.

[45] We understand that all or most site notices (as well as registrations) will be filed online.

[46] *See* PCIA *Ex Parte,* filed Jan. 26, 2007, at 3; CTIA *Ex Parte,* filed Jan. 19, 2007, Attachment at 3.

[47] *See* CTIA *Ex Parte,* filed Dec. 7, 2006, at 2; PCIA *Ex Parte,* filed Dec. 21, 2006, at 2.

[48] *See* 47 CFR 1.3 (any provision of the rules may be waived by the Commission on its own motion for good cause shown).

reached.[49] The Bureau expressly reserves the right to revisit this matter in the future, if the public interest so requires.

4. Confidential (Sensitive Commercial) Information

21. With respect to the issue of maintaining the confidentiality of information, both PCIA and CTIA assert that they will collect and disseminate only that information which is essential to the performance of the clearinghouse functions and will execute confidentiality agreements with all participating entities. Such procedures adequately ensure the necessary confidentiality. We continue to believe that designating multiple clearinghouses is the appropriate approach and believe that the safeguards instituted by both PCIA and CTIA will adequately protect participants from the inadvertent release of any confidential information. We reserve the right, however, to review at any time, the safeguards instituted by both clearinghouses to protect the confidentiality of certain information. Should breach of confidentiality issues develop, we will take the appropriate steps to rectify the situation.

5. Dispute Resolution

22. The Wireless Communications Association International (WCA) emphasizes in comments filed in response to the *Clearinghouse PN* that the role of the clearinghouses is limited to administration of cost sharing among the AWS and MSS licensees who will benefit from the relocation of BRS and other incumbents in the 2.1 GHz band.[50] Put differently, WCA avers that the clearinghouses do not administer the BRS relocation rules. We are unaware of any claim by CTIA, PCIA, or other commenters that suggest that the clearinghouses will administer BRS relocation. As such, we note that there does not appear to be any dispute on this point.

23. We also note that the Commission's rules provide that ''disputes arising out of *the cost sharing plan*, such as disputes over the amount of reimbursement required, must be brought in the first instance to the clearinghouse for resolution.[51] To the extent that disputes cannot be so resolved, the clearinghouse shall encourage the parties to use expedited Alternative Dispute Resolution (ADR) procedures, such as binding arbitration, mediation, or other ADR techniques. To the extent that disputes cannot be resolved using ADR and one or all parties seek to bring the dispute to the FCC for resolution, the clearinghouse shall cooperate with the parties and the FCC in attending any status conference(s) called by the staff and in producing whatever reports or records that are necessary for FCC resolution of the dispute.[52] The initial FCC point of contact is: Chief, Broadband Division, Wireless Telecommunications Bureau, FCC. In the event a mistake is made by a clearinghouse, it shall be responsible for correcting the mistake as part of any dispute resolution.

6. Term; Suspension or Termination

24. The FCC anticipates that, once selected, a clearinghouse will continue its operation until after the sunset date for all relevant AWS bands. However, the FCC's selection of CTIA or PCIA may be terminated by the FCC for cause at any time, upon sixty (60) days written notice, or suspended for up to 90 days, upon ten (10) days written notice. Should the FCC give notice of termination due to a breach or violation, the subject clearinghouse will have sixty (60) days from the date notice is effective to cure such breach or violation. Should the FCC give notice of suspension due to a breach or violation, the subject clearinghouse will have ten (10) days from the date the notice is effective to cure such breach or violation. A breach or violation is a failure of a clearinghouse to perform its duties and responsibilities in accordance with the Commission's rules and policies and/or the instant Order. A clearinghouse also may terminate its service after ninety (90) days written notification to the FCC; however, this provision does not absolve the clearinghouse of any private contractual obligations. Notifications required by this paragraph must be provided by Certified Mail—Return Receipt Requested. However, changes associated with rule amendments or decisions adopted by the FCC will be effective on the same date that the rule amendments and/or FCC decisions are effective and we advise CTIA and PCIA that a petition for reconsideration of the *AWS Relocation and Cost Sharing Report and Order* is pending before the FCC in ET Docket No. 00–258 and WT Docket No. 02–353. Nothing in the instant Order limits or otherwise prejudices the Commission's actions in that proceeding(s) and we reserve the discretion to add or delete clearinghouse selections at a later date if circumstances indicate that such action is warranted.

7. No Assignment or Transfer; Notice of Impairment

25. The FCC's clearinghouse selections, *i.e.*, the selections of CTIA and PCIA, may not be sold, assigned, or transferred to any party without the prior written approval of the FCC. Except as explicitly provided herein, the instant Order does not provide and shall not be construed to provide any third party with any remedy, claim, liability, reimbursement, cause of action or other right or privilege. In addition, CTIA and PCIA must agree to report to the FCC, within thirty (30) days of an occurrence, of any matters that could reasonably be expected to impair its ability to perform the duties authorized under this Agreement, including, but not limited to, a filing for bankruptcy or any legal or administrative proceeding that may bear upon CTIA's or PCIA's ability to perform the duties of a clearinghouse under the Commission's rules and policies or the instant Order.

8. Activity Reports and Special Reports to the FCC

26. As noted above, we are aware that both plans and their projected implementation may need to be modified at some time(s) during the course of the administration of the cost-sharing plan. In this connection, we find it appropriate to monitor both PCIA's and CTIA's implementation of their plans and require that both parties submit reports to the Commission at six-month intervals. The first report will be due on July 31, 2007 (covering the period from the release date of the instant Order through June 30, 2007), and every six months thereafter, *e.g.*, the second report will cover July 1, 2007, through December 31, 2007, and will be due on January 31, 2008. The reports must include an update on the number of links relocated, the amounts paid to relocate these links, updated cost and revenue projections, and any adjustments to existing fee structures. We also reserve the right at any time to

[49] We note that CTIA and PCIA have already agreed upon the specific data format and structure to be included in the exchange of site-notice data. *See* CTIA *Ex Parte,* filed October 19, 2006.

[50] *See* WCA comments at 3 (the process of moving BRS incumbents in the 2.1 GHz band, including the reimbursement of displaced BRS incumbents for their relocation costs, is a separate process from the allocation of responsibility for those costs among multiple AWS licensees who benefit from the relocation).

[51] *See* 47 CFR 27.1172 and 27.1188 (*emphasis added*). *See also* 47 CFR 27.1178 (the clearinghouse(s) will administer the cost-sharing plan by *inter alia*, determining the cost sharing obligation of AWS entities for the relocation of BRS incumbents from the 2150–2162 MHz band).

[52] We note that CTIA and PCIA are each required to follow the conditions and terms of any separate agreement (MOU) concerning the resolution of interference complaints that it may have with the Commission.

inspect the records of or require additional information or reports from CTIA and/or PCIA.

B. Requests for Clarification

1. Definition of Triggering ''Entity'' Under the Cost-sharing Formula

27. CTIA and PCIA request a clarification that—for a given relocated link—a triggering ''entity'' is a ''license,'' not a ''licensee'' [53] and, based on discussions with stakeholders, CTIA states that this is the way that carriers would prefer to have the matter handled.[54] CTIA notes that parties sought clarification of this matter previously and avers that the Commission's response leaves the matter ambiguous.[55]

28. In the *AWS Relocation and Cost Sharing Report and Order*, the Commission addressed a similar proposal [56] by noting that the cost-sharing formula already explicitly states that the *pro rata* reimbursement formula is based on the number of entities that would have interfered with the link. Accordingly, the Commission found that the need for a clarification had not been demonstrated in the record before it.[57] Given this procedural history, we note that the deadline for petitions for reconsideration of the *AWS Relocation and Cost Sharing Report and Order* was June 23, 2006,[58] and that the requested clarification is beyond the scope of the authority that the Commission delegated to the Bureau to select clearinghouses.[59] Therefore, we decline to clarify the rule as requested herein. Regarding CTIA's statement that carriers would prefer to share costs on a per license basis, we note that the cost-sharing obligations established by the Commission's cost-sharing plan merely serves as defaults. As in the PCS cost sharing rules, parties remain free to enter into private cost-sharing arrangements that alter some or all of these default obligations.[60]

2. BAS in the 2025–2110 MHz Band

29. The Association for Maximum Service Television (MSTV) notes in comments filed in response to the *Clearinghouse PN* that ''first-in-time'' TV Broadcast Auxiliary operations will continue to operate in the portion of the spectrum from 2025 to 2110 MHz (adjacent to the 2110–2025 band).[61] MSTV urges that all clearinghouses fully inform all new adjacent channel AWS licensees of their responsibility to protect ''first-in-time'' primary adjacent channel operations. MSTV states that this practice will ensure that all parties are fully aware of their responsibilities with regard to the protection of adjacent channel operations.[62] MSTV notes that PCIA has pledged to work closely with it to ensure that adjacent channel TV broadcast auxiliary operations are taken into account and MSTV has pledged to work similarly with all clearinghouses.[63] Although not within the scope of the Commission's cost-sharing plan, we applaud and encourage these private efforts to inform licensees of their obligations under the Commission's rules.

3. Procedures for Federal Coordination and Relocation

30. T-Mobile USA, Inc. (T-Mobile), in comments filed in response to the *Clearinghouse PN*, asks the Commission and NTIA to clarify the procedures for AWS deployments in the 1.7 GHz band.[64] T-Mobile notes that the Commission will be able to grant licenses prior to the relocation of federal government operations in the 1710–1755 MHz band and that the Commission and NTIA have released procedures that must be followed when AWS licensees deploy services in this band.[65] T-Mobile states that these procedures require new licensees to contact the appropriate federal agency to obtain the necessary information to conduct an interference analysis and that the agency must provide the necessary information within 30 days of the request.[66] However, T-Mobile contends that the current procedures do not specify how the information is to be shared, for example, whether it must be in electronic format and what file format should be used.[67] As such, T-Mobile states that it would like the affected federal agencies to begin to create a ready database of microwave system information to facilitate the exchange of data as soon as possible.[68] Additionally, T-Mobile is concerned that Federal agencies will not be prepared to respond to the quantity of requests they may receive at the close of the auction.[69] Accordingly, T-Mobile requests that the Commission and NTIA also clarify the repercussions for federal agencies that do not provide the necessary information within the 30-day time limit they have established.[70]

31. We find that T-Mobile's request is beyond the scope of the *Clearinghouse PN* and raises matters that are not within the scope of the Commission's directive and delegation to the Bureau of authority to select one or more clearinghouse(s) and to set forth details of the clearinghouses' duties and responsibilities. Accordingly, we do not reach T-Mobile's request herein.

C. Thirty-day Deadline for Submitting Claims and Notices to Clearinghouse for Activities That Occurred Between November 29, 2006 and the Clearinghouse ''Selection Date''

32. Claims for reimbursement are limited to relocation expenses incurred on or after November 29, 2006 (the ''start date'') [71] and, to obtain reimbursement under the cost-sharing plan, an AWS relocator or MSS/ATC relocator must submit documentation of the relocation agreement to the clearinghouse within 30 calendar days of the date a relocation agreement is signed with an incumbent.[72] In addition, prior to initiating operations for a newly constructed site or modified existing site, an AWS entity or MSS/ATC entity is required to file a notice containing site-specific data with the

[53] *See* CTIA *Ex Parte*, filed Dec. 7, 2006, at 2; PCIA *Ex Parte*, filed Dec. 21, 2006, at 2.

[54] *Id.*, CTIA *Ex Parte.*

[55] *Id.*, CTIA *Ex Parte, citing AWS Relocation and Cost Sharing Report and Order.*

[56] *AWS Relocation and Cost Sharing Report and Order*, 21 FCC Rcd at 4511–12 para. 71 and n.244, *citing* T-Mobile's and PCIA's comments in response to the *Fifth Notice* in ET Docket No. 00–258. (T-Mobile sought a ruling that a new entrant may only trigger a cost sharing obligation for a relocated link only once per license, regardless of the size of the license. PCIA stated that numerous disputes arose as to why larger area licensees did not trigger an obligation for each BTA where sites were in the proximity box and urged the Commission to affirm a ''one license—one trigger rule.'' *Id.*, n.244.

[57] *AWS Relocation and Cost Sharing Report and Order*, 21 FCC Rcd at 4516–17 para. 80, citing 47 CFR 24.243 (PCS cost-sharing formula). *See also* 47 CFR 27.1164 and 27.1180 (AWS cost-sharing formula for FS and BRS relocations, respectively).

[58] The *AWS Relocation and Cost Sharing Report and Order* was published in the **Federal Register** on May 24, 2006 (71 FR 29818) and the deadline for filing petitions for reconsideration or clarification was thirty-days thereafter. *See* 47 CFR 1.429(d).

[59] *See* 47 CFR 27.1162 and 27.1178. *See also* 47 CFR 1.429(a) (''[w]here the action was taken by the Commission, the petition will be acted on by the Commission'').

[60] *See AWS Relocation and Cost Sharing Report and Order*, 21 FCC Rcd at 4509–4510, 4531 para. 67, 123.

[61] MSTV comments at 1–2.

[62] *Id.*

[63] *Id.* at 2.

[64] T-Mobile comments at 4–5.

[65] The Federal Communications Commission and the National Telecommunications and Information Administration—Coordination Procedures in the 1710–1755 MHz Band, *public notice* 21 FCC Rcd 4730 (2006).

[66] T-Mobile comments at 4.

[67] *Id.* at 5.

[68] *Id.* at 4–5.

[69] *Id.*

[70] *Id.*

[71] *See* 47 CFR 27.1166(a), defining the ''start date'' as the date when the first AWS license is issued in the relevant AWS band. *See* also Wireless Telecommunications Bureau Grants Advanced Wireless Service Licenses, *public notice,* 21 FCC Rcd 13883 (2006) (announcing the grant of the first AWS licenses on November 29, 2006).

[72] *See* 47 CFR 27.1166(a)(1) and 27.1182(a).

clearinghouse.[73] The clearinghouse filing requirements do not take effect until a clearinghouse is selected.[74] Registrations and notices for activities that occurred after the start date but prior to the clearinghouse selection date must be submitted to a clearinghouse within 30 calendar days of the selection date.[75] We clarify that the selection date for calculating the initial 30-day deadline under these rules will be the date that the instant Order, or a summary thereof, is published in the **Federal Register**, *i.e.*, August 1, 2007. We further clarify that any registrations or notices submitted to a clearinghouse on or after November 29, 2006, need not be resubmitted merely because a clearinghouse received them prior to the selection date.[76]

II. Ordering Clauses

33. *It is ordered* that CTIA—The Wireless Association® (CTIA) and PCIA—The Wireless Infrastructure Association (PCIA) are each selected pursuant to 47 CFR 27.1162 and 27.1178, to serve as a neutral, not-for-profit clearinghouse to administer the Commission's cost-sharing plan in accordance with the Commission's rules, policies, and the instant Order.

34. *It is further ordered* that CTIA and PCIA shall submit to the Wireless Telecommunications Bureau reports on progress in implementing their respective plans beginning July 31, 2007 (for the period beginning today, *i.e.*, March 8, 2007, and ending on June 30, 2007), and every six months thereafter until the services of the clearinghouses are no longer needed.

35. This action is taken under delegated authority pursuant to §§ 0.131, 0.331, 27.1162, and 27.1178 of the Commission's rules, 47 CFR 0.131, 0.331, 27.1162 and 27.1178.

Federal Communications Commission.

Joel D. Taubenblatt,

Chief, Broadband Division, Wireless Telecommunications Bureau.

[FR Doc. E7–14872 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

[73] *See* 47 CFR 27.1170 and 27.1186.

[74] *See* 47 CFR 27.1162, 27.1166(a) and 27.1178.

[75] *Id.*

[76] The Bureau found CTIA and PCIA qualified to serve as clearinghouses on October 4, 2006. *See* note 15, *supra* and accompanying text.

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 07–3153; MB Docket No. 05–273; RM–11273; RM–11307]

Radio Broadcasting Services; Charleston and Englewood, TN

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Audio Division, at the request of Englewood Wireless, allots Channel 250A at Englewood, Tennessee, as the community's first local FM service. Channel 250A can be allotted to Englewood, Tennessee, in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.4 km (8.3 miles) at the following reference coordinates: 35–21–05 North Latitude and 84–36–18 West Longitude.

DATES: Effective August 27, 2007.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Deborah Dupont, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Report and Order*, MB Docket No. 05–273, adopted July 11, 2007, and released July 13, 2007. The full text of this Commission decision 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. The complete text of this decision also may be purchased from the Commission's duplicating 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, *http://www.bcpiweb.com.* The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government 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

Radio, Radio broadcasting.

■ As stated in the preamble, the Federal Communications Commission amends 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, 336.

§ 73.202 [Amended]

■ 2. Section 73.202(b), the Table of FM Allotments under Tennessee, is amended by adding Englewood, Channel 250A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E7–14932 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 07–3156; MM Docket No. 99–275; RM–9704]

Radio Broadcasting Services; Keno, OR

AGENCY: Federal Communications Commission.

ACTION: Final rule, dismissal of petition for reconsideration.

SUMMARY: This document dismisses a Petition for Reconsideration filed by Renaissance Community Improvement Association, Inc. directed against the dismissal of its Petition for Rule Making proposing the allotment of Channel 235A at Keno, Oregon. With this action, this proceeding is terminated.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Robert Hayne, Media Bureau, (202) 418–2177.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Memorandum Opinion and Order* in MM Docket No. 99–275, adopted July 11, 2007, and released July 13, 2007. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals ll, CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copying and Printing, Inc. 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.* This document is not subject to the Congressional Review Act. (The Commission is, therefore, not required to submit a copy of this Report and Order to GAO, pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A), because the petition for reconsideration was dismissed.)

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E7–14873 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

Proposed Rules

Federal Register
Vol. 72, No. 147
Wednesday, August 1, 2007

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 989

[Docket No. AMS–FV–07–0071; FV07–989–2 PR]

Raisins Produced From Grapes Grown In California; Use of Estimated Trade Demand To Compute Volume Regulation Percentages

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule invites comments on using an estimated trade demand figure to compute volume regulation percentages for 2007–08 crop Natural (sun-dried) Seedless (NS) raisins covered under the Federal marketing order for California raisins (order). The order regulates the handling of raisins produced from grapes grown in California and is administered locally by the Raisin Administrative Committee (Committee). This rule would provide parameters for implementing volume regulation for 2007–08 crop NS raisins, if supplies are short, for the purposes of maintaining a portion of the industry's export markets and stabilizing the domestic market.

DATES: Comments must be received by August 16, 2007.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposal. Comments must be sent to the Docket Clerk, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue SW., STOP 0237, Washington, DC 20250–0237; Fax: (202) 720–8938; or Internet: *http://www.regulations.gov.* All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Rose M. Aguayo, Marketing Specialist, or Kurt J. Kimmel, Regional Manager, California Marketing Field Office, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA; Telephone: (559) 487–5901, Fax: (559) 487–5906, or E-mail: *Rose.Aguayo@usda.gov* or *Kurt.Kimmel@usda.gov.*

Small businesses may request information on complying with this regulation by contacting Jay Guerber, Marketing Order Administration Branch, Fruit and Vegetable Programs, AMS, USDA, 1400 Independence Avenue, SW., STOP 0237, Washington, DC 20250–0237; Telephone: (202) 720–2491, Fax: (202) 720–8938, or E-mail: *Jay.Guerber@usda.gov.*

SUPPLEMENTARY INFORMATION: This proposal is issued under Marketing Agreement and Order No. 989 (7 CFR part 989), both as amended, regulating the handling of raisins produced from grapes grown in California, hereinafter referred to as the ''order.'' The order is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), hereinafter referred to as the ''Act.''

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Order 12866.

This proposal has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. This proposal will not preempt any State or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

This proposal invites comments on using an estimated trade demand figure to compute volume regulation percentages for 2007–08 crop NS raisins covered under the order. This rule would provide parameters for implementing volume regulation for 2007–08 crop NS raisins, if supplies are short, for the purposes of maintaining a portion of the industry's export markets and stabilizing the domestic market. This action was unanimously recommended by the Committee at a meeting on April 12, 2007.

Volume Regulation Authority

The order provides authority for volume regulation designed to promote orderly marketing conditions, stabilize prices and supplies, and improve producer returns. When volume regulation is in effect, a certain percentage of the California raisin crop may be sold by handlers to any market (free tonnage), while the remaining percentage must be held by handlers in a reserve pool (reserve) for the account of the Committee. Reserve raisins are disposed of through certain programs authorized under the order. For instance, reserve raisins may be sold by the Committee to handlers for free use or to replace part of the free tonnage raisins they exported; used in diversion programs; carried over as a hedge against a short crop the following year; or disposed of in other outlets not competitive with those for free tonnage raisins, such as government purchase, distilleries, or animal feed. Net proceeds from sales of reserve raisins are distributed to the reserve pool's equity holders, primarily producers.

Section 989.54 of the order prescribes procedures and time frames to be followed in establishing volume regulation for each crop year, which runs from August 1 through July 31. The Committee must meet by August 15 to review data regarding raisin supplies. At that time, the Committee computes a trade demand for each varietal type of raisins for which a free tonnage percentage might be recommended. Trade demand is equal to 90 percent of the prior year's domestic and export shipments, adjusted by subtracting

carryin inventory from the prior year and adding a desirable carryout inventory for the end of the current year.

By October 5, the Committee must announce preliminary crop estimates and determine whether volume regulation is warranted for the varietal types for which it computed trade demands. Preliminary volume regulation percentages are then computed to release 85 percent of the computed trade demand if a field price has been established or 65 percent of the trade demand if no field price has been established. Field price is the price that handlers pay for raisins from producers. By February 15, the Committee must recommend final free and reserve percentages that will tend to release the full trade demand.

The order also requires that, when volume regulation is in effect, two offers of reserve raisins must be made available to handlers for free use. These offers are known as the ''10 plus 10'' offers. Each offer consists of a quantity of reserve raisins equal to 10 percent of the prior year's shipments. The order also specifies that ''10 plus 10'' raisins must be sold to handlers at the current field price plus a 3 percent surcharge and Committee costs.

Development of Export Markets

With the exception of 11 crop years, volume regulation has been utilized for NS raisins since the order's inception in 1949. The procedures for determining volume regulation percentages have been modified over the years to address the industry's needs. In the past, volume regulation has been utilized primarily to help the industry manage an oversupply of raisins. Through the use of various marketing programs operated through reserve pools and other industry promotional activities, the industry has also developed its export markets.

Between 1980 and 1985, exports of California NS raisins averaged about 26 percent (53,700 packed tons, or raisins which have been processed) of the industry's total NS raisin shipments (207,600 packed tons, excluding government purchases) per year. During the last nine years (1997–2005) these exports averaged about 37 percent (105,000 packed tons, or raisins which have been processed) of the industry's total NS raisin shipments (282,000 packed tons, excluding government purchases) per year.

Export Replacement Offer

One market development program operated through reserve pools, the Export Replacement Offer (ERO), has helped U.S. raisins to be price competitive in export markets. Prices in export markets are generally lower than the domestic market. The ERO began in the early 1980's as a ''raisin-back'' program whereby handlers who exported California raisins could purchase, at a reduced price, reserve raisins for free use. This effectively blended down the cost of the raisins that were exported. The NS raisin ERO was changed to a ''cash-back'' program in 1996 whereby handlers could receive cash from the reserve pool for export shipments.

The ERO has been operated as a ''cash back'' program in all years since then, except for 2000, 2001, and a portion of 2002. During 2002 both ''cash back'' and ''raisin back'' programs were implemented. Financing for the cash-back ERO program has been primarily from the Committee's ''10 plus 10'' sales of reserve raisins. Under the 2002, 2003, 2004, and 2005 cash-back ERO programs an average of $39.7 million of reserve pool funds were utilized to support the export of about 103,000 packed tons of NS raisins.

Current Industry Situation—Declining Production

The Committee is concerned that the 2007–08 crop may be short because of grape vine removals over the last several years and an April frost. As a result, volume regulation may not be warranted based on the order's computed trade demand formula.

During the last several years, grape production has been declining because of poor grower returns in the wine and raisin segments of the industry. About 40,000 acres of grape vines have been removed in favor of other crops, which have recently been providing higher returns. In addition, a frost in April this year may reduce the crop further.

If no 2007–08 reserve were established, the industry would not be able to continue the ERO program and support its export sales. The Committee is concerned that the industry could lose a significant portion, perhaps 50 percent, of its export markets. Further, handlers who could not sell their raisins in export may sell their raisins domestically. Annual domestic shipments of NS raisins for the past 9 years have averaged about 177,000 packed tons. The Committee is concerned that additional raisins sold into the domestic market could create instability.

Thus, the Committee formed a working group to review this issue and consider options to continue to support its export sales while maintaining stability in the domestic market. After its meeting on February 1, 2007, the working group presented its recommendation to the subcommittee, and then, in turn, to the Committee.

At a meeting on April 12, 2007, the Committee unanimously recommended using an estimated trade demand rather than a computed trade demand to calculate the 2007–08 NS raisin crop volume regulation percentages, if the crop size falls within certain parameters. Section 989.154(b) of the order's administrative rules and regulations would be revised by replacing ''1999–2000'' with ''2007–08'' and ''235,000'' with ''215,000.''

Implementing Volume Regulation if Supplies Are Short To Maintain the ERO

Section 989.54(e) contains a list of factors that the Committee must consider when computing volume regulation percentages. Factor (4) states that the Committee must consider, if different than the computed trade demand, the estimated trade demand for raisins in free tonnage outlets.

The Committee unanimously recommended using an estimated trade demand figure for 2007–08 crop NS raisins, which is a figure different than the computed trade demand, to compute volume regulation percentages to create a reserve if supplies are short. This would allow the Committee to continue its ERO program, thereby maintaining a portion of its export sales and stabilizing the domestic market.

Specifically, the Committee recommended that an estimated trade demand be utilized to compute preliminary, interim, and final free and reserve percentages for 2007–08 crop NS raisins if the crop estimate is equal to, less than, or no more than 10 percent greater than the trade demand as computed according to the formula specified in § 989.54(a) of the order. If an estimated trade demand figure is utilized, the final reserve percentage would be no more than 10 percent. Finally, volume regulation would not be implemented if the 2007–08 crop estimate is below 215,000 natural condition tons.

To illustrate how this would work, the Committee would compute a trade demand for NS raisins by August 15 (as an example, 245,000 natural condition tons). At that time, the Committee would also announce its intention to use an estimated trade demand of 215,000 natural condition tons to compute volume regulation percentages for the 2007–08 crop.

Crop Estimate Below 215,000 Tons—No Regulation

The Committee would meet by October 5 to announce a NS crop estimate and determine whether volume regulation was warranted. Under the Committee's proposal, if the 2007–08 crop estimate is under 215,000 natural condition tons, volume regulation would not be recommended. With a crop of 215,000 natural condition tons, and about 108,000 natural condition tons of NS raisins projected to be carried forward from the 2006–07 crop year, a supply of about 323,000 natural condition tons of raisins would be available for the 2007–08 crop year. As previously mentioned, annual NS raisin shipments average about 282,000 packed tons (about 300,000 natural condition tons), excluding government purchases.

With an available supply of only 323,000 natural condition tons of NS raisins, the Committee believes that the industry's first priority would be to satisfy the needs of the domestic market, which absorbs annually an average of about 177,000 packed tons (188,000 natural condition tons). Assuming that 188,000 natural condition tons were shipped domestically, the Committee estimates that, with no ERO program to help U.S. raisins be price competitive in export markets, the industry would export about half of its usual tonnage, or about 56,000 natural condition tons. The remaining 79,000 natural condition tons would likely be held in inventory for the following 2008–09 crop year. Annual carryout inventory for NS raisins for the past 9 years has averaged about 108,000 natural condition tons.

Crop Estimate Between 215,000 Tons and 10 Percent Above the Computed Trade Demand—Volume Regulation

If the October 2007–08 crop estimate for NS raisins falls between 215,000 natural condition tons and 10 percent above the computed trade demand, the Committee would use an estimated trade demand figure to compute preliminary free and reserve percentages for the 2007–08 crop. Thus, using the 245,000 natural condition ton computed trade demand figure, an estimated trade demand would be used to compute volume regulation percentages if the crop estimate falls between 215,000 and 269,500 natural condition tons.

The order specifies that preliminary percentages compute to release 85 percent of the computed trade demand as free tonnage once a field price is established. Producers are paid the field price for their free tonnage. Normally, when preliminary percentages are computed, producers receive an initial payment from handlers for 85 percent of the computed trade demand (or 65 percent of the trade demand if no field price has been established). Using the 245,000 natural condition ton computed trade demand figure, this would equate to 208,250 natural condition tons. However, if the lower, 215,000 natural condition ton estimated trade demand figure were utilized to compute preliminary percentages, producers would receive an initial payment from handlers for only 182,750 natural condition tons, or 75 percent.

The Committee is concerned with the preliminary percentage computation using an estimated trade demand and its impact on producer returns. The Committee wants to ensure that the producers receive the field price for as much of their crop as possible while still establishing a small pool of reserve raisins to maintain the ERO. The Committee would meet by February 15 to compute final free and reserve percentages. The Committee recommended that if an estimated trade demand figure is used to compute percentages, the final reserve percentage be computed to equal no more than 10 percent of the estimated crop. Producers would ultimately be paid the field price for 90 percent of their crop, or their free tonnage.

The remaining 10 percent of the crop would be held in reserve and offered for sale to handlers in the ''10 plus 10'' offers. As previously described, the ''10 plus 10'' offers are two offers of reserve raisins that are made available to handlers for free use. The order specifies that each offer consists of a quantity of reserve raisins equal to 10 percent of the prior year's shipments. This requirement would not be met if volume regulation were implemented when raisin supplies were short. However, all of the raisins held in reserve would be made available to handlers for free use. Handlers would pay the Committee for the ''10 plus 10'' raisins and that money would be utilized to fund a 2007–08 ERO program. Any unused 2007–08 reserve pool funds could be loaned forward to initiate a 2008–09 ERO program or to make a grower payment to the 2007–08 reserve pool growers.

Crop Estimate More Than 10 Percent Above the Computed Trade Demand

Finally, the Committee recommended that, if the 2007–08 crop estimate is more than 10 percent greater than the computed trade demand (or above 269,500 natural condition tons in the earlier example), the computed trade demand (as an example, 245,000 natural condition tons) would be utilized to compute volume regulation percentages. Under this scenario, enough raisins (over 26,000 natural condition tons) would be available in reserve to continue the ERO program.

It is anticipated that allowing the use of an estimated trade demand figure to compute volume regulation percentages for 2007–08 crop NS raisins if supplies are short would assist the industry in maintaining a portion of its export markets and stabilize the domestic market. If the crop estimate is below 215,000 natural condition tons, no volume regulation would be implemented. If this occurs, it is anticipated that domestic market needs would be met, while export markets would likely not be satisfied.

However, if the crop falls between 215,000 natural condition tons and 269,500 tons, establishing a small reserve pool would allow the industry to not only satisfy the needs of the domestic market, but also maintain a portion of its export sales, which now account for about 37 percent of the industry's annual shipments. By maintaining an ERO program, even at a reduced level, exporters could continue to be price competitive and sell their raisins abroad. The domestic market would remain stable because it would not have to absorb any additional raisins that handlers could not afford to sell in export markets.

Initial Regulatory Flexibility Analysis

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities. Accordingly, AMS has prepared this initial regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of business subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 23 handlers of California raisins who are subject to regulation under the order and approximately 4,000 raisin producers in the regulated area. Small agricultural service firms have been defined by the Small Business Administration (13 CFR 121.601) as those having annual receipts of less than $6,500,000, and small agricultural producers are defined as those having annual receipts of less than $750,000. No more than 10 handlers,

and a majority of producers, of California raisins may be classified as small entities. Thirteen of the 23 handlers subject to regulation have annual sales estimated to be at least $6,500,000, and the remaining 10 handlers have sales less than $6,500,000, excluding receipts from any other sources.

This rule would revise § 989.154(b) of the order's administrative rules and regulations by changing the parameters for using an estimated trade demand figure specified in § 989.54(e)(4) of the order to compute volume regulation percentages for 2007–08 crop NS raisins. Section 989.154(b) would provide guidelines for the use of volume regulation if 2007–08 NS raisin supplies are short for the purposes of maintaining a portion of the industry's export markets and stabilizing the domestic market.

Regarding the impact of the action on producers and handlers, under the Committee's proposal, if an estimated trade demand figure was used to compute volume regulation percentages, the final reserve percentage would compute to no more than 10 percent. Producers would thus be paid the field price for at least 90 percent of their crop, but would not be paid the field price for about 10 percent of their crop that would go into a reserve pool. The field price for NS raisins for the past 5 years has averaged $1,073 per ton. Handlers in turn would purchase 90 percent of their raisins directly from producers at the field price, but would have to buy remaining raisins out of the reserve pool at a higher price (field price plus 3 percent and Committee costs). The ''10 plus 10'' price of NS reserve raisins has averaged about $100 higher than the field price for the past 9 years, or $1,173 per ton. Proceeds from the ''10 plus 10'' sales would be used to support export sales.

While there may be some initial costs for both producers and handlers, the long term benefits of this action far outweigh the costs. The Committee believes that with no reserve pool, and hence, no ERO program, export sales would decline dramatically, perhaps up to 50 percent. Handlers would likely sell into the domestic market raisins that they were unable to sell into lower priced export markets. Additional NS raisins sold into the domestic market, which typically absorbs about 177,000 packed tons, could create instability. The industry would likely lose a substantial portion of its export markets, which now account for about 37 percent (105,000 packed tons) of the industry's annual shipments (282,000 packed tons), excluding government purchases). Committee members have also commented that, once export markets were lost, it would be difficult and costly for the industry to recover those sales. Raisins are mostly used as an ingredient in baked goods, cereals, and snacks. Typically, buyers want reliable suppliers from year to year and are generally reluctant to find alternative ingredients or sources. In turn, once buyers change sources, they may not switch back.

Export markets for raisins are highly competitive. The U.S. and Turkey are the world's leading producers of raisins. Turkey exports approximately 80 percent of its total production, and represents an alternative product source for raisin buyers.

Maintaining the industry's export markets would help the industry maximize its 2007–08 total shipments of NS raisins and prevent handlers from carrying forward large quantities of inventory into the 2008–09 crop year. If the industry is unable to maximize its 2007–08 shipments of NS raisins, carry in inventory could be high, which would result in a lower computed trade demand figure for the 2008–09 crop year. If the industry returns to its pattern of relatively large crops in 2009–10, a low trade demand and large crop estimate would compute to a low free tonnage percentage. Large supplies exert downward pressure on the field price. Since NS raisin producers are paid significantly more for their free tonnage than for reserve tonnage, this would mean reduced returns to producers. Projected reduced 2009–10 returns to producers, coupled with the risks of rain and labor shortages during harvest, may influence producers to ''go green,'' or sell their raisin-variety grapes to the fresh-grape, wine, or juice concentrate markets. Additional supplies to those outlets could potentially reduce ''green'' returns as well.

A similar scenario occurred in the California raisin industry in the early 1980's where the industry experienced two consecutive short-crop years. The 1981–82 and 1982–83 crops were short, followed by relatively large crops for the remainder of the 1980's. The producer field price for NS raisins was $1,275 per ton for 1981–82 crop raisins, and $1,300 per ton for 1982–83 crop raisins. No volume regulation was implemented in 1982–83. However, a large inventory of high-priced raisins was carried forward into the 1983–84 crop year. When coupled with the largest crop on record at the time, volume regulation was implemented for the 1983–84 crop with the free tonnage percentage at a historically low 37.5 percent. By 1984, the producer field price for free tonnage raisins fell to $700 per ton, causing producers to experience large financial losses. Thus, the industry wants to help avoid a repeat of what happened in the 1980's by utilizing the Federal order to maintain export sales and provide stability in the domestic market.

An alternative to the proposed action was considered by the industry. As previously mentioned, the Committee formed a working group to address its concerns. The working group considered utilizing the computed trade demand formula in the order and utilizing about $7.5 million of available funds of the 2005–06 reserve pool and about 20,000 tons of natural condition raisins remaining in the 2006–07 reserve pool to fund the ERO. However, the committee decided that sufficient assets would not be available to fund the 2007–08 crop NS raisin ERO. The Committee's assets are not sufficient, because there was no 2004–05 reserve, and funds from the 2005–06 and 2006–07 pools will ultimately fund the 2007–08 ERO program only until about May 2008. Thus, after much discussion, the working group ultimately recommended to the Committee using an estimated trade demand to compute volume regulation percentages next year if 2007–08 crop NS raisin supplies are short.

This action would not impose any additional reporting or recordkeeping requirements on either small or large raisin handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies.

The AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

USDA has not identified any relevant Federal rules that duplicate, overlap or conflict with this proposed rule.

In addition, the Committee's working group meeting held on February 1, 2007, and the subcommittee and Committee meetings on April 12, 2007, were widely publicized throughout the raisin industry and all interested persons were invited to attend the meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the February 1, 2007, and April 12, 2007, meetings were public meetings and all entities, both large and small, were able to express views on this issue. Finally, interested persons are invited to submit information on the

regulatory and informational impacts of this action on small businesses.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: *http://www.ams.usda.gov/fv/moab/html.* Any questions about the compliance guide should be sent to Jay Guerber at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

A 15-day comment period is provided to allow interested persons to respond to this proposal. Fifteen days is deemed appropriate, because this action, if adopted, should be in place by the beginning of the 2007–08 crop year, August 1. All written comments timely received will be considered before a final determination is made on this matter.

List of Subjects in 7 CFR Part 989

Grapes, Marketing agreements, Raisins, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 989 is proposed to be amended as follows:

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 989 continues to read as follows:

Authority: 7 U.S.C. 601–674.

2. Section 989.154, paragraph (b) is revised to read as follows:

§ 989.154 Marketing policy computations.

(a) * * *

(b) *Estimated trade demand.* Pursuant to § 989.54(e)(4), estimated trade demand is a figure different than the trade demand computed according to the formula in § 989.54(a). The Committee shall use an estimated trade demand to compute preliminary and interim free and reserve percentages, or determine such final percentages for recommendation to the Secretary for 2007–08 crop Natural (sun-dried) Seedless (NS) raisins if the crop estimate is equal to, less than, or no more than 10 percent greater than the computed trade demand: *Provided,* That the final reserve percentage computed using such estimated trade demand shall be no more than 10 percent, and no reserve shall be established if the final 2007–08 NS raisin crop estimate is less than 215,000 natural condition tons.

Dated: July 26, 2007.

Lloyd C. Day,

Administrator, Agricultural Marketing Service.

[FR Doc. E7–14825 Filed 7–31–07; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

9 CFR Part 201

RIN 0580–AA98

Poultry Contracts; Initiation, Performance, and Termination

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Proposed rule.

SUMMARY: We are proposing to amend the regulations issued under the Packers and Stockyards P&S Act, 1921 (7 U.S.C. 181, *et seq.*) (P&S Act) concerning Records to be Furnished Poultry Growers and Sellers. The regulations list the records live poultry dealers (poultry companies) must furnish poultry growers, including requirements for the timing and contents of poultry growout contracts.

The proposed amendments would require poultry companies to timely deliver a copy of an offered contract to growers; to include information about any Performance Improvement Plans (PIPs) in contracts; to include provisions for written termination notices in contracts; and notwithstanding a confidentiality provision, allow growers to discuss the terms of contracts with designated individuals.

DATES: We will consider comments we receive by October 30, 2007.

ADDRESSES: We invite you to submit comments on this proposed rule. You may submit comments by any of the following methods:

- *E-Mail:* Send comments via electronic mail to *comments.gipsa@usda.gov*.
- *Mail:* Send hardcopy written comments to Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1643–S, Washington, DC 20250–3604.
- *Fax:* Send comments by facsimile transmission to: (202) 690–2755.
- *Hand Delivery or Courier:* Deliver comments to: Tess Butler, GIPSA, USDA, 1400 Independence Avenue, SW., Room 1643–S, Washington, DC 20250–3604.
- *Federal e-Rulemaking Portal:* Go to *http://www.regulation.gov*. Follow the on-line instruction for submitting comments.

Instructions: All comments should make reference to the date and page number of this issue of the **Federal Register**.

Background Documents: Regulatory analyses and other documents relating to this action will be available for public inspection in Room 1643–S, 1400 Independence Avenue, SW., Washington, DC 20250–3604 during regular business hours.

Read Comments: All comments will be available for public inspection in the above office during regular business hours (7 CFR 1.27(b)).

FOR FURTHER INFORMATION CONTACT: S. Brett Offutt, Director, Policy and Litigation Division, P&SP, GIPSA, 1400 Independence Ave., SW., Washington, DC 20250, (202) 720–7363, *s.brett.offutt@usda.gov*.

SUPPLEMENTARY INFORMATION:

Background

As the Grain Inspection, Packers and Stockyards Administration (GIPSA), one of our functions is the enforcement of the Packers and Stockyards (P&S) Act of 1921. Under authority granted us by the Secretary of Agriculture (Secretary), we are authorized (7 U.S.C. 228) to make those regulations necessary to carry out the provisions of the P&S Act. Section § 201.100 of the regulations (9 CFR 201.100) specifies what contract terms must be disclosed to growers by poultry companies.

We believe the failure to disclose certain terms in a poultry growing out arrangement (growout contract) constitutes an unfair, discriminatory, or deceptive practice in violation of section 202 (7 U.S.C 192) of the P&S Act.

Due to the vertical integration and high concentration of the poultry industry, growers are often presented contracts on a ''take it or leave it'' basis. Growers do not realistically have the option of negotiating contract terms with a large poultry company. Growers often do not have the option of contracting with another poultry company on more favorable terms because there may be no other poultry companies in the area. There is considerable information asymmetry as well as an imbalance in market power: Growers sometimes do not know the full content of their own contract and are constrained by confidentiality clauses from discussing the contract with business advisers, while at the same time poultry companies have detailed information about the market as a whole and about the current terms being offered to other growers. Growers often have much of their net worth invested

in poultry houses, which have limited value for purposes other than growing out poultry. Therefore, there is significant potential for poultry companies to engage in unfair and deceptive practices. Growers may decide they have little choice but to sign contracts in which disclosure of terms is incomplete and/or not provided in a timely fashion. In some cases, poultry companies are already providing the information proposed in this rule in a timely fashion; this rule will level the playing field by requiring all companies to adopt these fair and transparent practices in dealing with all growers.

Failure to deliver a written contract in a timely fashion is considered by GIPSA to be an unfair and deceptive practice because growers do not know what the contract terms will be. This practice could also be discriminatory if some growers receive written contracts in a timely fashion and others do not. Failure to include notice of written termination procedures in the contract and failure to provide notice of written termination is unfair, discriminatory and deceptive for the same reasons.

Failure to include information about Performance Improvement Plans is similarly potentially unfair and discriminatory if some growers receive this information and others do not, and deceptive if growers are unaware that such a program exists until they fail to meet a minimum performance threshold that was not specified in their contract.

Prohibiting growers from discussing contract terms with business advisers is unfair because growers are not typically attorneys or accountants, and it is unfair to deprive growers of professional advice before they commit to a contract, particularly when the poultry companies had access to such advice in drafting their growout contracts.

Current Poultry Contracting Practices and Proposed Changes

The market for growing out broiler chickens is vertically integrated and highly concentrated. USDA GIPSA reported that in 2005, the top four broiler slaughters represented 53% of the total market share based on volume of production.[1] A large number (20,000+) of poultry growers essentially receive contracts on a ''take it or leave it'' basis from a small number of poultry companies. While this concentration of poultry companies represents certain economies of scale, it also represents a potential for asymmetrical information and a lack of transparency that could lead to market inefficiencies.

The poultry companies accept much of the short term financial risk by providing growers with the chicks and feed, and typically pay the growers on a per pound basis when the poultry are ready for slaughter. Growers take the longer term risk by investing in the poultry houses. There is often a tournament or bonus system in which growers for the same poultry company compete with each other over a given period of time. Growers who consistently perform less well than other growers with regard to output (pounds of poultry) produced per unit of input (food and chicks) may be placed on a Performance Improvement Plan, may have their contract terminated, or may not receive a new contract offer or extension to their existing contract.

The current contracting process may involve verbal agreements that are made prior to delivery of a written contract. The process by which new growers are recruited can be informal word-of-mouth, although some poultry companies solicit new growers via their website. Prospective growers must have a line of credit sufficient to finance the construction of poultry houses in order to be a successful applicant. The poultry company will also typically inspect the property held by a prospective grower to verify that the grower has sufficient space and suitable soil conditions on which to place the houses, has right of way capable of supporting truck traffic, and has means to dispose of dead birds and bird waste. The discussion between the poultry company and prospective growers to verify these conditions may involve verbal commitments, and therefore growers may not understand all their rights and obligations. Existing growers may make similar verbal commitments for poultry house improvements. Currently, a grower may receive a specification for the poultry houses and use that specification to obtain a construction loan prior to receiving a written contract. New growers typically receive their contracts at about the same time as they receive the specifications for the poultry houses, but in some cases may not receive their written contracts until after construction of the poultry houses has already begun.

The existing § 201.100 already protects growers by requiring that the growout contract include the per unit charges for feed and other inputs furnished by each party, the duration of the contract and conditions for the termination of that contract, and the factors to be used when grouping or ranking poultry growers, among other items. This rulemaking proposes amendments to § 201.100 to additionally require that:

(1) The growout contract be delivered to the grower in writing at the same time that the grower receives the specifications for the poultry houses;

(2) The growout contract also include the criteria that will be used to place the grower on a performance improvement plan;

(3) A grower shall be notified in writing 30 days before removal of the flock that a contract is to be terminated;

(4) The contract shall include a provision allowing growers to terminate a contract by written notice 30 days before removal of a flock, and

(5) Notwithstanding any confidentiality clauses, growers shall be permitted to discuss the offered contract with their financial and business advisors.

These new requirements should help both growers and poultry companies by providing poultry growers with more information at an earlier stage in the contracting process. In many cases, these requirements are already being met in existing contracts or are being met through verbal agreements; this proposed rule would ''level the playing field'' by requiring poultry companies to include these provisions in all poultry growout contracts. Growers would have more information upon which to make a decision as to whether to accept the terms of the contract, and would be able to discuss the terms of the contract with business and financial professionals before committing to building or upgrading poultry houses. Poultry growers would understand the criteria that will be used to place them on a Performance Improvement Plan. Poultry companies would benefit from having growers who better understand the obligations of their contract. Poultry companies would also benefit by having more specific contract language to resolve performance issues and contract termination.

Timely Contract Delivery

In some cases, growers do not currently receive a written copy of their contract from live poultry dealers or poultry companies until after they have obtained financing for the construction or improvement of poultry houses. Lenders that have other contracts on file for a particular poultry company may extend financing to a grower based on a verbal commitment from the poultry company. In a six-month period beginning September 2005, GIPSA received 16 written and/or emailed complaints from growers regarding slow

[1] ''Assessment of the Livestock and Poultry Industries, FY 2006 Report'' *http://archive.gipsa.usda.gov/pubs/06assessment.pdf.*

delivery of written contracts by poultry companies. Growers typically invest $200,000 or more for the construction of each poultry house, and they often build at least four houses.

Requiring the poultry companies to provide growers with a written copy of their offered contracts on the same date the growers receive the specifications for their poultry houses will provide several benefits:

- It provides disclosure to growers of their rights and responsibilities before they sign a written contract to grow poultry for a particular poultry company. This would benefit both parties to the contract by ensuring that growers understand what their rights and obligations are before signing the contract.
  - It allows growers time to ask questions clarifying their responsibilities so they can remain in compliance with the terms of their contracts.
  - It benefits the poultry companies by increasing contract compliance rates among growers.
- It may make it easier for growers to obtain financing on favorable terms if they have a copy of the contract to show financing institutions.

We therefore propose to amend § 201.100 to require poultry companies to provide growers with a written copy of the offered contract on the same date that the growers receive the specifications for their poultry houses.

Right to Discuss Terms of Offer With Business Advisers

For the past decade, poultry grower stakeholder groups have been advocating regulation and/or legislation to limit confidentiality clauses in poultry contracts. Earlier this year, over 200 agricultural organizations sent a letter to the Senate Committee on Agriculture, Forestry and Nutrition, the House Committee on Agriculture, the Senate Committee on the Judiciary, and the House Committee on the Judiciary. The letter asked, among other things, for fairness standards for agricultural contracts that would include a prohibition of confidentiality clauses.[2] The Farm Security and Rural Investment Act of 2002 (FSRIA) validated this issue as one needing to be addressed. Section 10503 (7 U.S.C. 229b) of FSRIA requires that livestock and poultry companies allow producers/growers to discuss the terms of their contracts with certain individuals.

Permitting growers the freedom to discuss terms of their contracts with their accountant, lender, or other business advisors would help ensure that growers fully and correctly understand their rights and responsibilities as growers. This would heighten the degree to which growers remain in compliance with their contracts, providing benefits to the poultry companies as well. It would benefit poultry company-grower relationships by promoting communication and thereby decreasing misunderstandings and contract non-compliance issues.

We propose to amend § 201.100 to allow growers, notwithstanding a confidentiality clause in a contract, to discuss the terms of their contracts with their business advisors.

Performance Improvement Plans

All parties to a contract have a right to know all terms and conditions they will be subject to when signing the contract. In some cases, poultry growers are unaware that they are subject to being placed on a Performance Improvement Plan (PIP) if they do not meet minimum performance criteria. A grower may not be aware of the PIP program until the company sends the grower written or verbal instruction explaining the need to improve performance. In other cases, poultry growers were aware that their poultry company has a PIP program, but were unaware what the minimum performance level is until they fail to meet that level. The minimum performance level often represents an average performance over several growout cycles, which can be difficult to understand if the criteria are not explained in written detail. GIPSA has received complaints from growers that several large poultry companies have provided information on PIPs as additional riders (contract amendments) well after the initial contract was signed, or provided the information only after the grower had failed to meet criteria not previously documented. Not all poultry companies have PIPs, and of those that do, some but not all already provide information on their PIPs in their contracts. A review of the reference library of poultry contracts maintained by the Packers and Stockyards Program Eastern Regional Office found that roughly a quarter of the broiler contracts did have a PIP or ''probation'' clause. We propose to level the playing field by requiring the disclosure in the written contract of PIP terms by the poultry companies that have them.

If a poultry company has a PIP, growers need to know what performance criteria determine if they will be placed on a PIP. Growers need to know what, if any, additional support they can expect from their poultry company while on a PIP. Finally, growers need to know how they can regain their good standing classification and avoid having their contract terminated.

We propose to amend § 201.100 to add a requirement that those poultry companies with a PIP include information in their contracts concerning what triggers placement on the PIP and how growers may earn their way back to good standing.

Written Termination Notification

Existing contracts generally require that growers or the poultry company provide written notice of termination to the other party. Existing notice requirements vary from one contract to the next but typically require that notice of termination be provided anywhere from 3 to 30 days prior to the pick-up or delivery of the final flock. Poultry companies, however, are not consistently abiding by the termination requirements of their contracts. In one case, we found that only 10 percent of growers for one company received written termination notices when the company chose to terminate many contracts in a single region. This occurred despite the fact that the contracts stated that growers were to receive written termination notices. Written contract termination has been an issue for several years. The USDA National Commission on Small Farms recommended in 1998 that, ''The Secretary should consider Federal production contract legislation to address issues such as contract termination, duration, and re-negotiation.'' [3] Without written termination notices documenting the date and reason for termination, it is difficult for GIPSA to investigate complaints alleging unfair or discriminatory termination.

Currently, Section § 201.100(a)(1) states that contract contents must clearly specify, ''The duration of the contract and the conditions for the termination of the contract by each of the parties.'' (9 CFR 201.100(a)(1)) The regulation does not currently specify the means by which the notice is to be conveyed nor what additional guidance should be provided to the grower.

[2] *http://www.rafiusa.oerg/programs/CONTRACTAG/NCSA07FarmBillCompetition.pdf.*

[3] ''A time to Act: A Report of the USDA National Commission on Samll Farms'', 1998, Miscellaneous Publication 1545 (MP–1545), page 6 *http://www.csrees.usda.gov/nea/ag_systems/pdfs/time_to_act_1998.pdf*

We propose to amend § 201.100 to require that poultry companies notify growers in writing of the termination of contracts at least 30 days in advance of flock removal. We would require the notices to state when the termination is effective and what appeal rights, if any, the grower may have. The proposed amendment would require that contracts include a provision that either side may terminate the contract by providing written notification and 30 days advance notice.

Options Considered

We considered different alternatives to each of the proposed regulatory changes. These alternatives included issuing policy guidance to GIPSA employees, providing public notice that failure to provide growers with additional contract information was an unfair practice in violation of section 202 of the P&S Act, or recommending that growers seek redress of grievances through civil court action or arbitration. We did not believe that any of these alternatives would meet the needs of poultry growers. Therefore, we determined that § 201.100 needs revision as proposed.

Effects on Regulated Entities

If we implement these regulatory changes, some poultry companies may have to deliver their contracts to growers earlier than in the past. This would be the case only if the poultry company has historically delivered a written copy of its contracts to growers after delivering the house specifications.

These regulatory changes may require some revisions of contracts to include additional required information. Poultry companies, however, add or change contract terms in the normal course of business. There should therefore be little additional cost to the companies.

Information on PIPs would only result in changes to contracts if a poultry company already had a PIP. The additional contract wording should require little additional cost to the companies. Companies that do not already use PIPs but add PIPs later will need to revise contracts to reflect the PIP terms.

As noted above, most contracts already require that one party notify the other of a contract's termination. The regulatory change proposed here would make it a requirement that termination notices issued by either party be in writing, and require that poultry companies provide relevant termination information.

Executive Order 12866 and Regulatory Flexibility Act

The Office of Management and Budget (OMB) has designated this rule as not significant for the purposes of Executive Order 12866.

We have determined that this proposed rule will not have a significant economic impact on a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The proposed rule will affect poultry companies (live poultry dealers) in contractual relationships with poultry growers. Most such entities are poultry slaughterers and processors of poultry with more than 500 employees and do not meet the definition for small entities in the Small Business Act (13 CFR 121.201). To the extent the proposed rule does affect small entities, it will not impose substantial new expenses or changes to routine operations on them. The proposed amendments will require changes to the content and timely delivery of contracts. It will require only minor contract modifications in most cases and thus should not impose substantial new expenses for poultry companies or growers, whether small entities or not.

In accordance with 5 U.S.C. 605 of the Regulatory Flexibility Act, because this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities, we are not providing an initial regulatory flexibility analysis.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. These actions are not intended to have retroactive effect. This rule will not pre-eempt state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule. There are no administrative procedures that must be exhausted prior to any judicial challenge to the provisions of this rule.

Paperwork Reduction Act

This proposed rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). It does not involve collection of new or additional information by the federal government.

Government Paperwork Elimination Act Compliance

We are committed to compliance with the Government Paperwork Elimination Act, which requires Government agencies provide the public with the option of submitting information or transacting business electronically to the maximum extent possible.

List of Subjects in 9 CFR Part 201

Contracts, Poultry and poultry products, Trade practices.

For the reasons set forth in the preamble, we propose to amend 9 CFR part 201 to read as follows:

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

1. The authority citation for Part 201 is revised to read as follows:

Authority: 7 U.S.C. 192, 204, 222, and 228; 7 CFR 2.22 and 2.81.

2. Amend § 201.100 to redesignate paragraphs (a), (b), (c), (d), and (e) as (c), (d), (e), (f) and (g); add new paragraphs (a)(, (b), (c)(3) and (h); and revise the introductory text of paragraph (c) to read as follows:

§ 201.100 Records to be furnished poultry growers and sellers.

(a) *Poultry growing arrangement; timing of disclosure.* As a live poultry dealer who offers a contract to a poultry grower, you must provide the poultry grower with a true written copy of the offered contract on the date you provide the poultry grower with poultry house specifications.

(b) *Right to discuss the terms of poultry growing arrangement or contract offer.* As a live poultry dealer, notwithstanding any confidentiality provision, you must allow poultry growers to discuss the terms of a poultry growout contract offer or poultry growing arrangement offer with:

(1) A Federal or State agency;

(2) The grower's financial advisor or lender;

(3) The grower's legal advisor;

(4) An accounting services representative hired by the grower; or

(5) A member of the grower's immediate family or a business associate.

* * * * *

(c) *Contracts; contents.* Each live poultry dealer who enters into a growout contract with a poultry grower shall furnish the grower a true written copy of the contract, which shall clearly specify:

* * * * *

(3) Any performance improvement plan guidelines, including:

(i) The factors considered when placing a poultry grower on a performance improvement plan;

(ii) The guidance and support provided to a poultry grower while on a performance improvement plan; and

(iii) The factors considered to determine if and when a poultry grower

is removed from the performance improvement plan and placed back in good standing, or when the contract will be terminated.

* * * * *

(h) *Written termination notice; furnishing, contents.* As a live poultry dealer, when you terminate a poultry growing contract, you must provide the poultry grower with a written termination notice [pen and paper] at least thirty (30) days prior to the removal of a flock. Your poultry contracts must also provide poultry growers with the opportunity to terminate their poultry growing arrangement in writing at least thirty (30) days prior to the removal of a flock. Written notice regarding termination shall contain the following:

(1) The reason(s) for termination;

(2) In the case of termination, when the termination is effective; and

(3) Appeal rights, if any, the poultry grower may have with you.

Pat Donohue-Galvin,

Acting Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. E7–14924 Filed 7–31–07; 8:45 am]

BILLING CODE 3410–KD–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 703 and 704

RIN 3133–AD34

Permissible Foreign Currency Investments for Federal Credit Unions and Corporate Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: NCUA is considering whether to amend its investment rules to permit natural person federal credit unions (FCUs) and corporate credit unions (corporates) to make certain investments denominated in foreign currency. NCUA seeks comment on whether FCUs and corporates should be permitted to make these investments and the safety and soundness considerations related to such authority.

DATES: Comments must be received on or before October 30, 2007.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- NCUA Web Site: *http://www.ncua.gov/RegulationsOpinionsLaws/proposed_regs/proposed_regs.html*. Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov*. Include ''[Your name]—Comments on Advanced Notice of Proposed Rule for Parts 703 and 704'' in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

FOR FURTHER INFORMATION CONTACT: *Technical Information:* Kimberly A. Iverson, Senior Investment Officer, Office of Capital Markets and Planning, at the above address or telephone: (703) 518–6620; or *Legal Information:* Moisette I. Green, Staff Attorney, Office of General Counsel, at the above address or telephone: (703) 518–6540.

SUPPLEMENTARY INFORMATION:

A. Background

The Federal Credit Union Act (Act) permits federal credit unions (FCUs) to make investments denominated in foreign currency under the Act's authority permitting FCUs to invest or deposit their funds in shares or accounts of federally insured banks and corporates. 12 U.S.C. 1757(7), (8). In addition, the Board has authority under the Act to permit corporates to invest in foreign currency. 12 U.S.C. 1766. While the Act does not explicitly restrict FCUs and corporates to making investments only in U.S. dollars, NCUA has imposed this limitation by regulation.

NCUA regulations implement the authority in the Act and establish requirements and limitations under which FCUs and corporates, respectively under Parts 703 and 704, can make investments. 12 CFR parts 703, 704. The corporate regulation expressly states corporates may only make investments denominated in U.S. dollars. 12 CFR 704.5(b). For FCUs, the general investment rule does not expressly prohibit foreign currency denominated investments, but ties variable rate investments to a domestic interest rate and, consequently, limits FCU investment authority to U.S. dollars. 12 CFR 703.14(a).

Part of the impetus for this advance notice of proposed rulemaking (ANPR) is that, in 2006, the Board amended NCUA's share insurance rule to permit federally insured credit unions to accept member shares denominated in foreign currency. 12 CFR 745.7; 71 FR 14631 (March 23, 2006) (interim final rule); 71 FR 56001 (September 26, 2006) (final rule). That rulemaking, however, did not address lending or investment in foreign denominated currencies. The Board recognizes that, for some credit unions, the ability to accept member shares denominated in foreign currency—without authority to make investments in foreign denominated currencies—may place them at a competitive disadvantage. Commenters should note that this ANPR's scope is limited to investment in foreign denominated currencies; the Board may consider issues associated with lending in foreign denominated currencies at another time but is not inclined to do so as part of this ANPR.

The Board is considering whether to permit FCUs and corporates to make limited investments denominated in foreign currency as a complementary authority to the change in the share insurance rule and allow FCUs and corporates to invest funds from the now-permissible foreign denominated share accounts. Comments from interested parties on the issues associated with investments denominated in foreign currency will assist the Board in determining whether to permit these kinds of investments and, if so, the kinds of appropriate limitations and requirements for the activity to address safety and soundness concerns.

B. Discussion

U.S. Domiciled Issuers

The Board is considering whether to permit FCUs and corporates to invest foreign currency in deposits and instruments issued by federally insured banks, corporates, and government-sponsored enterprises (GSEs) domiciled in the U.S. or its territories. The Board believes restricting foreign currency investments to shares and deposits in federally insured banks, corporates, and GSEs domiciled in the U.S. or its territories would substantially mitigate exposure to the potential instability of a foreign country. Changes in the political and economic environment of a particular country may adversely affect the exchange rate for that currency, as well as the ability of a foreign domiciled entity to repay an obligation. By limiting investments to shares and deposits in U.S. domiciled depositories or the debt obligations of GSEs, a credit union could avoid settlement risks arising from international payment systems.

While the Board recognizes other investments in foreign currency may be permissible under the Act, it believes safety and soundness concerns

outweigh their utility. The Board requests comments on whether FCUs or corporates should be permitted to invest foreign currency in vehicles other than deposits and instruments issued by federally insured banks, corporates, and GSEs domiciled in the U.S. or its territories permissible under the Act. If a commenter supports additional authority, the Board requests that commenters specify the statutory authority for the investment and include a description of how the authority would be used and additional risks would be controlled.

Exchange Rate Risk

Credit unions would have to establish an appropriate process to measure, monitor, and control foreign exchange risk associated with investments denominated in foreign currency and foreign currency denominated shares, and the Board specifically requests comments on appropriate foreign exchange risk limits. Commenters should address how an FCU or corporate would measure, monitor, and control the foreign exchange risk of each currency in which it invests and accepts deposits. An FCU or corporate should be able to evaluate the volatility of each currency in which it invests and takes deposits and the Board requests comments on appropriate limits per foreign currency and aggregate limits across all foreign currencies. Additionally, the Board requests comments on whether it should limit the currencies in which investments may be denominated.

Foreign exchange risk may be mitigated, for example, by maintaining a balance between foreign currency denominated assets and the member shares denominated in foreign currencies. To control the risk arising when assets and liabilities denominated in a particular foreign currency are not in balance, NCUA is considering establishing a maximum limit on the out-of-balance amount. For example, NCUA could establish an out-of-balance limit of 10 percent of an FCU's net worth or a corporate's capital between foreign currency denominated assets and liabilities. That limit would require an FCU with $10 million in net worth to maintain an amount of foreign currency denominated assets in a given foreign currency within $1 million of the amount of liabilities in that same foreign currency.

Credit and Other Risks

While foreign currency denominated investments might be in partially or fully insured accounts, FCUs and corporates must manage the other risks these investments pose. NCUA expects credit unions would have to establish appropriate processes for controlling credit risk, interest rate risk, liquidity risk, transaction risk, compliance risk, strategic risk, and reputation risk associated with investments denominated in foreign currency. Comment is invited on provisions a regulation should contain to control these various risks.

Regarding credit risk, NCUA believes a regulation permitting investments denominated in foreign currency would need to address obligor or concentration limits. Any limit on credit risk may include requirements for a counterparty and the instrument or investment type. The Board requests comments on whether it should impose a limit on credit ratings or other requirements to control credit risk.

The Board is particularly concerned about a credit union's ability to liquidate foreign currency denominated investments. Liquidity risk relates to the available market for the instruments or activities in which FCUs and corporates invest with foreign currency. The Board requests comments generally on liquidity risk and what requirements or limits would reasonably constrain it.

Exit Strategy

NCUA may also require credit unions to develop an exit strategy to facilitate divestiture of all investments in a particular currency. An exit strategy would provide for stress testing and the means to evaluate the performance of foreign currency investments. An exit strategy should be commensurate with the level of risk exposure and identify triggering events or scenarios that would alert credit unions as to when divestiture would be appropriate or necessary. The Board requests comments on potential investment policy and exit strategy requirements and the availability of bond coverage to absorb potential losses.

As an integral part of an exit strategy, the Board is considering a requirement that members must be notified of any conversion of their shares from foreign currency denominated to U.S. dollar denominated. The Board requests comments on the appropriate notice that members should be given in such an event.

Information Systems and Technology Risks

The Board believes it is likely that a regulation would need to address information systems and technology risks. For example, a regulation would likely require FCUs and corporates to demonstrate they can effectively manage the inherent risks of running multiple balance sheets in various denominations while simultaneously presenting consolidated information to NCUA.

The Board requests comments on FCU and corporate ability to manage this risk, the data NCUA should collect regarding their information systems and investments denominated in foreign currency, and how often NCUA should collect the data. The Board believes additional reporting would be required to monitor foreign currency exposure adequately both on an individual credit union basis and an industry-wide basis. Call reports would likely need to be revised to capture necessary data regarding foreign currency exposures. Additional interim reporting for supervision purposes may also be required of individual credit unions engaging in the activity.

Internal Controls

A regulation would likely address the need to establish certain internal controls, policies, and procedures to manage investments denominated in foreign currency as well as staff qualifications and potential conflict of interest issues. FCUs and corporates would be expected to have knowledgeable, experienced staff to manage foreign currency investment portfolios. The Board requests comments on whether it should regulate the qualifications of credit union employees involved in foreign currency investment activities. Additionally, the Board requests comments on whether a rule should permit the employment of third parties to meet experience requirements for credit union staff in conducting foreign currency investments and, if so, whether the conflict of interest provision in the member business loan would be an appropriate model for a provision in a rule governing foreign currency investments. 12 CFR 723.5.

NCUA Approval

The Board believes is it likely that a regulation on this activity would include an approval process for an FCU or corporate to engage in foreign currency denominated investments and deposits. This would be primarily because of the staff expertise and internal systems required for the activity. An approval process could be patterned on the requirements for corporates to obtain expanded authorities under part 704 or by some other method. The NCUA Board is interested in comments regarding an appropriate mechanism for an approval process.

C. Request for Comments

In addition to the areas of interest noted above, the Board invites comments from all interested parties on any aspects it should consider concerning foreign currency investments by FCUs and corporates.

By the National Credit Union Administration Board on July 26, 2007.

Mary F. Rupp,

Secretary of the Board.

[FR Doc. E7–14849 Filed 7–31–07; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28828; Directorate Identifier 2007–NM–010–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 707 Airplanes and Model 720 and 720B Series Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to adopt a new airworthiness directive (AD) for all Boeing Model 707 airplanes and Model 720 and 720B series airplanes. This proposed AD would require accomplishing an airplane survey to define the configuration of certain system installations, and repair of any discrepancy found. This proposed AD would also require modifying the fuel system by installing lightning protection for the fuel quantity indication system (FQIS), ground fault relays for the fuel boost pumps, and additional power relays for the center tank fuel pumps and uncommanded on-indication lights at the flight engineer's panel. This proposed AD results from fuel system reviews conducted by the manufacturer. We are proposing this AD to prevent certain failures of the fuel pumps or FQIS, which could result in a potential ignition source inside the fuel tank, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by September 17, 2007.

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:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Fax:* (202) 493–2251.
- *Hand Delivery:* Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for the service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Kathrine Rask, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6505; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this proposed AD. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number ''FAA–2007–28828; Directorate Identifier 2007–NM–010–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of the proposed AD. We will consider all comments 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 that 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 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 Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*, or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Operations office (telephone (800) 647–5527) is located on the ground floor of the West Building at the street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Discussion

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 requires certain type design (i.e., type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: single failures, single failures in combination with a latent condition(s),

and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

Results from the SFAR 88 analysis show that potential ignition sources include:

- Fuel pump electrical failures that burn through the pump end cap or case.
- Fuel pump electrical failures that burn through the wire and cause electrical arcing through the conduit.
- Mechanical failure of center tank fuel pumps due to uncommanded operation that causes an ignition source and an arc in a wing tank due to a latent in-tank degradation of the fuel quantity indication system (FQIS) and a lightning strike.

We have determined that the actions identified in this AD are necessary to prevent certain failures of the fuel pumps or FQIS, which could result in a potential ignition source inside the fuel tank, which, in combination with flammable fuel vapors, could result in fuel tank explosion and consequent loss of the airplane.

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 airplanes of this same type design. For this reason, we are proposing this AD, which would require modifying the fuel system by installing lightning protection for the fuel quantity indication system (FQIS), ground fault relays for the fuel boost pumps, and additional power relays for the center tank fuel pumps and uncommanded on-indication lights at the flight engineer's panel.

To date, the airframe manufacturer has not developed service information for the modifications proposed by this AD. Due to the age of the subject airplane models, the operator needs to conduct an airplane survey to define the configuration of system installations for the wing leading edges, wing-to-body area, electrical equipment bay, flight deck, and FQIS to facilitate development of the required service information. The survey would identify locations where new components and wire bundles could be installed, as well as the configuration of affected systems.

Therefore, to ensure that service information is available within a reasonable time to allow modification of the airplane; this proposed AD would also require conducting an airplane survey, and reporting the results to the FAA. The report would include photographs and sketches, part numbers of certain components, and the actual configuration of certain systems.

Due to the age of these airplanes, it is possible that discrepancies (i.e., wear or deterioration) might be detected during the survey. This proposed AD would also require repair of those discrepancies.

Ensuring Compliance with Airplane Survey

Appendix 1 of this proposed AD contains the 707 SFAR 88 survey areas. The appendix is for informational use and provides highlights of the general content of the required survey to assist operators in developing an acceptable survey plan. Operators may wish to use the appendix as an aid to implement the airplane survey.

Costs of Compliance

There are about 185 airplanes of the affected design in the worldwide fleet. This proposed AD would affect about 52 airplanes of U.S. registry.

The proposed survey would take about 20 work hours per airplane, at an average labor rate of $80 per work hour. Based on these figures, the estimated cost of the proposed survey for U.S. operators is $83,200, or $1,600 per airplane.

Because the manufacturer has not yet developed a modification commensurate with the actions specified by this proposed AD, we cannot provide specific information regarding the required number of work hours or the cost of parts to do the proposed modification. In addition, modification costs will likely vary depending on the operator and the airplane configuration. The proposed compliance time of 72 months should provide ample time for the development, approval, and installation of an appropriate modification.

Based on similar modifications accomplished previously on other airplane models, however, we can reasonably estimate that the proposed modification may require as many as 420 work hours per airplane, at an average labor rate of $80 per work hour. Required parts may cost up to $185,000 per airplane. Based on these figures, the estimated cost of the proposed modification for U.S. operators is $11,367,200, or $218,600 per airplane.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket No. FAA–2007–28828; Directorate Identifier 2007–NM–010–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by September 17, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Boeing Model 707–100 long body, –200, –100B long body, and –100B short body series airplanes; and Model 707–300, –300B, –300C, and –400 series airplanes; and Model 720 and 720B series airplanes; certificated in any category.

Unsafe Condition

(d) This AD results from fuel system reviews conducted by the manufacturer. We are issuing this AD to prevent certain failures of the fuel pumps or fuel quantity indication system (FQIS), which could result in a potential ignition source inside the fuel tank, which, in combination with flammable fuel vapors, could result in fuel tank explosion and consequent loss 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.

Airplane Survey

(f) Within 12 months after the effective date of this AD: Conduct an airplane survey that defines the configuration of system installations for the wing leading edges, wing-to-body area, electrical equipment bay, flight deck, and FQIS using a method approved in accordance with the procedures specified in paragraph (h)(1) of this AD. If any discrepancy is detected, repair before further flight using a method approved in accordance with the procedures specified in paragraph (h)(1) of this AD. Submit the survey results to the Manager, Seattle Aircraft Certification Office (ACO), FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356, at the applicable time specified in paragraph (f)(1) or (f)(2) of this AD. The report must include the survey results (e.g., photographs and sketches, part numbers of FQIS components and fuel pumps, and the actual configuration of FQIS and the fuel pump control systems), a description of any discrepancy found, the airplane serial number, and the number of landings and flight hours on the airplane. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements contained in this AD and has assigned OMB Control Number 2120–0056.

(1) If the survey was done after the effective date of this AD: Submit the report within 30 days after the survey.

(2) If the survey was done before the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

Note 1: For the purposes of this AD, ''discrepancy'' is defined as any wear or deterioration (e.g., damage, fluid leaks, corrosion, cracking, or system failures) that might prevent the airplane from being in an airworthy condition.

Modification of Fuel System

(g) Within 72 months after the effective date of this AD: Modify the fuel system as specified in paragraphs (g)(1), (g)(2), and (g)(3) of this AD, using a method approved in accordance with the procedures specified in paragraph (h)(1) of this AD.

(1) Replace the FQIS wire bundle along the leading edge of the left and right wings with a new wire bundle that has a lightning shield that is separated from other wiring.

(2) Replace each fuel pump relay with a ground fault interrupter relay.

(3) Install redundant power relays for the center tank fuel pumps and uncommanded on-indication lights at the flight engineer's panel.

Alternative Methods of Compliance (AMOCs)

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

BILLING CODE 4910–13–P

Appendix 1. 707 SFAR 88 Survey Areas

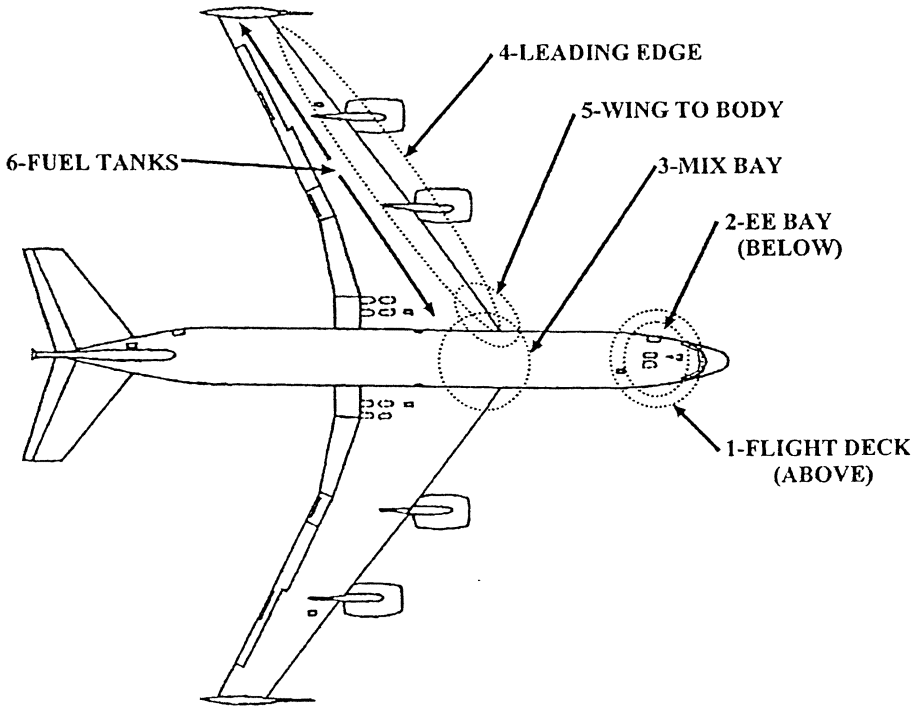
707 SFAR-88 Survey

Boeing and the FAA have identified the following changes to the 707/720 fuel systems to support SFAR-88. Boeing is in the process of developing Service Bulletins for these system changes:

- FQIS Wire Shielding and Separation
- Ground Fault Interrupt (GFI) Relay
- Pump Un-Commanded On (PUO) system
- Potential solution for FQIS Center Tank Hot Short Protection

To support the development of these Service Bulletins, Boeing requires a photographic survey of the airplane. Because these airplanes are now rare,

Boeing needs operator assistance with the required SFAR-88 design changes. Boeing needs digital videos or digital photographs of the following areas of the aircraft:



707 SFAR 88 SURVEY
AREAS

1) Flight Deck

New circuit breakers will be installed on the P1, P2, P3, P4 and/or P5 panels. Two new indication lights are installed in the lower P11 panel. Provide photographs of these panels.

Provide photos of the Flight Deck area above and below the Engineer's panel and on the opposite side showing the existing wire bundle routing with the ceiling and side panels removed. This will be used to route additional wire bundles separated from the existing power wires that will be routed to the EE Bay.

Verify the part number(s) of the FQIS indicators installed in the P11 panel. Verify if a remote trimmer is installed for this indicator.

Appendix 1. 707 SFAR 88 Survey Area

2) E/E-Bay
Provide photos of any location within the E/E-Bay where there is enough space to install a J-box. A J-box is a 22 inch by 12 inch by 4.0 inch tall avionics box that contains control relays. A new J-box must be installed in order to add the Ground Fault Interrupt relays and the Pump Un-commanded ON relays. Possible locations are along the body structure and beneath the cabin floor.

3) Mix Bay
Provide photos showing the tubing and duct routing from the wing section. Provide photos of the current wire bundles in the mix bay. Boeing intends to add 18 new splices for the FQIS wire harness. Provide photos for the installation of a box which is 9 x 6 x 6 inches tall which may be required for FQIS Center Tank Hot Short Protection. Boeing requests photos from both inside the aircraft fuselage showing the wire routing and pressure vessel penetration.

4) Leading Edge
Provide photos of the Fuel Quantity Indication system connectors on the front for all fuel tanks. Provide photographs of the front spar every 3 feet from the reserve tank to the center tank. Photos should show tubing installations, existing wire harnesses, pneumatic ducts, etc. Photograph areas between the engine struts, outboard of engine 1 and 4, and between the inboard strut and side of body with a free 9 X 3 X 5 inch accessible areas. These photos will help Boeing engineering develop new FQIS wire routing that has a minimum of 2 inch separation from existing wires , or possibly to install new FQIS spar penetration connectors. Provide photos of the front spar and seal ribs with in the strut area with the access panels removed. These photos will also be used in the development of the FQIS wire shielding and separation.

5) Wing to Body (Un-pressurized wire penetrations)
Photos of the existing wire bundle penetrations through the pressure vessel and a 3 foot radius area around the existing wire bundle penetrations in the wing to body fairing (view from the front spar looking inboard).

6) Fuel Tanks
Provide photographs of the fuel quantity indication probes and the wiring for the probes. Photograph along the wiring to the spar penetration. Provide photographs of the internal tank structure and plumbing. Note that non-explosion proof equipment is generally not allowed inside fuel tanks.

NOTE: To photograph inside the fuel tanks, ensure that the Lower Explosion Limit of the fuel tank is below 10%, and tape the battery compartment on the camera closed. Tapping the battery compartment closed will ensure that the battery will not suddenly eject if the camera is dropped, which will prevent a potential spark.

General notes on taking pictures

1) Preferably, use a digital camera that has a close-up feature and a built in or external flash. A camera with 4 mega pixels or more is preferred. Photos should be in JPEG format.

2) Close up photos should also show a scale in inches or centimeters. In other words, please put a ruler in the shot. After the photos are taken, use any digital photography software to add text (in English) as necessary. Please indicate where on the aircraft the close-up photos were taken (body stations and or wing stations).

3) Digital Video is also an acceptable way to complete this survey. With video, make sure there is enough lighting, especially in the confined areas such as the fuel tanks or EE Bay. With video, please provide sweeps of the areas indicated above. For example, focus on the front spar and slowly walk outboard to inboard to provide an overview of the entire spar. Then, provide the detailed shots of each of the items indicated above. Boeing prefers the videos to be in an AVI or a WMV format.

4) Store the photos or video on CDs or DVDs media. Provide separate CDs or DVDs for each aircraft. Label the media with the aircraft tail number, registry and or serial number. Submit the media to the FAA

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector

(PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

Issued in Renton, Washington, on July 18, 2007.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 07–3712 Filed 7–31–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2006–26710; Directorate Identifier 2006–NM–147–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 757 Airplanes

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

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: The FAA is revising an earlier proposed airworthiness directive (AD) for all Boeing Model 757 airplanes. The original NPRM would have required revising the Airworthiness Limitations (AWLs) section of the Instructions for Continued Airworthiness by incorporating new limitations for fuel tank systems to satisfy Special Federal Aviation Regulation No. 88 requirements. The original NPRM also would have required the initial inspection of certain repetitive inspections specified in the AWLs to phase-in those inspections, and repair if necessary. The original NPRM resulted from a design review of the fuel tank systems. This action revises the original NPRM by aligning the compliance time for revising the AWLs section with the compliance date of the special maintenance program requirements, updating the listing of applicable airplane maintenance manuals in Appendix 1, and clarifying certain actions. We are proposing this supplemental NPRM to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss of the airplane.

DATES: We must receive comments on this supplemental NPRM by August 27, 2007.

ADDRESSES: Use one of the following addresses to submit comments on this supplemental NPRM.

- *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:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Fax:* (202) 493–2251.
- *Hand Delivery:* Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Contact Boeing Commercial Airplanes, P.O. Box 3707, Seattle, Washington 98124–2207, for service information identified in this proposed AD.

FOR FURTHER INFORMATION CONTACT: Kathrine Rask, Aerospace Engineer, Propulsion Branch, ANM–140S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 917–6505; fax (425) 917–6590.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to submit any relevant written data, views, or arguments regarding this supplemental NPRM. Send your comments to an address listed in the **ADDRESSES** section. Include the docket number ''Docket No. FAA–2006–26710; Directorate Identifier 2006–NM–147–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this supplemental NPRM. We will consider all comments received by the closing date and may amend this supplemental NPRM in light of those comments.

We will post all comments submitted, 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 supplemental NPRM. Using the search function of that 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 Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov,* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Operations office (telephone (800) 647–5527) is located on the ground level of the West Building at the DOT street address stated in the **ADDRESSES** section. Comments will be available in the AD docket shortly after the Docket Management System receives them.

Discussion

We proposed to amend 14 CFR part 39 with a notice of proposed rulemaking (NPRM) for an AD (the ''original NPRM'') for all Boeing Model 757 airplanes. The original NPRM was published in the **Federal Register** on January 3, 2007 (72 FR 50). The original NPRM proposed to require revising the Airworthiness Limitations (AWLs) section of the Instructions for Continued Airworthiness by incorporating new limitations for fuel tank systems to satisfy Special Federal Aviation Regulation No. 88 (SFAR 88) requirements. The original NPRM also proposed to require the initial inspection of certain repetitive inspections specified in the AWLs to phase-in those inspections, and repair if necessary.

Explanation of Change in Compliance Time

In most ADs, we adopt a compliance time allowing a specified amount of time after the AD's effective date. In this case, however, we have already issued regulations that require operators to revise their maintenance/inspection programs to address fuel tank safety issues. The compliance date for these regulations is December 16, 2008. To provide for efficient and coordinated implementation of these regulations and this supplemental NPRM, we are using this same compliance date in this supplemental NPRM, instead of the 18-month compliance time recommended by Boeing. Therefore, we have revised the compliance time in paragraph (g) from ''within 18 months after the effective date of this AD'' to a compliance date of ''no later than December 16, 2008.''

Comments

We have considered the following comments on the original NPRM.

Request To Revise Note 1

Boeing requests that the Note 1 of the original NPRM be revised from ''* * * the operator must request approval for revision * * *'' to ''* * * the operator must request approval for deviation from * * * .'' Boeing states that, as written, Note 1 would result in modifications, alternations, or repairs being incorporated into the Boeing 757 Maintenance Planning Data (MPD) Document D622N001–9, Revision March 2006 (referred to in the original NPRM as the appropriate source of service information) that are outside of its configuration definition data and responsibility. Boeing also states that the MPD document is intended to reflect the Boeing 757 type design as defined only by Boeing data.

We partially agree. We do not agree with Boeing's suggested change. We find that Boeing is misinterpreting the intent of Note 1, and that clarification is necessary. The sentence in question states, ''In this situation, * * * the operator must request approval for revision to the airworthiness limitations (AWLs) in the Boeing 757 Maintenance Planning Data (MPD) Document D622N001–9 * * * .'' The term ''revision'' refers to the ''airworthiness limitations,'' not to the MPD document. The modification, alteration, or repair would affect only a few airplanes, so a revision to the MPD document, which would affect the whole fleet, would not be appropriate. However, we do agree with Boeing that a revision to the MPD document may not be necessary. We have determined that operators also can request approval for revision to the AWLs in the MPD document according to paragraph (i) of this supplemental NPRM. Therefore, we have revised Note 1 accordingly.

Request To Add Procedures of Boeing 757 MPD Document

Boeing requests that the original NPRM be revised to contain the procedures specified in Section 9 of Boeing 757 MPD Document D622N001–9 or an approved equivalent AWL/Certification Maintenance Requirement (CMR) document, rather than referring to the MPD document as the source for the procedures. Boeing states that it may move Section 9 (airworthiness limitation section) out of the Boeing 757 MPD document, and thus the AD may need to be revised.

We do not agree. We have confirmed with Boeing that it has no immediate plans to change the Boeing 757 MPD document. Therefore, until the Boeing 757 MPD Document D622N001–9 is revised, we consider it appropriate that this supplemental NPRM refer to it as the appropriate source of service information for accomplishing the proposed actions. We might consider issuing additional rulemaking or approving alternative methods of compliance to address that concern in the future. We have not changed the supplemental NPRM regarding this issue.

Request To Extend Compliance Time

United Parcel Service (UPS) requests that, for low cycle operators (less than 800 flight cycles per year), the compliance time for the initial inspections in paragraph (h) of the original NPRM be extended from ''10 years or 36,000 flight cycles'' to ''16 years (8C) or 36,000 flight cycles, whichever occurs first.'' UPS states that this will not penalize low-utilization operators. UPS states that it has tank entries approximately every 8 years, and that 16 years lines up better with its maintenance program. UPS also states that a compliance time of 10 years would significantly increase its financial burden. UPS did not submit any data with its comment.

We do not agree. In developing the compliance time for the original NPRM, we considered not only the risk of creating an ignition source in the tank, but we also considered the practical aspect of accomplishing the proposed inspections within a period of time that corresponds to the major structural inspections or fuel tank entries to limit the impact on operators. With UPS's tank entries occurring approximately every 8 years, the 36,000 total flight cycles or 120-month proposed compliance time would allow UPS's entire fleet to be inspected during scheduled maintenance with an additional 2 years to allow for some scheduling flexibility. However, paragraph (i) of the supplemental NPRM provides operators the opportunity to request an extension of the compliance time if data are presented to justify such an extension.

Request To Include an Additional Airworthiness Limitation

Boeing requests that we revise paragraph (h) of the original NPRM for completeness to include Airworthiness Limitation 28–AWL–25 (Lightning and Fault Current Protection—Motor Operated Valve Actuator). Boeing notes this AWL was added to Section 9 of the Boeing 757 MPD Document D622N001–9 in October 2006.

We agree with Boeing's intent; however, we do not agree with including Airworthiness Limitation 28–AWL–25 in this supplemental NPRM. We are considering issuing a separate rulemaking action that would propose to require installation of a new actuator and inspections in accordance with Airworthiness Limitation 28–AWL–25.

Request To Revise Numbering of Notes

Boeing requests that Notes 2 and 3 of the original NPRM be renumbered. Boeing believes that there are only two notes as part of Table 1 of the original NPRM, and that the notes were incorrectly numbered.

We understand Boeing's concern; however, we do not agree that the notes need to be renumbered. There are total of three notes in the supplemental NPRM. All three notes are correctly numbered. In all ADs, notes are numbered sequentially in the regulatory text.

Request To Revise Appendix 1

Boeing requests that Appendix 1 of the original NPRM be revised to include missing task titles and numbers. Boeing provided no justification.

We partially agree. Since we issued the original NPRM, the modifications of the motor operated valve actuator have been approved, and the associated airplane maintenance manual (AMM) changes have been released. Therefore, we agree with Boeing to revise columns ''Task Title'' and ''Task #,'' as applicable, of Appendix 1 of the supplemental NPRM to include the latest information specified in the AMM that is associated with design changes of the fuel tank system changes. However, we do not agree with Boeing to add task titles for the component maintenance manuals (CMM), because the AWLs cover the entire CMM, not just specific tasks.

Explanation of Other Changes to Original NPRM

We have revised paragraph (g) of this supplemental NPRM to clarify that the exception refers to the ''initial inspections'' specified in Table 1 of this AD rather than the ''inspections.''

We have revised paragraph (h) of this supplemental NPRM to allow the use of later revisions of the MPD.

FAA's Determination and Proposed Requirements of the Supplemental NPRM

Some of the changes discussed above expand the scope of the original NPRM; therefore, we have determined that it is necessary to reopen the comment period to provide additional opportunity for public comment on this supplemental NPRM.

Costs of Compliance

There are about 990 airplanes of the affected design in the worldwide fleet. The following table provides the estimated costs for U.S. operators to comply with this proposed AD.

ESTIMATED COSTS

Action	Work hours	Average labor rate per hour	Cost per airplane	Number of U.S.-registered airplanes	Fleet cost
Revision of AWLs section of the Instructions for Continued Airworthiness	8	$80	$640	639	$408,960
Detailed and special detailed inspections	8	80	640	639	408,960

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this supplemental NPRM and placed it in the AD docket. See the **ADDRESSES** section for a location to examine the regulatory evaluation.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket No. FAA–2006–26710; Directorate Identifier 2006–NM–147–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by August 27, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Boeing Model 757–200, –200PF, –200CB, and –300 series airplanes, certificated in any category.

Note 1: This AD requires revisions to certain operator maintenance documents to include new inspections and maintenance actions. Compliance with these limitations is required by 14 CFR 43.16 and 91.403(c). For airplanes that have been previously modified, altered, or repaired in the areas addressed by these limitations, the operator may not be able to accomplish the actions described in the revisions. In this situation, to comply with 14 CFR 43.16 and 91.403(c), the operator must request approval for revision to the airworthiness limitations (AWLs) in the Boeing 757 Maintenance Planning Data (MPD) Document D622N001–9 according to paragraph (g) or (i) of this AD.

Unsafe Condition

(d) This AD results from a design review of the fuel tank systems. We are issuing this AD to prevent the potential for ignition sources inside fuel tanks caused by latent failures, alterations, repairs, or maintenance actions, which, in combination with flammable fuel vapors, could result in a fuel tank explosion and consequent loss 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.

Service Information

(f) The term ''Revision March 2006 of the MPD'' as used in this AD, means Section 9 of Boeing 757 MPD Document D622N001–9, Revision March 2006.

Revision of AWLs Section

(g) No later than December 16, 2008, revise the AWLs section of the Instructions for Continued Airworthiness by incorporating the information in the sections specified in paragraphs (g)(1) through (g)(3) of this AD into the MPD, except that the initial inspections specified in Table 1 of this AD must be done at the compliance times specified in Table 1. Accomplishing the revision in accordance with a later revision of the MPD is an acceptable method of compliance if the revision is approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA.

(1) Section E., ''AIRWORTHINESS LIMITATIONS—FUEL SYSTEMS,'' of Revision March 2006 of the MPD.

(2) Section F., ''PAGE FORMAT: SYSTEMS AIRWORTHINESS LIMITATIONS,'' of Revision March 2006 of the MPD.

(3) Section G., ''AIRWORTHINESS LIMITATIONS—FUEL SYSTEM AWLs'' of Revision March 2006 of the MPD.

Initial Inspections and Repair

(h) Do the inspections specified in Table 1 of this AD and repair any discrepancy, in accordance with Section G., ''AIRWORTHINESS LIMITATIONS—FUEL SYSTEM AWLs,'' of Revision March 2006 of the MPD. The repair must be done before further flight. Accomplishing the actions in accordance with a later revision of the MPD is an acceptable method of compliance if the revision is approved by the Manager, Seattle ACO, FAA.

TABLE 1.—INITIAL INSPECTIONS

Airworthiness limitations	Description	Compliance time (whichever occurs later)	
		Threshold	Grace period
(1) 28–AWL–01	A detailed inspection of external wires over the center fuel tank for damaged clamps, wire chafing, and wire bundles in contact with the surface of the center fuel tank.	Before the accumulation of 36,000 total flight cycles, or within 120 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness, whichever occurs first.	Within 72 months after the effective date of this AD.
(2) 28–AWL–03	A special detailed inspection of the lightning shield to ground termination on the out-of-tank fuel quantity indicating system to verify functional integrity.	Before the accumulation of 36,000 total flight cycles, or within 120 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness, whichever occurs first.	Within 24 months after the effective date of this AD.
(3) 28–AWL–14	A special detailed inspection of the fault current bond of the fueling shut-off valve actuator of the center wing tank to verify electrical bond.	Before the accumulation of 36,000 total flight cycles, or within 120 months since the date of issuance of the original standard airworthiness certificate or the date of issuance of the original export certificate of airworthiness, whichever occurs first.	Within 60 months after the effective date of this AD.

Note 2: For the purposes of this AD, a detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at an intensity deemed appropriate. Inspection aids such as mirror, magnifying lenses, etc., may be necessary. Surface cleaning and elaborate procedures may be required.''

Note 3: For the purposes of this AD, a special detailed inspection is: ''An intensive examination of a specific item, installation, or assembly to detect damage, failure, or irregularity. The examination is likely to make extensive use of specialized inspection techniques and/or equipment. Intricate cleaning and substantial access or disassembly procedure may be required.''

Alternative Methods of Compliance (AMOCs)

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

(2) To request a different method of compliance or a different compliance time for this AD, follow the procedures in 14 CFR 39.19. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

APPENDIX 1. FUEL TANK SYSTEM AIRWORTHINESS LIMITATIONS—APPLICABLE MAINTENANCE MANUALS

Airworthiness limitation (AWL)	Airworthiness limitation instruction (ALI)/ critical design configuration control limitation (CDCCL)	ATA section or component maintenance manual (CMM) document	Task title	Task #
28–AWL–01	ALI	Airplane Maintenance Manual (AMM) 28–11–00/601.	External Wires Over the Center Tank Inspection.	28–11–00–206–221
28–AWL–02	CDCCL	Standard Wiring Practices Manual (SWPM) 20–10–11.	Wiring Assembly and Installation Configuration.	
28–AWL–03	ALI	AMM 20–55–54/601	Fuel Quantity Indicating System (FQIS) Connectors—Inspection/ Check.	20–55–54–286–001
28–AWL–04	CDCCL	SWPM 20–10–15	Assembly of Shield Ground Wires	
28–AWL–05	CDCCL	SWPM 20–10–11	Wiring Assembly and Installation Configuration.	
28–AWL–06	CDCCL	CMM 28–41–68 Revision 4 or subsequent revisions.	.....	
28–AWL–07	CDCCL	CMM 28–40–56, Revision 4; CMM 28–40–62, revision 3; CMM 28–40–59, revision 5; or subsequent revisions.	.....	
28–AWL–08	CDCCL	SWPM 20–14–12	Repair of FQIS Wire Harness	
	.....	AMM 28–41–09/401	Install the Tank Wiring Harness	Varies with configuration
28–AWL–09	CDCCL	AMM 29–11–26/401	Install the Heat Exchanger	29–11–26–404–012
28–AWL–10	CDCCL	AMM 28–22–07/401	Install the Fuel Line and Fittings	28–22–07–404–005
28–AWL–11	CDCCL	.....	.....	

APPENDIX 1. FUEL TANK SYSTEM AIRWORTHINESS LIMITATIONS—APPLICABLE MAINTENANCE MANUALS—Continued

Airworthiness limitation (AWL)	Airworthiness limitation instruction (ALI)/ critical design configuration control limitation (CDCCL)	ATA section or component maintenance manual (CMM) document	Task title	Task #
28–AWL–12	CDCCL	CMM 28–22–08, revision 3; CMM 28–20–02, revision 9; or subsequent revisions.		
28–AWL–13	CDCCL	AMM 28–22–03/401	Install the Fuel Boost Pump Assembly or the Fuel Override Pump Assembly.	28–22–03–404–007
28–AWL–14	ALI	AMM 28–21–02/401	Fueling Shutoff Valve Resistance Check.	28–21–02–764–047
28–AWL–15	CDCCL	AMM 28–21–02/401	Install the Fueling Shutoff Valve	28–21–02–404–019
		AMM 28–21–12/401	Install the Actuator of the Fueling Shutoff Valve.	28–21–12–404–015
28–AWL–16	CDCCL	AMM 28–11–01/401	Install the Main Tank Access Door	28–11–01–404–014
		AMM 28–11–02/401	Install the Center Tank Access Door	28–11–02–404–019
		AMM 28–11–03/401	Install the Surge Tank Access Door	28–11–03–404–008
28–AWL–17	CDCCL	AMM 28–11–03/401	Install the Surge Tank Access Door	28–11–03–404–008
		AMM 28–13–04/201	Install the Pressure Relief Valve	28–13–04–402–014
28–AWL–18	CDCCL	AMM 28–11–03/401	Install the Surge Tank Access Door	28–11–03–404–008
		AMM 28–13–05/401	Install the Housing of the Vent Flame Arrestor.	28–13–05–404–004
28–AWL–19	CDCCL	Fault Isolation Manual (FIM) 28–22–00/101.	Engine Fuel Feed System—Fault Isolation.	
28–AWL–20	ALI	AMM 28–22–00/501	Center Tank Fuel Override Pump Auto Shutoff Functional Test.	28–22–00–725–507
			System Test—Engine Fuel Feed System.	Varies with Configuration
28–AWL–21	ALI	AMM 28–22–00/501	System Test—Engine Fuel Feed System.	Varies with Configuration
28–AWL–22	CDCCL	AMM 28–41–24/401	Densitometer Hot Short Protector Installation.	28–41–24–404–006
28–AWL–23	CDCCL	AMM 28–22–01/401	Install the Adapter Shaft of the Engine Fuel Shutoff Valve (Spar Valve).	28–22–01–404–19
		AMM 28–22–02/401	Install the Engine Fuel Crossfeed Adapter Shaft.	28–22–02–404–041
		AMM 28–22–11/401	Install the Actuator of the Engine Fuel Shutoff Valve (Spar Valve).	28–22–11–404–007
		AMM 28–22–12/401	Install the Actuator of the Engine Fuel Crossfeed Valve.	28–22–12–404–024
		AMM 28–26–01/401	Install the Adapter Shaft for the Defuel Valve.	28–26–01–404–035
		AMM 28–26–02/401	Install the Defueling Valve Actuator	28–26–02–404–015
28–AWL–24	CDCCL	CMM 28–20–21		
28–AWL–25	ALI	AMM 28–22–01/401	Install the Adapter Shaft of the Engine Fuel Shutoff Valve (Spar Valve).	28–22–01–404–19
		AMM 28–022–02/401	Install the Engine Fuel Crossfeed Adapter Shaft.	28–22–02–404–041
		AMM 28–22–11/401	Install the Actuator of the Engine Fuel Shutoff Valve (Spar Valve).	28–22–11–404–007
		AMM 28–22–12/401	Install the Actuator of the Engine Fuel Crossfeed Valve.	28–22–12–404–024
		AMM 28–26–01/401	Install the Adapter Shaft for the Defuel Valve.	28–26–01–404–035
		AMM 28–26–02/401	Install the Defueling Valve Actuator	28–26–02–404–015
		AMM 28–25–11/401	Install the Actuator of the APU Fuel Shutoff Valve.	28–25–11–404–010
28–AWL–26	ALI	AMM 28–22–00/501	System Test—Engine Fuel Feed System.	Varies with Configuration

Issued in Renton, Washington, on July 25, 2007.

Stephen P. Boyd,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–14867 Filed 7–31–07; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2007–28645; Directorate Identifier 2007–CE–059–AD]

RIN 2120–AA64

Airworthiness Directives; EADS SOCATA Model TBM 700 Airplanes

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for the products listed above. This proposed AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

This Airworthiness Directive (AD) results from one report about imperfect locking on ground of the upper access door opening interior handle which has enabled its opening without actuating unlocking knob.

If not corrected an inadvertent action on the handle without actuating the unlocking knob could lead to a door opening.

Investigations identified the unsafe condition resulting from interference between the window trim panel and the handle locking mechanism.

The proposed AD would require actions that are intended to address the unsafe condition described in the MCAI.

DATES: We must receive comments on this proposed AD by August 31, 2007.

ADDRESSES: You may send comments by any of the following methods:

- *DOT Docket Web Site:* Go to *http://dms.dot.gov* and follow the instructions for sending your comments electronically.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://dms.dot.gov*; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Albert Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4119; fax: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2007–28645; Directorate Identifier 2007–CE–059–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because 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 we receive about this proposed AD.

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Emergency Airworthiness (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

This Airworthiness Directive (AD) results from one report about imperfect locking on ground of the upper access door opening interior handle which has enabled its opening without actuating unlocking knob.

If not corrected an inadvertent action on the handle without actuating the unlocking knob could lead to a door opening.

Investigations identified the unsafe condition resulting from interference between the window trim panel and the handle locking mechanism.

Requirements of this AD are first, check for proper operation the locking handle and secondly modification of the window trim panel.

You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

EADS SOCATA has issued Mandatory Service Bulletin TBM Aircraft SB 70–150, dated May 2007. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of the Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between This Proposed AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have proposed different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a NOTE within the proposed AD.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 23 products of U.S. registry. We also estimate that it would take about 2 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $80 per work-hour. Required parts would cost about $5 per product. Where the service information lists

required parts costs that are covered under warranty, we have assumed that there will be no charge for these costs. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here.

Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $3,795, or $165 per product.

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 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 this proposed regulation:

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

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

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

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

EADS SOCATA: Docket No. FAA–2007–28645; Directorate Identifier 2007–CE–059–AD.

Comments Due Date

(a) We must receive comments by August 31, 2007.

Affected ADs

(b) None.

Applicability

(c) This AD applies to TBM 700 airplanes, serial numbers 1 through 9, 11 through 17, 19 through 22, 25 through 27, 29 through 31, 33 and 34, 38, 46, and 49, that are:

(1) Certificated in any category;

(2) Not equipped with modification No. MOD70–019–25; and

(3) Equipped with an interior handle unlocking device through push-button.

Subject

(d) Air Transport Association of America (ATA) Code 52: Doors.

Reason

(e) The mandatory continuing airworthiness information (MCAI) states:

This Airworthiness Directive (AD) results from one report about imperfect locking on ground of the upper access door opening interior handle which has enabled its opening without actuating unlocking knob.

If not corrected an inadvertent action on the handle without actuating the unlocking knob could lead to a door opening.

Investigations identified the unsafe condition resulting from interference between the window trim panel and the handle locking mechanism.

Requirements of this AD are first, check for proper operation the locking handle and secondly modification of the window trim panel.

Actions and Compliance

(f) Unless already done, do the following actions:

(1) Before each flight after the effective date of this AD until the actions of paragraph (f)(2) of this AD have been done, check the handle locking using paragraph A of the accomplishment instructions in EADS SOCATA Mandatory TBM Aircraft Service Bulletin SB 70–150, dated May 2007. If any discrepancy is found, do the following before further flight until the modification in paragraph (f)(2) of this AD is done:

(i) Fabricate a placard using letter at least 1⁄8 inches in height with the words ''FLIGHT ALLOWED WITH ONLY THE FLIGHT DECK SEATS OCCUPIED.''

(ii) Install this placard on the instrument panel within clear view of the pilot.

(iii) The owner/operator holding at least a private pilot certificate as authorized by section 43.7 of the Federal Aviation Regulations (14 CFR 43.7) may do both the pre-flight checks and the placard requirements of this AD. Make an entry in the aircraft records showing compliance with this portion of the AD following section 43.9 of the Federal Aviation Regulations (14 CFR 43.9).

(2) Within the next 12 months after the effective date of this AD modify the window trim panel using paragraph B of the accomplishment instructions in EADS SOCATA Mandatory TBM Aircraft Service Bulletin SB 70–150, dated May 2007. This modification terminates the requirements of paragraph (f)(1) of this AD.

FAA AD Differences

Note: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Staff, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Albert Mercado, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4119; fax: (816) 329–4090. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI European Aviation Safety Agency (EASA) Emergency AD No: 2007–0172–E, dated June 15, 2007; and EADS SOCATA Mandatory TBM Aircraft Service Bulletin SB 70–150, dated May 2007, for related information.

Issued in Kansas City, Missouri, on July 26, 2007.

James E. Jackson,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. E7–14857 Filed 7–31–07; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2007–0401; FRL–8448–3]

Approval and Promulgation of Air Quality Implementation Plans; Massachusetts; State Implementation Plan Revision To Implement the Clean Air Interstate Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a revision to the Massachusetts State Implementation Plan (SIP) submitted on March 30, 2007. This revision addresses the requirements of EPA's Clean Air Interstate Rule (CAIR), promulgated on May 12, 2005 and subsequently revised on April 28, 2006 and December 13, 2006. EPA is proposing to determine that the SIP revision fully implements the CAIR requirements for Massachusetts. Therefore, as a consequence of the SIP approval, EPA will also withdraw the CAIR Federal Implementation Plan (CAIR FIP) concerning NO_X ozone-season emissions for Massachusetts. The CAIR FIPs for all States in the CAIR region were promulgated on April 28, 2006 and subsequently revised on December 13, 2006.

In the SIP revision that EPA is proposing to approve, Massachusetts would meet CAIR requirements by participating in the EPA-administered cap-and-trade program addressing NO_X ozone-season emissions. Massachusetts's SIP revision is based on EPA's model CAIR NO_X ozone season rule and is in most respects substantively identical to that model rule. The Massachusetts CAIR program has two major substantive differences from that model rule (expanded applicability, and a different methodology for allocating NO_X allowances), both of which are consistent with the flexibility allowed under CAIR for state participation in the EPA-administered cap-and-trade program. The SIP revision complies with the statutory and regulatory requirements for approval of a CAIR NO_X ozone-season program.

DATES: Comments must be received on or before August 31, 2007.

ADDRESSES: Submit your comments, identified by FDMS Docket ID No. EPA–R01–OAR–2007–0401, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *E-mail: arnold.anne@epa.gov.*
3. *Fax:* (617) 918–0047.
4. *Mail:* ''FDMS Docket ID No. EPA–R01–OAR–2007–0401'', Anne Arnold, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100 (mail code CAQ), Boston, MA 02114–2023.
5. *Hand Delivery or Courier:* Deliver your comments to: Anne Arnold, Manager, Air Quality Planning Unit, Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, 11th floor, (CAQ), Boston, MA 02114–2023. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to Docket ID No. ''FDMS Docket ID No. EPA–R01–OAR–2007–0401''. 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.regulations.gov*, 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 through *www.regulations.gov* or e-mail, information that you consider to be CBI or otherwise protected. The *www.regulations.gov* Web site is 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 *www.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 and any form of encryption and should be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. 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. In addition to publicly available docket materials available electronically in *www.regulations.gov*, the hard copy of these materials, including the state submittal and EPA's technical support document, is available at the Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100, Boston, MA. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions concerning today's proposal, please contact Alison C. Simcox, Air Quality Planning Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100 (CAQ), Boston, MA 02114–2023, telephone number (617) 918–1684, fax number (617) 918–0684, e-mail *simcox.alison@epa.gov*.

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I. What Action Is EPA Proposing to Take?

EPA is proposing to approve a revision to Massachusetts's SIP, submitted on March 30, 2007. This SIP revision includes a new regulation, 310 CMR 7.32, ''Massachusetts Clean Air Interstate Rule,'' and amendments to existing regulation 310 CMR 7.28, ''NO_X Allowance Trading Program.'' In its SIP revision, Massachusetts would meet CAIR requirements by requiring certain electric generating units (EGUs) to participate in the EPA-administered State CAIR cap-and-trade program addressing NO_X ozone-season emissions. EPA is proposing to determine that the Massachusetts SIP as revised will meet the applicable requirements of CAIR. Any final action approving the SIP will be taken by the Regional Administrator for Region 1. As a consequence of the SIP Approval, the Administrator of EPA will also issue a final rule to withdraw the FIP concerning NO_X ozone-season emissions for Massachusetts. This action will delete and reserve 40 CFR 52.1140. The withdrawal of the CAIR FIP for Massachusetts is a conforming amendment that must be made once the SIP is approved because EPA's authority to issue the FIP was premised on a deficiency in the SIP for Massachusetts. Once the SIP is fully approved, EPA no longer has authority for the FIP. Thus, EPA will not have the option of maintaining the FIP following the full SIP approval. Accordingly, EPA does not intend to offer an opportunity for a public hearing or an additional opportunity for written public comment on the withdrawal of the FIP.

II. What Is the Regulatory History of the CAIR and the CAIR FIPs?

The Clean Air Interstate Rule (CAIR) was published by EPA on May 12, 2005 (70 FR 25162). In this rule, EPA determined that 28 States and the District of Columbia contribute significantly to nonattainment and interfere with maintenance of the national ambient air quality standards (NAAQS) for fine particles ($PM_{2.5}$) and/or 8-hour ozone in downwind States in the eastern part of the country. As a result, EPA required those upwind States to revise their SIPs to include control measures that reduce emissions of SO_2, which is a precursor to $PM_{2.5}$ formation, and/or NO_X, which is a precursor to both ozone and $PM_{2.5}$ formation. For jurisdictions that contribute significantly to downwind $PM_{2.5}$ nonattainment, CAIR sets annual State-wide emission reduction requirements (i.e., budgets) for SO_2 and annual State-wide emission reduction requirements for NO_X. Similarly, for jurisdictions that contribute significantly to 8-hour ozone nonattainment, CAIR sets State-wide emission reduction requirements for NO_X for the ozone season (May 1st to September 30th). Under CAIR, States may implement these reduction requirements by participating in the EPA-administered cap-and-trade programs or by adopting any other control measures.

CAIR explains to subject States what must be included in SIPs to address the requirements of section 110(a)(2)(D) of the Clean Air Act (CAA) with regard to interstate transport with respect to the 8-hour ozone and $PM_{2.5}$ NAAQS. EPA made national findings, effective on May 25, 2005, that the States had failed to submit SIPs meeting the requirements of section 110(a)(2)(D). The SIPs were due in July 2000, 3 years after the promulgation of the 8-hour ozone and $PM_{2.5}$ NAAQS. These findings started a 2-year clock for EPA to promulgate a Federal Implementation Plan (FIP) to address the requirements of section 110(a)(2)(D). Under CAA section 110(c)(1), EPA may issue a FIP anytime after such findings are made and must do so within two years unless a SIP revision correcting the deficiency is approved by EPA before the FIP is promulgated.

On April 28, 2006, EPA promulgated FIPs for all States covered by CAIR in order to ensure the emissions reductions required by CAIR are achieved on schedule. Each CAIR State is subject to the FIPs until the State fully adopts, and EPA approves, a SIP revision meeting the requirements of CAIR. The CAIR FIPs require EGUs to participate in the EPA-administered CAIR SO_2, NO_X annual, and NO_X ozone season trading programs, as appropriate. The CAIR FIP SO_2, NO_X annual, and NO_X ozone season trading programs impose essentially the same requirements as, and are integrated with, the respective CAIR SIP trading programs. The integration of the FIP and SIP trading programs means that these trading programs will work together to create effectively a single trading program for each regulated pollutant (SO_2, NO_X annual, and NO_X ozone season) in all States covered by the CAIR FIP or SIP trading program for that pollutant. The CAIR FIPs also allow States to submit abbreviated SIP revisions that, if approved by EPA, will automatically replace or supplement certain CAIR FIP provisions (e.g., the methodology for allocating NO_X allowances to sources in the State), while the CAIR FIP remains in place for all other provisions.

On April 28, 2006, EPA published two additional CAIR-related final rules that added the States of Delaware and New Jersey to the list of States subject to CAIR for $PM_{2.5}$ and announced EPA's final decisions on reconsideration of five issues, without making any substantive changes to the CAIR requirements.

III. What are the General Requirements of CAIR and the CAIR FIPs?

CAIR establishes State-wide emission budgets for SO_2 and NO_X and is to be implemented in two phases. The first phase of NO_X reductions starts in 2009 and continues through 2014, while the first phase of SO_2 reductions starts in 2010 and continues through 2014. The second phase of reductions for both NO_X and SO_2 starts in 2015 and continues thereafter. CAIR requires States to implement the budgets by either:

(1) Requiring EGUs to participate in the EPA-administered cap-and-trade programs; or

(2) adopting other control measures of the State's choosing and demonstrating that such control measures will result in compliance with the applicable State SO_2 and NO_X budgets.

The May 12, 2005 and April 28, 2006 CAIR rules provide model rules that States must adopt (with certain limited changes, if desired) if they want to participate in the EPA-administered trading programs.

With two exceptions, only States that choose to meet the requirements of CAIR through methods that exclusively regulate EGUs are allowed to participate in the EPA-administered trading programs. One exception is for States that adopt the opt-in provisions of the model rules to allow non-EGUs individually to opt into the EPA-administered trading programs. The other exception is for States that include all non-EGUs from their NO_X SIP Call trading programs in their CAIR NO_X ozone season trading programs.

IV. What are the Types of CAIR SIP Submittals?

States have the flexibility to choose the type of control measures they will use to meet the requirements of CAIR. EPA anticipates that most States will choose to meet the CAIR requirements by selecting an option that requires EGUs to participate in the EPA-administered CAIR cap-and-trade programs. For such States, EPA has provided two approaches for submitting and obtaining approval for CAIR SIP revisions. States may submit full SIP revisions that adopt the model CAIR cap-and-trade rules. If approved, these

SIP revisions will fully replace the CAIR FIPs. Alternatively, States may submit abbreviated SIP revisions. These SIP revisions will not replace the CAIR FIPs; however, the CAIR FIPs provide that, when approved, the provisions in these abbreviated SIP revisions will be used instead of or in conjunction with, as appropriate, the corresponding provisions of the CAIR FIPs (e.g., the NO_X allowance allocation methodology).

A State submitting a full SIP revision may either adopt regulations that are substantively identical to the model rules or incorporate by reference the model rules. CAIR provides that States may only make limited changes to the model rules if the States want to participate in the EPA-administered trading programs. A full SIP revision may change the model rules only by altering their applicability and allowance allocation provisions to:

1. Include NO_X SIP Call trading sources that are not EGUs under CAIR in the CAIR NO_X ozone season trading program;

2. Provide for State allocation of NO_X annual or ozone season allowances using a methodology chosen by the State;

3. Provide for State allocation of NO_X annual allowances from the compliance supplement pool (CSP) using the State's choice of allowed, alternative methodologies; or

4. Allow units that are not otherwise CAIR units to opt individually into the CAIR SO_2, NO_X annual, or NO_X ozone season trading programs under the opt-in provisions in the model rules.

An approved CAIR full SIP revision addressing EGUs' SO_2, NO_X annual, or NO_X ozone season emissions will replace the CAIR FIP for that State for the respective EGU emissions.

V. Analysis of Massachusetts's CAIR SIP Submittal

A summary of EPA's review of Massachusetts's CAIR program is given below. Additional details regarding requirements of Massachusetts's 310 CMR 7.32 regulation and EPA's evaluation of this regulation are detailed in a memorandum dated July 16, 2007, entitled ''Technical Support Document (TSD) for revisions to the Massachusetts SIP: 310 CMR 7.32 (''Massachusetts Clean Air Interstate Rule'').'' The TSD and Massachusetts's CAIR SIP submittal are available in the docket supporting this action.

A. State Budgets for Allowance Allocations

The CAIR NO_X annual and ozone season budgets were developed from historical heat input data for EGUs. Using these data, EPA calculated annual and ozone season regional heat input values, which were multiplied by 0.15 pounds per million British thermal units (lb/mmBtu), for phase 1 of the CAIR program (2009–2014) and by 0.125 lb/mmBtu, for phase 2 of the CAIR program (2015 and thereafter) to obtain regional NO_X budgets for 2009–2014 and for 2015 and thereafter, respectively. EPA derived the State NO_X annual and ozone season budgets from the regional budgets using State heat input data adjusted by fuel factors. Massachusetts, however, is only required to participate in the CAIR NO_X ozone-season program, not the CAIR NO_X annual or SO_2 trading programs. Therefore, only CAIR NO_X ozone-season budgets apply to the Massachusetts CAIR program.

In today's action, EPA is proposing approval of Massachusetts's SIP revision at 310 CMR 7.32. This SIP revision adopts the budgets established for the State in CAIR, *i.e.*, 7,551 tons of NO_X ozone-season emissions for CAIR phase 1 and 6,293 tons for CAIR phase 2, plus an additional 363 tons of NO_X ozone-season emissions for both phases 1 and 2 to account for NO_X emissions from ''non-EGU'' units from the Massachusetts NO_X SIP Call trading program (see section V.B. below). The total NO_X ozone-season budget is therefore 7,914 tons of NO_X ozone-season emissions for CAIR phase 1 and 6,656 tons for CAIR phase 2. Massachusetts's SIP revision sets this budget as the total number of allowances (with each allowance authorizing one ton of NO_X ozone-season emissions) available for allocation for each year under the EPA-administered CAIR cap-and-trade program.

B. CAIR Cap-and-Trade Programs

The CAIR NO_X annual and ozone-season model trading rules both largely mirror the structure of the NO_X SIP Call model trading rule in 40 CFR part 96, subparts A through I. While the provisions of the NO_X annual and ozone-season model rules are similar, there are some differences. For example, the NO_X ozone season model rule reflects the fact that the CAIR NO_X ozone season trading program replaces the NO_X SIP Call trading program after the 2008 ozone season and is coordinated with the NO_X SIP Call program. The NO_X ozone season model rule provides incentives for early emissions reductions by allowing banked, pre-2009 NO_X SIP Call allowances to be used for compliance in the CAIR NO_X ozone-season trading program. In addition, States have the option of continuing to meet their NO_X SIP Call requirement by participating in the CAIR NO_X ozone season trading program and including all their NO_X SIP Call trading sources in that program. Massachusetts has decided to exercise the option of including all its NO_X SIP Call units in its State CAIR program. Therefore, the Massachusetts CAIR SIP revision includes amendments to the Massachusetts NO_X SIP Call trading program (310 CMR 7.28) such that the NO_X SIP Call trading program applies for the control periods from 2003 through 2008, but is then superseded by the Massachusetts CAIR program (310 CMR 7.32) beginning with the control period in 2009.

EPA also used the CAIR model trading rules as the basis for the trading programs in the CAIR FIPs. The CAIR FIP trading rules are virtually identical to the CAIR model trading rules, with changes made to account for federal rather than state implementation. The CAIR model SO_2, NO_X annual, and NO_X ozone season trading rules and the respective CAIR FIP trading rules are designed to work together as integrated SO_2, NO_X annual, and NO_X ozone season trading programs.

In the SIP revision, Massachusetts chooses to implement its CAIR budgets by requiring EGUs (as well as ''non-EGUs'' from its NO_X SIP Call trading program, as discussed below) to participate in EPA-administered cap-and-trade programs for NO_X ozone-season emissions. Massachusetts has adopted a full SIP revision that adopts, with certain allowed changes discussed below, the CAIR model cap-and-trade rules for NO_X ozone-season emissions.

C. Applicability Provisions for non-EGU NO_X SIP Call Sources

In general, the CAIR model trading rules apply to any stationary, fossil-fuel-fired boiler or stationary, fossil-fuel-fired combustion turbine serving at any time, since the later of November 15, 1990 or the start-up of the unit's combustion chamber, a generator with nameplate capacity of more than 25 MWe producing electricity for sale.

States have the option of bringing in, for the CAIR NO_X ozone season program only, those units in the State's NO_X SIP Call trading program that are not EGUs as defined under CAIR (herein called ''non-EGUs''). EPA advises States exercising this option to add the applicability provisions in the State's NO_X SIP Call trading rule for ''non-EGUs'' to the applicability provisions in 40 CFR 96.304 in order to include in the CAIR NO_X ozone season trading program all units required to be in the

State's NO_X SIP Call trading program that are not already included under 40 CFR 96.304. Under this option, the CAIR NO_X ozone-season program must cover all large industrial boilers and combustion turbines, as well as any small EGUs (i.e. units serving a generator with a nameplate capacity of 25 MWe or less) that the State currently requires to be in the NO_X SIP Call trading program.

Massachusetts has chosen to expand the applicability provisions of the CAIR NO_X ozone season trading program to include all units in the State's NO_X SIP Call trading program. Units in the Massachusetts NO_X SIP Call trading program include units that burn more than 50-percent fossil fuel and that have a maximum heat-input capacity of 250 million British thermal units (MMBtu) or more, or serve a generator with a nameplate capacity of 15 MWe or more. These units are included in the Massachusetts NO_X SIP Call trading program whether or not they produce electricity for sale, and, as noted above, will be included in the Massachusetts CAIR program beginning with the control period in 2009.

EPA has determined that Massachusetts 310 CMR 7.32 includes the allowable CAIR applicability provisions relating to adding all NO_X SIP Call trading program units to the Massachusetts CAIR NO_X ozone season program.

D. NO_X Allowance Allocations

Deadlines: There is one technical flaw in the SIP revision, but EPA is proposing to approve the SIP revision despite this flaw. CAIR requires states to submit to EPA the initial allocations for EGUs that started operation before 2001 by October 31, 2006. Massachusetts's proposed SIP revision does not meet this requirement, nor did the state submit those allocations by this date. However, the purpose of this date was to allow EPA sufficient time to process the allocations data. EPA now has the allocations, and no outside party was prejudiced by Massachusetts's failure to meet this date. The TSD associated with this Notice of Proposed Rulemaking explains this issue and EPA's rationale for proposing to approve the SIP revision despite this technical flaw.

NO_X allowance-allocation methodology: Under the NO_X allowance-allocation methodology in the CAIR model trading rules and in the CAIR FIP, NO_X annual and ozone-season allowances are allocated to units that have operated for five years (i.e., ''existing units''), based on heat input data from a three-year period that are adjusted for fuel type by using fuel factors of 1.0 for coal, 0.6 for oil, and 0.4 for other fuels. The CAIR model trading rules and the CAIR FIP also provide a new unit set-aside from which units without five years of operation are allocated allowances based on the units' prior year emissions.

States may establish in their SIP submissions a different NO_X allowance-allocation methodology that will be used to allocate allowances to sources in the States if certain requirements are met concerning the timing of submission of units' allocations to the Administrator for recordation and the total amount of allowances allocated for each control period. In adopting alternative NO_X allowance-allocation methodologies, States have flexibility with regard to:

1. The cost to recipients of the allowances, which may be distributed for free or auctioned;
2. The frequency of allocations;
3. The basis for allocating allowances, which may be distributed, for example, based on historical heat input or electric and thermal output; and
4. The use of allowance set-asides and, if used, their size.

Massachusetts has chosen to replace the provisions of the CAIR NO_X ozone-season model trading rule concerning allowance allocations with its own methodology. Massachusetts's 310 CMR 7.32 distributes NO_X ozone-season allowances based upon historical electric and thermal output, rather than heat input. Massachusetts also provides a percentage of allowances for Public Benefit and new unit set-asides.

(1) What Types of Set-Asides are Included in Massachusetts CAIR?

Massachusetts 310 CMR 7.32 includes both a Public Benefit set-aside (PBSA) to encourage Energy Efficiency Projects (EEPs) and Renewable Energy Projects (REPs), and a new unit set-aside to allow for addition of new units. Both of these types of set-asides were included in the State's NO_X SIP Call trading program.

Massachusetts has set a new unit set-aside at 5 percent of the State's CAIR budget for both phases of the CAIR program. Therefore, the new unit set-aside includes 396 CAIR NO_X ozone-season allowances during CAIR phase 1 (2009–2014), and 333 allowances during CAIR phase 2 (2015 and thereafter).

Massachusetts has set a PBSA at 10 percent of the State's CAIR budget for both phases of the CAIR program. Therefore, the PBSA includes 791 CAIR NO_X ozone-season allowances during CAIR phase 1 (2009–2014), and 666 allowances during CAIR phase 2 (2015 and thereafter).

(2) Banking and Transferring of Set-Asides

The Massachusetts CAIR SIP establishes an account for any unallocated PBSA or new unit set-aside allowances so that these can be allocated in future years. This is similar to the account established under the State's NO_X SIP Call trading program. If the number of banked set-aside allowances is 10 percent or more of the total Massachusetts CAIR budget after allocations and compliance deductions have been made for a given year, the State will allocate allowances that exceed 5 percent of the State's CAIR budget to existing CAIR NO_X ozone-season units using the allocation methodology described below.

If Massachusetts approves the allocation of more allowances for EEPs and REPs than are available in the PBSA, Massachusetts will allow transfer of unallocated allowances from the new unit set-aside to the PBSA. However, allowances may not be transferred from the PBSA to the new unit set-aside.

(3) Methodology for Allocating CAIR Allowances

Massachusetts has chosen to replace the provisions of the CAIR NO_X ozone-season model trading rule concerning allowance allocations with a methodology similar to that used in the Massachusetts NO_X SIP Call trading program. This methodology, which is based on energy output, allocates allowances to existing units and, to the extent possible, to new units based on their steam and/or electricity output. More details on Massachusetts's methodology for allocating CAIR allowances can be found in the TSD associated with this Notice of Proposed Rulemaking.

(4) Massachusetts CAIR Permits and Reporting Requirements

The Massachusetts CAIR SIP includes most of the permitting provisions of the CAIR model rule. Massachusetts, however, has modified the rule as it applies to collection of output data and also requires all Massachusetts CAIR units to have Massachusetts CAIR permits.

Under the CAIR model rule, facilities that are subject to the Acid Rain Program or the CAIR NO_X and SO_2 annual trading programs must report emissions data year-round, but facilities that are only subject to the NO_X ozone-season trading program need only submit NO_X emission data to the State during the ozone season. As noted above, Massachusetts is only required to participate in the CAIR NO_X ozone-

season program. However, under Massachusetts's CAIR NO_X ozone season allowance trading program, all units recording NO_X emissions data with Continuous Emission Monitoring Systems (CEMS) are required to submit quarterly data emission reports year-round.

Because of the importance to Massachusetts of obtaining emissions data for air-quality planning efforts related to EPA's programs to address Regional Haze and Particulate Matter (PM), which are both year-round air-quality issues, Massachusetts has decided to require that all of the State's CAIR units with CEMS report NO_X emissions to the State on a year-round basis. Massachusetts will not require units without CEMS to report emissions on a year-round basis. EPA has determined that these modifications of the CAIR NO_X ozone-season trading rule in regard to collection of output data and CAIR permits are acceptable.

E. Individual Opt-in Units

The opt-in provisions of the CAIR SIP model trading rules allow certain non-EGUs (i.e., boilers, combustion turbines, and other stationary fossil-fuel-fired devices) that do not meet the applicability criteria for a CAIR trading program to participate voluntarily in (i.e., opt into) the CAIR trading program. A non-EGU may opt into one or more of the CAIR trading programs. In order to qualify to opt into a CAIR trading program, a unit must vent all emissions through a stack and be able to meet monitoring, recordkeeping, and recording requirements of 40 CFR part 75. The owners and operators seeking to opt a unit into a CAIR trading program must apply for a CAIR opt-in permit. If the unit is issued a CAIR opt-in permit, the unit becomes a CAIR unit, is allocated allowances, and must meet the same allowance-holding and emissions monitoring and reporting requirements as other units subject to the CAIR trading program. The opt-in provisions provide for two methodologies for allocating allowances for opt-in units, one methodology that applies to opt-in units in general and a second methodology that allocates allowances only to opt-in units that the owners and operators intend to repower before January 1, 2015.

States have several options concerning the opt-in provisions. States may adopt the CAIR opt-in provisions entirely or may adopt them but exclude one of the methodologies for allocating allowances. States may also decline to adopt the opt-in provisions at all.

The Massachusetts CAIR SIP does not include opt-in provisions because the State has chosen to allocate CAIR allowances using an energy-output methodology that cannot be used for opt-in sources under the model CAIR NO_X ozone-season trading rule. The Massachusetts NO_X SIP Call trading program (310 CMR 7.28), however, does allow for opt-in sources (although no sources have opted into this program to date). Therefore, sources that wish to be part of the Massachusetts CAIR program can take advantage of the opt-in provisions of the State's NO_X SIP Call program until the end of 2008.

Beginning with the 2009 ozone season, the NO_X SIP Call program will be replaced by the State's CAIR Program, and no further opt-in units will be allowed.

VI. Proposed Action

EPA is proposing to approve Massachusetts's full CAIR SIP revision submitted on March 30, 2007, including regulations 310 CMR 7.32 (''Massachusetts CAIR'') and amendments to 310 CMR 7.28 (''NO_X Allocation Trading Program''). Under this SIP revision, Massachusetts is choosing to participate in the EPA-administered cap-and-trade program for NO_X ozone-season emissions. The SIP revision meets the applicable requirements in 40 CFR 51.123(aa) with regard to NO_X ozone-season emissions. EPA is proposing to determine that the SIP as revised will meet the requirements of CAIR. As a consequence of the SIP approval, the Administrator of EPA will also issue, without providing an opportunity for a public hearing or an additional opportunity for written public comment, a final rule to withdraw the CAIR FIP concerning NO_X ozone-season emissions for Massachusetts. This action will delete and reserve 40 CFR section 52.1140 in Part 52.

VII. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely proposes to approve State law as meeting Federal requirements and would impose no additional requirements beyond those imposed by State law. Accordingly, the Administrator certifies that this proposed rule would 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 action proposes to approve pre-existing requirements under State law and would not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

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

In reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act.

Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule would not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: July 24, 2007.

Robert W. Varney,

Regional Administrator, EPA New England.

[FR Doc. E7–14887 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2007–0462; FRL–8442–5]

Revisions to the California State Implementation Plan, Sacramento Metropolitan Air Quality Management District and San Joaquin Valley Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Sacramento Metropolitan Air Quality Management District (SMAQMD) and San Joaquin Valley Air Pollution Control District (SJVAPCD) portions of the California State Implementation Plan (SIP). These revisions concern oxides of nitrogen (NO_X) emissions from boilers, process heaters, steam generators, and glass melting furnaces. We are proposing to approve local rules to regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: Any comments on this proposal must arrive by August 31, 2007.

ADDRESSES: Submit comments, identified by docket number EPA–R09-OAR–2007–0462, by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov*.

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an ''anonymous access'' system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. 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.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Francisco Dóñez, EPA Region IX, (415) 972–3956, *Donez.Francisco@epa.gov*.

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rules: SMAQMD 411 and SJVAPCD 4354. In the Rules and Regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: June 20, 2007.

Jane Diamond,

Acting Regional Administrator, Region IX.

[FR Doc. E7–14587 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2007–0477; FRL–8448–4]

Approval and Promulgation of Implementation Plans; State of Iowa

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to approve the State Implementation Plan (SIP) revision submitted by the state of Iowa for maintenance of the sulfur dioxide National Ambient Air Quality Standard in Muscatine, Iowa.

DATES: Comments on this proposed action must be received in writing by August 31, 2007.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R07–OAR–2007–0477 by one of the following methods:

1. *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

2. *E-mail: Hamilton.heather@epa.gov.*

3. *Mail:* Heather Hamilton, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101.

4. *Hand Delivery or Courier:* Deliver your comments to: Heather Hamilton, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8 to 4:30, excluding legal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Heather Hamilton at (913) 551–7039, or by e-mail at *Hamilton.heather@epa.gov.*

SUPPLEMENTARY INFORMATION: In the final rules section of the **Federal Register**, EPA is approving the state's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision amendment and anticipates no

relevant adverse comments to this action. A detailed rationale for the approval is set forth in the direct final rule. If no relevant adverse comments are received in response to this action, no further activity is contemplated in relation to this action. If EPA receives relevant 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 action. EPA will not institute a second comment period on this action. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on part of this rule and if that part can be severed from the remainder of the rule, EPA may adopt as final those parts of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the rules section of this **Federal Register**.

Dated: July 22, 2007.

John B. Askew,

Regional Administrator, Region 7.

[FR Doc. E7–14869 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL–8447–3]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List; Partial Deletion of Sites From the Otis Air National Guard Base/Camp Edwards Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of intent.

SUMMARY: EPA is announcing its intent to partially delete 61 source area sites on the Otis Air National Guard Base/Camp Edwards Superfund Site from the National Priorities List (NPL) and requests public comment on this action. A source area site is defined by: soil; structures, if present; and does not include any contaminated groundwater plume that may be below the site. Otis Air National Guard Base/Camp Edwards is a Federal Facility Superfund Site known locally as the Massachusetts Military Reservation (MMR), so this notice will use MMR as the abbreviation to describe the entire Superfund Site. The United States Air Force is the lead agency at the MMR Superfund Site.

EPA bases its proposal to partially delete the 61 source area sites from the MMR Superfund Site on the determination of EPA and the Commonwealth of Massachusetts, through the Massachusetts Department of Environmental Protection (MassDEP), that all appropriate response actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) have been implemented to protect human health, welfare, and the environment and that no further response actions by responsible parties, at these 61 sites, are appropriate. Based on all investigations completed to date, there are 80 source area sites at MMR. Upon conclusion of this process, there would be 19 source area sites remaining. This partial deletion pertains to only the surface area of sites investigated (and in some cases cleaned-up) for soil contamination, and does not pertain to any of the 12 groundwater plumes associated with MMR Superfund Site. All other sites (including all contaminated groundwater plumes on the Site) not included in this notice will remain on the NPL. In the northern half of the MMR, there are source area sites and groundwater plumes associated with an investigation and cleanup program known as the Impact Area Groundwater Study Program which is being conducted under the authority of Safe Drinking Water Act Administrative Orders. These sites and groundwater plumes are not the subject of this partial deletion proposal.

The NPL, promulgated pursuant to section 105 of CERCLA, as amended, is Appendix B of 40 CFR part 300, which is the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). This partial deletion of the Otis Air National Guard Base/Camp Edwards Superfund Site is proposed in accordance with 40 CFR 300.425(e) and the Notice of Policy Change: Partial Deletion of Sites Listed on the National Priorities List (60 FR 55466). This action is being proposed by EPA with the concurrence of the Commonwealth of Massachusetts, through the MassDEP, because EPA has determined that all appropriate response actions under CERCLA have been completed and, therefore, further remedial action pursuant to CERCLA is not appropriate.

DATES: Comments concerning this proposed partial deletion may be submitted on or before August 31, 2007.

ADDRESSES: Submit your comments identified by Docket ID No. EPA–HQ–SFUN–1989–0007, by one of the following methods:

- *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *E-mail*: lim.robert@epa.gov.
- *Fax*: 617–918–0392.
- *Mail*: Bob Lim, Remedial Project Manager, U.S. EPA. New England Region, One Congress Street, Suite 1100 (HBT), Boston, MA 02114.
- *Hand Delivery:* Records Center, One Congress Street, Suite 1100, Boston, MA 02114. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–SFUND–1989–0007. EPA's policy is that all comments received will be included in the public docket without change and may be available online at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential 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 *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is 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 *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at

the EPA's New England Region Superfund Records Center, One Congress Street, Suite 1100, Boston, MA 02114 and the Information Repositories at AFCEE/IRP Office at Building 322 on MMR, by appointment only Monday through Friday 8 am to 5 pm, (508) 968–4670 ext 1, and the Information Repositories in the Towns of Bourne, Falmouth, Sandwich, and Mashpee.

FOR FURTHER INFORMATION CONTACT: Bob Lim, Remedial Project Manager, U.S. Environmental Protection Agency, One Congress Street, Suite 1100 (HBT), Boston, Massachusetts 02114–2023, (617) 918–1392, Fax (617) 918–1291, e-mail: *lim.robert@epa.gov*.

SUPPLEMENTARY INFORMATION:

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I. Introduction

EPA is announcing its intent to partially delete 61 source area sites on the Otis Air National Guard Base/Camp Edwards Superfund Site from the National Priorities List (NPL) and requests public comment on this action. A source area site is defined by: Soil; structures, if present; and does not include any contaminated groundwater plume that may be below the site. Otis Air National Guard Base/Camp Edwards is a Federal Facility Superfund Site known locally as the Massachusetts Military Reservation (MMR), so this notice will use MMR as the abbreviation to describe the entire Superfund Site. Furthermore to avoid confusion, this notice will use a lowercase ''s'' when referring to the individual source area sites and a uppercase ''S'' for the entire Superfund Site. The United States Air Force through the Air Force Center for Engineering and Environment (AFCEE) is the lead agency at the MMR Superfund Site.

The NPL was promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act. EPA identifies sites that appear to present a significant risk to public health or the environment and maintains the NPL as the list of those sites. This partial deletion of the 61 sites on the MMR Superfund Site is proposed in accordance with 40 CFR 300.425(e) and Notice of Policy Change: Partial Deletion of Sites Listed on the National Priorities List (60 FR 55466 (Nov. 1, 1995)). EPA will accept comments on the proposal to delete the 61 sites for thirty (30) days after publication of this document in the **Federal Register**.

EPA and the Massachusetts Department of Environmental Protection (MassDEP) have determined that remedial action on site soil and, if present, structures at these clearly defined 61 sites have been successfully completed. The remaining sites of the MMR Superfund Site will remain on the NPL (all groundwater, surface water and soil not contained in these 61 portions (see Table 1)) for remedial investigation, remedial action, and continued monitoring. MMR occupies over 22,000 acres of land in portions of the Towns of Bourne, Falmouth, Mashpee, and Sandwich. MMR was listed on the National Priorities List in 1989 (CERCLIS ID—MA2570024487).

A two-party Federal Facility Agreement which was signed in 1991, and as subsequently amended, requires the Air Force to take the lead on cleanup activities for Installation Restoration Program sites at MMR.

The military's Installation Restoration Program (IRP) was established in 1982 leading to numerous soil and groundwater investigations and cleanups in the southern, developed southern half of the base. In addition, the military has extended public water supply lines into neighborhoods where plumes have affected groundwater underneath homes which had relied on private wells. To date, investigations have identified 80 source area sites and 12 groundwater plumes. Figures and tables supporting this notice are found in separate appendices in the Deletion Docket. Figure 1 shows all IRP source area sites and IRP plumes. For more information on the site history and current news at MMR, visit the program's Web site (*http://www.mmr.org*).

This partial deletion proposal pertains to the soil and, if present, structures at 61 sites ranging in size from half an acre to 80.7 acres. The total proposed area is 482.1 acres. Acreage and coordinates for each individual site are presented in each site summary. In addition, the Deletion Docket contains a file with a table of all sites with the area and coordinates of each site. Table 1 identifies structures as being present with an asterisk next to the site name and noted in those site summaries. Based on all investigations completed to date, there are 80 source area sites at MMR. Upon conclusion of this process, there would be 19 source area sites remaining. Even though some of the sites appear to be above contaminated groundwater plumes, this partial deletion does not include any plumes of contaminated groundwater because data shows that the sites are not related to the plumes.

Figure 1 identifies the 12 plumes of contaminated groundwater associated with MMR Superfund cleanup. They are: Ashumet Valley, Chemical Spill–4 (CS–4); CS–10; CS–19; CS–20; CS–21; CS–23; Fuel Spill–1 (FS–1); FS–12; FS–28; FS–29; and Landfill–1. Primary contaminants of concern in these plumes include solvents (*i.e.*, trichloroethylene, tetrachloroethylene), fuel components (*i.e.*, ethylene dibromide), and an explosive compound (*i.e.*, 1,3,5-hexahydro-1,3,5-trinitrotoluene (RDX)), in the CS–19 plume. There are currently eleven groundwater pump and treat cleanup remedies for which cleanup on some plumes is expected to continue for over 25 years. AFCEE currently operates groundwater cleanup systems for 11 groundwater plumes and treats over 18 million gallons per day. From 1997 to March 2007, over 32 billion gallons of contaminated groundwater have been extracted and treated.

In the northern half of MMR, there is a separate, ongoing investigation and cleanup program known as the Impact Area Groundwater Study Program (IAGWSP). These sites and groundwater plumes are not the subject of this Notice of Intent for Partial Deletion. The authority for this program is based upon EPA's Safe Drinking Water Act (SDWA) Program. In February 1997, EPA's New England regional office (EPA New England) issued SDWA Administrative Order 1–97–1019 (AO1) requiring investigation of contamination at or emanating from the Training Ranges and Impact Area upon the sole source aquifer that underlies MMR and surrounding communities. In May 1997, EPA New England issued SDWA Administrative Order 1–97–1030 (AO2), which prohibited all live firing of mortars and artillery, firing of lead from small arms, planned detonation of ordnance or explosives at or near the Training Ranges and Impact Area except for UXO activities, and certain other training related activities. In January 2000, EPA New England issued SDWA Administrative Order 1–2000–0014 (AO3), which required the IAGWSP to implement Rapid Response Actions (RRAs) and remedial actions to ''abate the threat to public health presented by the contamination from past and present activities and sources at and emanating from the Training Ranges and Impact Area.'' The Department of the Army is undertaking the investigation and

cleanup under the Administrative Orders. EPA has issued a total of four Administrative Orders for investigation and cleanup, and prohibition of all live fire of munitions, propellants and pyrotechnics, demolition training, firing of lead from small arms, planned detonation of ordnance, or explosives except for UXO activities and certain other training related activities. Figure 1 shows a number of plumes which have been identified in the IAGWSP investigations. The primary contaminants of concern in these plumes are 1,3,5-hexahydro-1,3,5-trinitrotoluene (RDX) and perchlorate, which are mapped to their non-detect boundary (*i.e.*, 0.35 parts per billion for perchlorate and 0.25 parts per billion for RDX). The MassDEP has promulgated a 2.0 part per billion groundwater cleanup standard for perchlorate. There is no promulgated groundwater standard for RDX, but its Health Advisory is 2.0 parts per billion and its risk-based action level for a one-in-million excess cancer risk probability is 0.6 parts per billion.

Shown on Figure 1, the IAGWSP plumes of contaminated groundwater are: Central Impact Area (CIA); Demolition Area 1 (Demo 1); Demo 2; J–1 North; J–2 North; J–2 East; J–3; L–Range; and Northwest Corner. IAGWSP source area sites are not shown on Figure 1. In 2004 and 2005, short-term response actions were undertaken to address both soil and groundwater contamination. Currently, there are temporary groundwater cleanup systems for Demo 1, J–2 North and J–3 South plumes. For more information on this program, visit the program's Web site (*http://groundwaterprogram.army.mil*).

The EPA identifies sites that appear to present a significant risk to public health or the environment and maintains the NPL as the list of those sites. As described in § 300.425(e)(3) of the NCP, sites deleted from the NPL remain eligible for remedial actions if conditions at a deleted site warrant such action.

Section II of this document explains the criteria for deleting sites from the NPL. Section III discusses the procedures EPA is using for this action. Section IV discusses sites in detail, the soil portion of each of the 61 sites, and explains how each site meets the deletion criteria.

II. NPL Deletion Criteria

The National Contingency Plan (NCP) establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate to protect public health or the environment. In making such a determination pursuant to § 300.425(e), EPA will consider, in consultation with the State, whether the following criteria have been met:

- 300.425(e)(1)(i). Responsible parties or other persons have implemented all appropriate response actions required; or
- § 300.425(e)(1)(ii). All appropriate Fund-financed response under CERCLA has been implemented; or
- § 300.425(e)(1)(iii). The remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, taking of remedial measures is not appropriate.

Deletion of a portion of a site from the NPL does not preclude eligibility for subsequent Fund-financed actions at the area deleted if future site conditions warrant such actions. § 300.425(e)(3) of the NCP provides that Fund-financed actions may be taken at sites that have been deleted from the NPL.

A partial deletion of a site from the NPL does not affect or impede EPA's ability to conduct CERCLA response activities at area not deleted and remaining on the NPL. In addition, deletion of a portion of a site from the NPL does not affect the liability of responsible parties or impede agency efforts to recover costs associated with response efforts.

In the case of MMR, the selected remedies are protective of human health and the environment. Two five-year reviews have been conducted at MMR. Copies are located at the repository previously noted. For sites with remedies or final decisions, the remedies were deemed protective, and no information existed to warrant any changes to protectiveness statements for other sites.

III. Deletion Procedures

Deletion of the 61 sites on the MMR Superfund Site from the NPL does not itself create, alter, or revoke any person's rights or obligations. Deletion of the site from the NPL does not preclude eligibility for future response actions, NCP § 300.425(e)(3). The following procedures were used for the proposed deletion of the following study areas from the MMR Superfund Site:

- EPA has recommended the partial deletion and has prepared the relevant documents.
- EPA has consulted with the Commonwealth of Massachusetts on the partial deletion of the sites from the NPL.
- The Commonwealth of Massachusetts concurred with the partial deletion of the sites from the NPL.
- Concurrent with this national Notice of Intent for Partial Deletion, a public notice will also appear in a local newspaper. Additionally, notice has been distributed to appropriate Federal, State, local officials, and other interested parties. These notices announce a thirty (30) day public comment period on the deletion package, which commences on the date of the publication of this document in the **Federal Register** and a newspaper of record.
- All relevant documents have been compiled in the site deletion docket and are available at the information repositories listed previously.

Upon completion of the thirty (30) day public comment period for the deletion of the 61 sites on the MMR Superfund Site, EPA's New England regional office will accept and evaluate all public comments received before making a final decision to delete. If necessary, the Agency will prepare a Responsiveness Summary to address any significant public comments received. The Responsiveness Summary will be made available to the public at the information repositories listed previously (or in the site docket at *http://www.regulations.gov*). If, after review of all public comments, EPA determines that the partial deletion from the NPL is appropriate, EPA will publish a final Notice of Partial Deletion in the **Federal Register**. Deletion of the 61 sites does not actually occur until the final Notice of Partial Deletion is published in the **Federal Register**.

IV. Basis for Intent for Partial Site Deletion

A. Site Histories for Partial Deletion Sites

The following information presents EPA's rationale for deleting the sites from the MMR Superfund Site. To aid in the understanding of the 61 sites that are the subject of this action, the site history narratives are organized into two groups, Sections A.1 and A.2. A summary of the site names are found in Table 1 which is found in a tables appendix in the Deletion Docket. Section A.1 contains site narratives where no cleanup action was taken because the investigation found the site conditions to be protective of both human and the environment. Section A.2 contains sites where actions (CERCLA and non-CERCLA actions) have been completed.

1. Investigation Findings for No Action Sites

The sites in this section have been investigated, but were found to have no contamination and no CERCLA or non-CERCLA actions have been taken. Sites with structures that are part of the partial deletion are noted in the each narrative, if present, and are identified in Table 2 with an asterisk. Table 2 can be found in the tables appendix in the Deletion Docket. Figures that are referenced in this section can be found in a figures appendix in the Deletion Document.

The no action decisions for these 17 sites have been documented in decision documents called No Further Action Decision Documents. These documents are jointly signed by representatives from EPA, the Air Force and the Commonwealth of Massachusetts, and provide investigation summaries and the conclusion of no action. At MMR and other Federal Facility Superfund Sites, no action for sites, which have only been investigated at the preliminary assessment/site inspection (PA/SI) level of effort and found to require no action, are typically documented via a No Further Action Decision Document rather than Record of Decision.

Chemical Spill–5 (U.S. Coast Guard) (CS–5 (CG))

Site Location and History

CS–5 (CG), U.S. Coast Guard Carpentry Shop, is located in the Cantonment Area of the MMR, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (MA State Plane NAD27 feet) are: 856392, 242413; 856587, 242280; 856502, 242170; 856307, 242305; and 856392, 242413. The area CS–5 (CG) proposed for partial deletion includes all surface soils and structures within these coordinates.

CS–5 (CG) is a less than one-acre area which featured a carpentry shop which operated from 1973 to the mid-1990s and housed paint wastes such as turpentine, thinner, and excess paint.

Investigation and Feasibility Study Activities

A Phase I Records Search was completed in December 1986. The site was assessed and found to have no evidence of past disposal or spills of hazardous substances.

No feasibility study was conducted since the records search concluded that the site did not impact the soil and groundwater.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in July 1991. No risks are present at CS–5 (CG) and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill–7 (CS–7)

Site Location and History

CS–7, Operational Motor Pool (Organizational Maintenance Shops–6), is located in the Cantonment Area of the MMR, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 863203, 241519; 863318, 241471; 863243, 241297; 863129, 241345; and 863203, 241519. The area CS–7 proposed for partial deletion includes all surface soils and structures within these coordinates.

CS–7 is half-acre area which featured a vehicle maintenance shop which was operated by the Air National Guard from 1966 to 1976. Wastes were accumulated and eventually transported for off-site disposal, but any spills would have flowed into the stormwater drainage system. Currently, Massachusetts Army National Guard vehicles are maintained at this location.

Investigation and Feasibility Study Activities

A Phase I Records Search was completed in December 1986. The site was assessed and found to have no evidence of past disposal or spills of hazardous substances. Current hazardous waste management practices were reviewed and found to be adequate in preventing spills and releases to the environment.

No feasibility study was conducted since the records search concluded that the site did not impact the soil and groundwater.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in August 1990. No risks are present at CS–7 and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-7 (U.S. Coast Guard) (CS–7 (CG))

Site Location and History

CS–7 (CG), U.S. Coast Guard Dry Cleaning Facility, is located in the Cantonment Area of the MMR, as shown in Figure 4. Its coordinates in Northing and Easting coordinates (NAD27) are: 859050, 239116; 859086, 239098; 859043, 239010; 859006, 239028; and 859050, 239116. The area CS–7 (CG) proposed for partial deletion includes all surface soils and structures within these coordinates.

CS–7 (CG) is a one tenth of an acre area which featured a dry-cleaning facility which operated from the mid-1960s to 1975 using a TCE-containing dry-cleaning compound. The dry-cleaning machines were reported to have periodically leaked fluid on the floor which had floor drains that were connected to the base sanitary sewer system.

Investigation and Feasibility Study Activities

A Phase I Records Search was completed in December 1986. The site was assessed and found to have no evidence of past disposal or spills of hazardous substances onto site soil because any leaked or spilled dry-cleaning fluids would have flowed into the building's floor drains which are connected to the base sanitary sewer system.

No feasibility study was conducted since the records search concluded that the site did not impact the soil and groundwater.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in July 1991. No risks are present at CS–7 (CG) and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-12 (CS–12)

Site Location and History

CS–12, Veterans Administration Roads and Grounds Shop, is located in the Cantonment Area of the MMR, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 851979, 246666; 852048, 246851; 852328, 246750; 852260, 246566; and 851979, 246666. The area CS–12 proposed for partial deletion includes all surface soils and structures within these coordinates.

CS–12 is a one-acre area which featured a maintenance shop for the Veterans Administration which has operated since 1980. All generated wastes are disposed at an off-site location, but any spills would have flowed into floor drains which include an oil/water separator and leaching pit.

No significant spills of waste petroleum, oil or lubricants; solvents; herbicides; or pesticides are know to have occurred.

Investigation and Feasibility Study Activities

A Phase I Records Search was completed in December 1986. The site was assessed and found to have no evidence of past disposal or spills of hazardous substances. Investigation indicated no contamination requiring action. Current hazardous waste management practices were reviewed and found to be adequate in preventing spills and releases to the environment.

No feasibility study was conducted since the records search concluded that the site did not impact the soil and groundwater.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in July 1991. No risks are present at CS–12 and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Coal Yard-1 (CY–1)

Site Location and History

CY–1 is located in the western half of the Cantonment Area of the MMR, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 855517, 240898; 856096, 240798; 856109, 240882; 856835, 240781; 856662, 240092; 856946, 240284; 855839, 239812; 855260, 239978; and 855517, 240898. The area CY–1 proposed for partial deletion includes all structures and surface soils within these coordinates.

CY–1 is a 24.5-acre former U.S. Army coal storage area which operated from 1940 to 1957. Coal was unloaded and stockpiled on the ground surface prior to transport to individual power plants.

Investigation and Feasibility Study Activities

Since CY–1 had a similar operational history to CY–2 and CY–4, findings from CY–2 and CY–4 investigations were used to guide the CY–1 investigation. Investigations at CY–2 and CY–4 included: soil borings and monitoring well installation; surface and subsurface soil samples; and ash samples. Results from these investigations demonstrated that coal storages did not cause soil or groundwater contamination. Of the few detected analytes, all were below action levels.

The distribution of PAHs at CY–2 suggests that significant leaching of PAHs from coal storage activities has not occurred. Groundwater data from CY–2 also confirms that PAHs are not migrating to groundwater. A groundwater monitoring well at CY–1 was installed in 1998 and found not to contact any site-related contaminants. Additional surface soil sampling was conducted at CY–1 in June 2001. Samples were analyzed for specific metals (i.e, arsenic, chromium, lead, vanadium, and zinc). All results were below action levels.

Based on the findings at CY–2 and CY–4, and of additional investigations at CY–1 and CY–3, no further action was recommended at CY–1. No feasibility study was conducted since the investigations concluded that there were no risks to human health and the environment.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in January 2003. No risks requiring action are present at CY–1, and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Coal Yard-3 (CY–3)

Site Location and History

CY–3 is located in the western half of the Cantonment Area of the MMR, as shown in Figure 4. Its coordinates in Northing and Easting coordinates (NAD27) are: 854442, 243657; 855106, 243623; 854977, 243197; 854604, 243197; 854602, 243379; 854454, 243431; and 854442, 243657. The area CY–3 proposed for partial deletion includes all surface soils within these coordinates.

CY–3 is a five-acre area which was located at the former VA hospital steam plant which operated from 1945 to 1972. Coal was stored on an unbermed, paved pad before transfer to hopper bins. Coal ash was temporarily stored in a pit before being taken to the on-base landfill. All stockpiled coal and ash have been removed.

Investigation and Feasibility Study Activities

Since CY–3 had a similar operational history to CY–2 and CY–4, findings from CY–2 and CY–4 investigations were used to guide the CY–3 investigation. Investigations at CY–2 and CY–4 included: soil borings and monitoring well installation; surface and subsurface soil samples; and ash samples. Results from these investigations demonstrated that coal storages did not cause soil or groundwater contamination. Of the few detected analytes, all were below action levels.

The distribution of PAHs at CY–2 suggests that significant leaching of PAHs from coal storage activities has not occurred. Groundwater data from CY–2 also confirms that PAHs are not migrating to groundwater. A groundwater monitoring well at CY–1 was installed in 1998 and found not to contact any site-related contaminants. Additional surface soil sampling was conducted at CY–3 in June 2001. Samples were analyzed for specific metals (i.e, arsenic, chromium, lead, vanadium, and zinc). All results were below action levels.

Based on the findings at CY–2 and CY–4, and of additional investigations at CY–1 and CY–3, no further action was recommended at CY–3. No feasibility study was conducted since the investigations concluded that there were no risks to human health and the environment.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in January 2003. No risks requiring action are present at CY–3, and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-2 (U.S. Coast Guard) (FS–2 (CG))

Site Location and History

FS–2 (CG) is located in the western half of the Cantonment Area of the MMR, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 856255, 237383; 857124, 237257; 857125, 236889; 856250, 237016, and 856255, 237383. The area FS–2 (CG) proposed for partial deletion includes all surface soils within these coordinates.

FS–2 (CG) is a four-acre area which was a former location of a hot-mix asphalt plant which operated between 1941 and 1943. It was reported that asphalt transportation trucks were washed with kerosene or diesel fuel at an unknown location within the area.

Investigation and Feasibility Study Activities

A preliminary assessment in 1986 identified FS–2 (CG) as a potential area of past uncontrolled releases of hazardous substances. During field investigations between October 1990 and January 1991, and in 1993, test pits were excavated and surface soil and subsurface soil samples were collected and analyzed to evaluate site conditions. A downgradient monitoring well was also installed and sampled. In 1995, additional soil samples (surface and subsurface) were collected using a hand-auger and analyzed.

Soil data and field observations confirmed the presence of the past asphalt-batching plant and construction debris. Semivolatile compounds (i.e., those typically found in asphalt) were detected. Inorganics were sporadically detected above background concentrations. Compounds observed in soil were not observed in groundwater which is further indication of no source areas at the site. Human health and ecological risk was evaluated at the site and indicated that the site did not pose a risk warranting any action.

No feasibility study was conducted since a risk evaluation concluded that there were no risks to human health and the environment.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in February 2000. No risks requiring action are present at FS–2 (CG), and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-3 (FS–3)

Site Location and History

FS–3, the Johns Pond Fuel Dump Site, is located south of the MMR boundary, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 865984, 235664; 866044, 235743; 867241, 234840; 867181, 234760; and 865984, 235664. The area FS–3 proposed for partial deletion includes all structures and surface soils within these coordinates.

FS–3 is a three-acre area which consists of a 1,500 foot road section along Back Road and 50 feet on either side of the road. It was estimated that between 1955 and 1962, an average of three aircraft refueler trucks per week each drained 40 gallons of fuel or fuel-contaminated water onto the shoulders of this road section.

Investigation and Feasibility Study Activities

A preliminary assessment in 1986 identified FS–3 as a potential area of past uncontrolled releases of hazardous substances. A site investigation which included a soil gas survey, soil boring and monitoring well installation, and collection and analysis of soil and groundwater samples was conducted in 1988. Soil data showed an absence of contaminant source areas and were consistent with background values for inorganics. Fuel-related compounds were not detected in groundwater. The investigation data supported that there was no contaminated soil or groundwater from the historical releases.

No feasibility study was conducted since a risk evaluation concluded that there were no risks to human health and the environment.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in January 2000. No risks are present at FS–3 and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-15 (FS–15)

Site Location and History

FS–15, Runway No. 5, is located in the secure flightline area of the MMR, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 864651, 238513; 864787, 238949; 865144, 238777; 864832, 238386; and 864651, 238513. The area FS–15 proposed for partial deletion includes all surface soils within these coordinates.

FS–15 is a three-acre area which was known as the Runway No. 5 fuel spill of aviation gasoline. It was reported to have occurred in the early 1960s when a plane crashed near at the southern end of the runway by the same name. A significant amount of the fuel was consumed in a fire.

Investigation and Feasibility Study Activities

A Phase I Records Search was completed in December 1986. The records search concluded that there was negligible contaminant migration into the soil and groundwater because the fire following the fuel spill consumed the fuel.

No feasibility study was conducted since the records search concluded that the spill did not impact the soil and groundwater.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in August 1990. No risks are present at FS–15 and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-16 (FS–16)

Site Location and History

FS–16, Army Maintenance, Building 2816, is located in the secure flightline area of the MMR, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 863696, 241715; 863796, 241952; 863998, 241855; 863892, 241627; and 863696, 241715. The area FS–16 proposed for partial deletion includes all surface soils and structures within these coordinates.

FS–16 is a one-acre area which was located outside of Building 2816, the Army Helicopter Maintenance Building, where a tanker truck spilled approximately 200 gallons of JP–4 in 1982. The spill was washed off the tarmac and into the surrounding ground.

Investigation and Feasibility Study Activities

A Phase I Records Search was completed in December 1986. The records search concluded that there was negligible contaminant migration into the soil and groundwater because the volume of spilled fuel was small and it was assumed that a majority of the spilled fuel volatilized and degraded over time.

No feasibility study was conducted since the records search concluded that the spill did not impact the soil and groundwater.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in July 1991. No risks are present at FS–16 and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-27 (FS–27)

Site Location and History

FS–27 is located south of the MMR boundary, as shown in Figure 4. It is three parcels with coordinates in Easting and Northing coordinates (NAD27). The first parcel's coordinates are: 857983, 238854; 857986, 238536; 857917, 238536; 857918, 238854; and 857983, 238854. The second parcel's coordinates are: 855492, 242421; 855716, 242424; 855716, 242258; 855494, 242260; and 855492, 242421. The third parcel's coordinates are: 858088, 244484; 859974, 243704; 859949, 243537; 860044, 243382; 860235, 243323; 860326, 243027; 862694, 241938; 861667, 239703; 861660, 239707; 862683, 241932; 860319, 243022; 860229, 243316; 860036, 243377; 859941, 243536; 859966, 243700; 858085, 244476; 854176, 246140; 854023, 245467; 853789, 245026; 853460, 244616; 853187, 244306; 853109, 243761; 853238, 243553; 852968, 243312; 852963, 243318; 853228, 243557; 853100, 243760; 853180, 244310; 853454, 244621; 853782, 245031; 854015, 245469; 854168, 246143; 852475, 246877; 850727, 248013; 850572, 248268; 850170, 249298; 849787, 249779; 849347, 250292; 849095, 250502; 848664, 250713; 848399, 250928; 848404, 250934; 848668, 250720; 849099, 250509; 849353, 250297; 849793, 249784; 850177, 249302; 850580, 248271; 850732, 248020; 852482, 246881; and 858088, 244484. The area FS–27 proposed for partial deletion includes all surface soils within these coordinates.

FS–27 is composed of three areas totaling six acres where soil excavated during the installation of a fiber-optic cable line along Connery Avenue, West Hospital Road, North Inner Road, and Generals Boulevard was stockpiled. The stockpiles were: beneath overhead power lines off Guenther Road (approximately 1,000 cubic yards); and in an embankment (approximately 480 cubic yards) behind Building 5202 (the 3-in-1 Store).

Investigation and Feasibility Study Activities

Investigation of potential contamination from FS–27 excavated soil was initiated because petroleum hydrocarbons were detected in March 1990 in soil from the Guenther Road stockpile when it was used as backfill at another site. A site inspection at FS–27 along the fiber optic line was conducted in 1993. A remedial investigation of the area adjacent to Building 5202 was conducted in 1993–1994. A supplemental investigation was conducted in 1999. Activities included subsurface soil sampling, installation of monitoring wells, and analyses of soil and groundwater samples.

Results from the investigations demonstrated that the soil was not significantly impacted from site activities. Groundwater samples near Building 5202 show that the soil is not contaminated and impacting the groundwater.

No feasibility study was conducted since a risk evaluation concluded that there were no risks to human health or the environment.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in May 2001. No risks are present at FS–27 and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Landfill-1 (U.S. Coast Guard) (LF–1 (CG))

Site Location and History

LF–1 (CG) is located in the southeastern portion of MMR, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 866535, 243403; 866639, 242391; 865910, 242353; 865811, 243343; and 866535, 243403. The area LF–1 (CG) proposed for partial deletion includes all surface soils within these coordinates.

LF–1 (CG) is a 16-acre area that was used for disposal of asphalt and debris generated during a runway extension project completed in the 1950s.

Investigation and Feasibility Study Activities

This site was initially identified in the records search in 1986. Empty containers and asphalt rubble were observed during a walkover which was conducted in February 1990. A single downgradient monitoring well was installed to monitor for potential impact of the site on groundwater. Groundwater sampling results demonstrated no impact to groundwater quality.

No feasibility study was conducted since no contaminants of concern were identified.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in December 1995. No risks are present at LF–1 (CG) and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Landfill-2 (U.S. Coast Guard) (LF–2 (CG))

Site Location and History

LF–2 (CG), U.S. Coast Guard Rubble Landfill, is located in the Cantonment Area of the MMR, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 855740, 242295; 856395, 242984; 856699, 242717; 856038, 242032; and 855740, 242295. The area LF–(CG) proposed for partial deletion includes all surface soils within these coordinates.

LF–2 (CG) is a nine-acre area which was used for the disposal of asphalt and concrete.

Investigation and Feasibility Study Activities

A Phase I Records Search was completed in December 1986. The site was assessed and found to have no evidence of past disposal or spills of hazardous substances.

No feasibility study was conducted since the records search concluded that the site did not impact the soil and groundwater.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in July 1991. No risks are present at LF–2 (CG) and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Landfill-3 (LF–3)

Site Location and History

LF–3 is located in the northeastern edge of MMR, as shown in Figure 3. Its coordinates in Easting and Northing coordinates (NAD27) are: 875410, 267386; 875088, 267242; 874688, 268236; 875009, 268380; and 875410, 267386. The area LF–3 proposed for partial deletion includes all surface soils within these coordinates.

LF–3 consists of several piles of sand located along the eastern edge of a deep, steep sloping kettle depression.

Investigation and Feasibility Study Activities

In 1985, this unauthorized disposal area was identified from an adjacent dirt road. It was reported to contain 'household items, trash, construction debris, mattresses, furniture, and brush piles.' No evidence of hazardous waste (*i.e.*, empty fuel or paint cans, or drums) was observed.

On August 6, 1996, representatives from EPA, MassDEP, Army, and AFCEE conducted a site visit. At the time of the site visit, the area was observed to be overgrown with trees and shrubs. No evidence of waste, debris or contamination was visible.

No feasibility study was conducted since past waste disposal was determined not hazardous and removed, and then replaced with clean sand.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in April 1997. No risks are present at LF–3 and no institutional controls are present.

Response Actions and Cleanup Standards

In 1985, following the discovery of the unauthorized dumping, approximately two five-ton dump truck loads of debris was removed in a non-CERCLA action, and taken to the main base landfill.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Landfill-3 (U.S. Coast Guard) (LF–3 (CG))

Site Location and History

LF–3 (CG), U.S. Coast Guard Rubble Landfill, is located in the Cantonment Area of the MMR, as shown in Figure 3. Its coordinates in Easting and Northing coordinates (NAD27) are: 871815, 259843; 872208, 260744; 872648, 260310; 872235, 259424; and 871815, 259843. The area LF–3 (USCG) proposed for partial deletion includes all surface soils within these coordinates. LF–3 (CG) is a 13-acre area which was used for the disposal of demolition rubble and debris.

The site received sand and gravel excavated from the construction of a dispensary building.

Investigation and Feasibility Study Activities

A Phase I Records Search was completed in December 1986. The site was assessed and found to have no evidence of past disposal or spills of hazardous substances.

No feasibility study was conducted since the records search concluded that the site did not impact the soil and groundwater.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in July 1991. No risks are present at LF–3 (CG) and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Landfill-5 (LF–5)

Site Location and History

LF–5, Rubble Landfill at Veterans Administration Cemetery, is located in the Cantonment Area of the MMR, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 854089, 245737; 853972, 245339; 853768, 245007; 853211, 245502; 853293, 245758, and 854089, 245737. The area LF–5 proposed for partial deletion includes all surface soils within these coordinates.

LF–5 is a ten-acre area which contained a concrete rubble and debris fill area.

Investigation and Feasibility Study Activities

A Phase I Records Search was completed in December 1986. The site was assessed and found to have no evidence of past disposal or spills of hazardous substances.

No feasibility study was conducted since the records search concluded that the landfill did not impact the soil and groundwater.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in August 1990. No risks are present at LF–5 and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Landfill-6 (LF–6)

Site Location and History

LF–6, former U.S. Navy Construction Landfill, is located in the secure flightline area just west of Runway 5, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 865512, 240132; 865654, 240686; 865844, 240664; 865915, 240040, and 865512, 240132.

The area LF–6 proposed for partial deletion includes all surface soils within these coordinates.

LF–6 is a four-acre area which contained a debris and concrete rubble fill area during expansion of the taxiway area and has been paved over.

Investigation and Feasibility Study Activities

A Phase I Records Search was completed in December 1986. The site was assessed and found to have no evidence of past disposal or spills of hazardous substances.

No feasibility study was conducted since the records search concluded that the landfill did not impact the soil and groundwater.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in August 1990. No risks are present at LF–6 and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been taken and no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

2. Investigation Findings and Response Action Summaries

These sites have been investigated and have had actions (CERCLA and/or non-CERCLA) to reduce and/or eliminate any risk to human health and environment, and to prevent soil contamination from leaching into groundwater. Sites with structures that are part of the partial deletion are noted at the beginning of each of the descriptions. Table 3 which is found in a tables appendix in the Deletion Docket contains a summary of the site names. There are a total of 44 sites in this group. Figures showing the location of the following sites are found in the figures appendix of the Deletion Docket.

Chemical Spill-1 (CS–1)

Site Location and History

CS–1 is located on North Truck Road, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 864286, 242486; 860657, 244156; 860795, 244472; 861764, 243991; 861854, 244185; 864463, 242886; and 864286, 242486. The area CS–1 proposed for partial deletion includes all surface soils and existing structures within these coordinates.

CS–1 was active from 1941 to 1946, and was a 40-acre vehicle maintenance site with a motor pool, 11 vehicle maintenance buildings, and 11 gas stations. Other components of the site included 12 catch basins located within the paved motor pool areas, 11 leaching wells associated with the vehicle maintenance buildings, and the fenced perimeter that received surface runoff from the pavement.

Investigation and Feasibility Study Activities

A site inspection at CS–1 was conducted in 1993 and led to two rounds of confirmational sampling in 1995 and 1999. The site inspection field work consisted of magnetometer surveys, surface and subsurface soil sampling, monitoring well installation, and groundwater sampling.

The field work identified two USTs, confirmed removal of USTs near a taxiway, found metals (beryllium, chromium, lead, nickel, and thallium) in unfiltered groundwater samples, detected low concentrations of organic compounds in groundwater samples, and found contamination in catch basins and vehicle maintenance building leaching wells. Groundwater sampling in 1995 using the low flow purge and sampling technique showed that metals were below action levels at the site and earlier detections were due to suspended particulates. The site inspection recommended removal of existing USTs, vehicle maintenance building foundation slabs, work pits and associated soil, and catch basins. A groundwater sampling event in 1999 confirmed that there was no organic groundwater contamination present below the site.

No feasibility study was conducted since response actions in the form of CERCLA removal actions were conducted as part of the basewide drainage structure removal program.

Characterization of Risk and Decision Document Findings

Due to the response actions conducted under the drainage structure removal program in 1996, a No Further Action Decision Document was finalized in September 1999. No further risks are present at CS–1 and no institutional controls are present.

Response Actions and Cleanup Standards

In 1985 and 1986, nine USTs were removed under non-CERCLA authority (*i.e.*, no Action Memorandum was issued). In addition, as part of a basewide drainage structure CERCLA removal program, a total of 49 drainage structures and associated contaminated soil (approximately 900 tons) were removed in 1996. Two 5,000 gallon USTs inside the flight line area were identified and removed. Excavated soil was transported to an on-base asphalt batching facility.

Given its location in an active portion of the MMR, structures related to airfield activities remain present within the former CS–1 site.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-1 (U.S.Coast Guard) (CS–1 (CG))

Site Location and History

Chemical Spill-1 (U.S. Coast Guard) (CS–1 (CG)) is also known as the U.S. Coast Guard Transmitter Station and is shown in Figure 3. Its coordinates in Easting and Northing coordinates (NAD27) are: 871486, 261949; 871765, 261814; 871693, 241646; 871825, 261572; 871681, 261267; 871107, 261544; 871292, 261850; 871406, 261794; and 871486, 261949. The area CS–1 (CG) proposed for partial deletion includes all surface soils and existing structures within these coordinates.

CS–1 (CG) occupies a six-acre area where a building, a 4,000-gallon underground storage tank, and storage sheds are located. Between 1968 and 1975, activities such as disposal of waste solvent on the ground and burial of used electrical components may have released contaminants into the environment. Drummed solvents were stored on-site; however the storage area has since been removed of drums and covered by an addition to the transmitter building.

Investigation and Feasibility Study Activities

Site investigations were conducted to characterize the nature and distribution of contaminants at CS–1 (CG) between 1986 and 1993. A ground-penetrating radar survey identified anomalies in which electrical cabinets were found and removed. The SI and RI did not identify compounds at concentrations indicative of disposal of hazardous substances.

No feasibility study was conducted since the site did not pose a risk.

Characterization of Risk and Decision Document Findings

The investigations concluded that the site did not pose a risk. A Record of Decision was finalized in September 1995 and selected no further action with semi-annual groundwater monitoring for volatile organic compounds. In July 2004, after several years of monitoring data, an agreement was reached to cease groundwater monitoring as concentrations were below any action levels.

No further risks are present at CS–1 (CG) and no institutional controls are present.

Response Actions and Cleanup Standards

No response actions have been conducted, therefore no cleanup standards have been set.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-2 (CS–2)

Site Location and History

CS–2 is located in the Cantonment Area of the MMR, as shown in Figure 5. It is composed of two parcels. Their coordinates in Easting and Northing coordinates (NAD27) are: 863028, 237328; 863695, 238801; 863882, 238716; 863205, 237242; and 863028, 237328 for parcel A; and 863989, 240813; 864349, 240657; 864097, 240141; 863963, 240203; 864145, 240589; 863929, 240685; and 863989, 240813 for parcel B. The area CS–2 proposed for partial deletion includes all surface soils within these coordinates.

CS–2 is a ten-acre area composed of three former motor pools and subsurface structures associated with a building. Each motor pool which was active from 1941 to 1946 originally consisted of a vehicle maintenance building, a gas station with a leaching well, one or two underground storage tanks, and one or two other buildings.

Investigation and Feasibility Study Activities

CS–2 was identified as a potential site from a records search which was conducted in 1986. A sump investigation was conducted in 1991 which led to a site inspection in 1993 and groundwater sampling in 1999. The site inspection field work consisted of magnetometer surveys, surface and subsurface soil sampling, monitoring well installation, and groundwater sampling focusing on the presence or absence of contamination associated with the former motor pools and subsurface structures.

The site inspection's magnetometer survey confirmed that five USTs associated with Blocks 2, 4 and 5 were removed. Sampling results for soil and groundwater did not identify significant organic or metals contamination from historical uses. A groundwater sampling event in 1999 confirmed that there was no organic or metals contamination as the results were below action levels.

No feasibility study was conducted since a CERCLA removal response action removed drainage structures which were potential contamination sources, and a risk evaluation determined that there were no risks to human health or the environment.

Characterization of Risk and Decision Document Findings

Due to the response actions conducted under the drainage structure removal program in 1996, a No Further Action Decision Document was finalized in November 2000. No further risks are present at CS–2 and no institutional controls are present.

Response Actions and Cleanup Standards

In the early to mid-1980s, five USTs associated with Blocks 2, 4 and 5 were removed under non-CERCLA authority. In addition, as part of a CERCLA basewide drainage structure removal program, a total of 18 drainage structures and associated contaminated soil were removed in 1996. Excavated soil was transported to an on-base asphalt batching facility.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-2 (U.S. Coast Guard) (CS–2 (CG))

Site Location and History

CS–2 (CG) is located within the secured flightline area of the MMR, as shown in Figure 5. The coordinates in Easting and Northing coordinates (NAD27) are: 866410, 244042; 867591, 244186; 867664, 243676; 867263, 243637; 867313, 243185; 867049, 243157; 867000, 243604; 866463, 243551; and 866410, 244042. The area CS–2 (CG) proposed for partial deletion includes all surface soils and existing structures within these coordinates.

CS–2 (CG) is a 16-acre area which featured U.S. Coast Guard Air Station Hangars 3170 and 3172, a former auto hobby shop in Building 3161, a former Ground Support Shop in Building 3162, and administrative facilities in Buildings 3163 and 3164.

Investigation and Feasibility Study Activities

CS–2 (CG) was investigated several times between 1989 and 1995 with additional groundwater and sediment sampling in 1999. Investigation activities included a geophysical survey, soil gas survey, test pitting, soil borings, installation of monitoring wells, and collection and analysis of soil and sediment samples. Results of the site investigations indicated minor releases of fuel, polychlorinated biphenyls, and inorganic compounds in the area. However, based on the results of a risk evaluation, unacceptable human health and ecological risks are not expected from exposures to soil and groundwater.

No feasibility study was conducted since a CERCLA response action removed drainage structures which were potential contamination sources, and a risk evaluation determined that there were no risks to human health or the environment.

Characterization of Risk and Decision Document Findings

Due to the response actions conducted under the drainage structure removal program in 1996, a No Further Action Decision Document was finalized in November 2000. No further risks are present at CS–2 (CG) and no institutional controls are present.

Response Actions and Cleanup Standards

In 1996, a leaching well and leach field associated with Building 3170 were removed in a CERCLA removal action as part of a basewide drainage structure removal program. A dry well located west of Building 3162 was replaced in 1992 and contaminated sediments were removed. In April 1993, an 8,000 gallon underground storage tank was removed in a non-CERCLA action.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-3 (CS–3)

Site Location and History

CS–3, South Truck Road Motor Pool, is located in the southern portion of the MMR, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 858508, 238559; 858508, 238564; 861531, 237143; 851364, 236782; 860282, 237287; 860004, 236700; 859113, 237123; 859391, 237706; 858339, 238201; and 858508, 238559. The area CS–3 proposed for partial deletion includes all surface soils and existing structures within these coordinates.

CS–3 is a 45-acre area which featured a motor pool which was used by various agencies (U.S. Army from 1940 to 1946; Air National Guard Civil Engineering from 1950 to 1973; and U.S. Air Force from 1955 to 1973).

Investigation and Feasibility Study Activities

Following a preliminary assessment in 1986, CS–3 was investigated and characterized during two site inspections in 1988 and 1989, and a groundwater sampling program in 1999. Investigation activities included: a soil gas survey; excavation of test pits; installation of test boring and monitoring wells; and soil and groundwater sampling and analysis. In 1991, sumps at CS–3 were investigated as part of a basewide investigation program.

Soil and groundwater sampling detected minimal contamination. Results of the human health and ecological risk assessments suggest that unacceptable levels of risk are not anticipated.

No feasibility study was conducted since response actions in the form of non-CERCLA and CERCLA removal actions were conducted and the investigations concluded that the site did not pose a risk to human health or the environment.

Characterization of Risk and Decision Document Findings

The risk assessment concluded no significant risk to human health and environment. A No Further Action Decision Document was finalized in June 2000. No further risks are present at CS–3 and no institutional controls are present.

Response Actions and Cleanup Standards

Several response actions have been conducted at the site. In 1985, six underground storage tanks were removed in a non-CERCLA action. In 1996, six underground drainage structures were removed in a CERCLA action, and one was abandoned in place during a base-wide drainage structural removal program.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-3 (U.S. Coast Guard) (CS–3 (CG))

Site Location and History

CS–3 (CG) occupies approximately two acres in the south central portion of the MMR, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 855290, 242137; 855401, 242259; 855631, 242260; 855777, 242169; 855597, 242919; and 855290, 242137. The area CS–3 (CG) proposed for partial deletion includes all surface soils and existing structures within these coordinates.

CS–3 (CG) was the former location of an automobile service and gasoline station. The site is currently occupied by a gasoline station, convenience store, and garden shop. Activities that may have introduced hazardous substances to this area occurred from 1951 to 1979.

Investigation and Feasibility Study Activities

A records review for CS–3 (CG) was conducted in 1986. A remedial investigation was conducted during 1991. Surface and subsurface soil samples were collected from various locations such as former USTs and the leaching well.

In both soil and groundwater, there were sporadic detections of VOCs (1,2-dichloromethane, toluene, xylenes, and ketones), TPH, SVOCs (i.e., bis-2(ethylhexyl)phthalate, benzo(a)pyrene, benzo(b)fluoranthene, trimethylbenzenes (in groundwater only)), pesticides (i.e., chlordane, dichlorodiphenyltrichloroethane (DDT)) and metals (in groundwater only) (i.e., arsenic, manganese, lead, and thallium). Since soil and groundwater detections were detected sporadically and below action levels, it was concluded that widespread disposal of hazardous waste has not occurred at CS–3 (CG). Considering that detections were below background concentrations and action levels, the human health and ecological risk assessments determined that the site does not pose a risk.

No feasibility study was conducted since response actions in the form of non-CERCLA and CERCLA removal actions were conducted and the remedial investigation concluded that the site did not pose a risk to human health or the environment.

Characterization of Risk and Decision Document Findings

The risk assessment concluded no significant risk to human health and environment. A No Action Record of Decision was finalized in September 1998. No further risks are present at CS–3 (CG) and no institutional controls are present.

Response Actions and Cleanup Standards

In 1985, an underground storage tank was found to be leaking and a non-CERCLA removal action was conducted to remove the UST and associated petroleum contaminated soil. In 1994, three former gasoline USTs were removed in a non-CERCLA action and replaced with aboveground storage tanks. Approximately 340 cubic yards of contaminated soil was removed during the UST removal. In 1996, sediment and sludge inside a leaching well was removed in a CERCLA removal action, however the leaching well and associated discharge pipes were not removed because they are partly buried behind Building 5202 and it was determined that the leaching well and discharge pipes did not pose a future source of soil and/or groundwater contamination.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-4 (CS–4)

Site Location and History

Chemical Spill-4 (CS–4) is located in the southern section of the MMR within the outline of the CS–10 groundwater plume as shown on Figure 4. CS–4 consists of two parcels whose coordinates in Easting and Northing coordinates (NAD27) are: 859012, 243969; 859939, 243607; 860065, 243369; 859920, 243079; 859234, 243403; and 859012, 243969 for parcel A; 858358, 241466; 858018, 241673; 858913, 243535; 859230, 243395; and 858358, 241466 for parcel B. The area CS–4 proposed for partial deletion includes all surface soils and structures within these coordinates.

CS–4 is a 28 acre area to the northeast of West Truck Road and Gaffney Road which contained a former gasoline station, and is an area south of Gaffney Road which contained a former storage yard of the Defense Property Disposal Office which operated from 1965 to 1985. Military vehicles were maintained by the U.S. Army from 1940 to 1946 and by the U.S. Air Force from 1955 to 1973.

Investigation and Feasibility Study Activities

Initial investigations in 1986 and 1988 identified petroleum-related and chlorinated solvent contaminated soil and sediment in the area known as West Truck Road Motorpool which is South of Truck and Gaffney Roads. An engineering evaluation/cost analysis report to address this contaminated soil in the West Truck Road Motorpool area was prepared in May 1993.

Investigations for the area to the northeast of West Truck and Gaffney Roads were conducted in 1994, 1996, and 2001. The investigation activities included: ten test pits; surface and surface soil samples; installation of one monitoring well; and groundwater samples.

Investigations indicated that pesticides and inorganics were detected in soil and required action. Shallow groundwater sample results did not indicate contamination requiring action.

An engineering evaluation/cost analysis report was conducted to evaluate removal action alternatives to address the contaminated soil in the area to the northeast of West Truck Road and Gaffney Road.

Characterization of Risk and Decision Document Findings

A non-time critical removal Action Memorandum for the West Truck Road Motorpool documented the soil removal and treatment in 1994. Investigations concluded that soil which was contaminated with volatile organic compounds had a major source of the CS–4 groundwater plume and was a continuing threat to the groundwater due to leaching.

The Site Inspection Report concluded that: dieldrin, chromium, cadmium, cyanide, lead, and zinc posed a human health and ecological risk. An Action Memorandum for CS–4 was issued in January 2002.

Response Actions and Cleanup Standards

By 1984, six 5,000 gallon underground storage tanks were removed in non-CERCLA actions. In 1994, approximately 11,000 cubic yards (13,235 tons) of contaminated soil from the South Truck Road Motor Pool was removed in a CERCLA non-time critical removal action. The soil was treated on-base in a low temperature thermal desorption system. The removal action cleanup standards were: 0.005 mg/kg for benzene (leaching to groundwater); 0.005 mg/kg for trichloroethylene (leaching to groundwater); and 0.005 mg/kg for perchloroethylene (leaching to groundwater). A removal action report was issued in September 1999.

In 2002, approximately 2,600 cubic yards of contaminated soil from the area northeast of West Truck Road and Gaffney Road was removed in a CERCLA removal action and transported off-site for treatment and/or disposal. During this removal action, a 500-gallon underground storage tank with 275 gallons of diesel fuel were discovered and also removed. The removal action cleanup standards were: 99 mg/kg for Lead (ecological); 68 mg/kg for Zinc (ecological); 1.0 mg/kg for Arochlor 1260 (human health); 0.227 mg/kg for 4,4'-DDE (ecological); 0.25 mg/kg for 4,4'-DDT (ecological); 0.035 mg/kg for Dieldrin (ecological); 200 mg/kg for Total Petroleum Hydrocarbons; 1000 mg/kg (0–15 ft bgs)/5,000 mg/kg (greater than 15 ft bgs) for C_9-C_{18} Aliphatic Hydrocarbons; 2,500 mg/kg (0–15 ft bgs)/5,000 mg/kg (greater than 15 ft bgs) for C_{19}-C_{36} Aliphatic Hydrocarbons; 200 mg/kg (0–15 ft bgs)/200 mg/kg (greater than 15 ft bgs) for C_{11}-C_{22} Aromatic Hydrocarbons; 100 mg/kg (0–15 ft bgs)/500 mg/kg (greater than 15 ft. bgs) for C_5-C_8 Aliphatic Hydrocarbons; 1,000 mg/kg (0–15 ft bgs)/5,000 mg/kg (greater than 15 ft bgs) for C_9-C_{12} Aliphatic Hydrocarbons; and 100 mg/kg (0–15 ft. bgs)/100 mg/kg (greater than 15 ft bgs) for C_9-C_{10} Aromatic Hydrocarbons. The removal action for CS–4 was documented in a removal action report which was issued in September 2005.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-4 (U.S. Coast Guard)/ Fuel Spill-1 (U.S. Coast Guard) (CS–4 (CG)/FS–1 (CG))

Site Location and History

Chemical Spill-4 U.S. Coast Guard/ Fuel Spill-1 U.S. Coast Guard (CS–4 (CG)/FS–1 (CG)) is located in the southern section of the MMR, as shown in Figure 5 within the outline of the CS–10 groundwater plume. CS–4 (CG)/FS–1 (CG) coordinates in Easting and Northing coordinates (NAD27) are: 867997, 238955; 868394, 238660; 868369, 238629; 868310, 238672; 868211, 238546; 868145, 238601; 868132, 238555; 867975, 238349; 867671, 238576; and 867997, 238955. The area CS–4 (CG)/FS–1 (CG) proposed for partial deletion includes all surface soils and structures within these coordinates.

CS–4 (CG)/FS–1 (CG) is a five-acre area which featured Hangar Building 128 and its surrounding area. From 1955 to 1970, Hangar 128 was used to maintain U.S. Air Force EC–121 (i.e., Super-Constellation) aircraft. During that time, unknown quantities of solvents (i.e., toluene and TCE) and aviation gasoline washed into the stormwater drainage system. From 1976 to 1988, Hangar was used by the USCG to maintain fixed-wing aircraft. In 1978, two spills occurred at the hangar. An aviation gasoline spill of approximately 1,000 gallons occurred on the tarmac on the northern side of the hangar and was washed into the stormwater drainage system.

The second aviation gasoline spill of approximately 250 gallons occurred on the southern side of the hangar and was washed onto surrounding soil.

Investigation and Feasibility Study Activities

The site was first investigated in 1993, then in 1995, a follow-up investigation occurred. The soil and groundwater investigation focused on the areas of the reported spills and an acid leaching pit on the western side of the hangar. Groundwater did not require action, however contaminated soil was recommended for a removal action.

A site investigation was completed in 1993 and identified pesticides as the contaminant of concern as there were no herbicides detected. The investigation activities included: ten test pits; surface and surface soil samples; installation of one monitoring well; and groundwater samples.

Investigations indicated that pesticides and inorganics were detected in soil and required action. Groundwater sample results did not indicate contamination requiring action.

An engineering evaluation/cost analysis was conducted to evaluate removal action alternatives.

Characterization of Risk and Decision Document Findings

The Site Inspection Report concluded that: Dieldrin, Chromium, Cadmium, cyanide, lead, and zinc posed a human health and ecological risk. A multi-site Action Memorandum with CS–4 (CG)/FS–1 (CG) as one of the sites was issued in 1999.

Response Actions and Cleanup Standards

By August 2001, approximately 318 cubic yards of contaminated soil was excavated and transported off-site for disposal. The removal action cleanup standards were: 0.035 mg/kg for Dieldrin (ecological); 19 mg/kg for Chromium (ecological); 1.8 mg/kg for Cadmium (ecological); 1.0 mg/kg for cyanide (background); 99 mg/kg for lead (ecological); 68 mg/kg for zinc (ecological). The removal action for CS–4 (CG)/FS–1 (CG) was documented in a removal action report which was issued in April 2004.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-5 (CS–5)

Site Location and History

Chemical Spill-5 (CS–5) is located in the Cantonment section of the MMR, as shown in Figure 4, within the footprint of the CS–10 groundwater plume. CS–5 coordinates in Easting and Northing coordinates (NAD27) are: 857269, 242122; 857465, 242403; 857647, 242423; 857839, 242306; 857906, 242189; 857850, 242105; 857797, 242082; 857664, 241877; and 857269, 242122. The area CS–5 proposed for partial deletion includes all surface soils and structures within these coordinates.

CS–5 is a five-acre area adjacent to Building 3461 which was used as a weapons repair shop from 1941 to 1946, and a refueler maintenance and spray paint shop from 1955 to 1967. Releases from the building's activities (i.e., oils, solvents, paints, fuel, etc) may be contributed to site contamination.

Investigation and Feasibility Study Activities

A soil, sediment, and groundwater investigation was completed in October 1993. In 1996, as part of a basewide drainage structure removal program, a leaching well at CS–5 was removed, and a wash rack was decontaminated and abandoned in place by concrete. Groundwater did not require action, however contaminated soil was recommended for a removal action.

Investigations were conducted in 1993 and 1995, and identified polychlorinated biphenyl soil contamination which required cleanup.

A preliminary assessment was completed in 1999 and identified petroleum-contaminated soil requiring action. In the spring of 2000, a non-CERCLA removal action was conducted, then the site was further investigated in 2001.

Seventeen additional surface soil and subsurface soil samples were collected at the area of the previous excavation as well as debris piles at the site. The site investigation and risk evaluation for human health and ecological risk concluded that a removal action was needed to address metals, petroleum and polynuclear-aromatic hydrocarbon contamination. Prior to the removal action, an additional 95 soil samples were collected at 47 locations.

An engineering evaluation/cost analysis was conducted to evaluate removal action alternatives.

Characterization of Risk and Decision Document Findings

The Site Inspection Report concluded that Benzo(a)anthracene, Benzo(b)anthracene, Benzo(k)anthracene, Benzo(k)anthracene, Benzo(g,h,i)anthracene, Benzo(a)pyrene, Chrysene, Dibenzo(a,h)anthracene, Fluoranthene, Indeno(1,2,3-c,d)pyrene, and Phenanthrene posed a human health and ecological risk. A multi-site Action Memorandum with CS–5 as one of the sites was issued in 1999.

Response Actions and Cleanup Standards

By May 2001, approximately 86 cubic yards of contaminated soil was excavated and transported off-site for disposal. The removal action cleanup standards were: 5 mg/kg for Benzo(a)anthracene; 5 mg/kg for Benzo(b)anthracene; 5 mg/kg for Benzo(k)anthracene; 5 mg/kg for Benzo(k)anthracene; 5 mg/kg for Benzo(g,h,i)anthracene; 5 mg/kg for Benzo(a)pyrene; 0.625 mg/kg for Chrysene; 5 mg/kg for Dibenzo(a,h)anthracene; 7.81 mg/kg for Fluoranthene; 5 mg/kg for Indeno(1,2,3-c,d)pyrene; and 0.625 mg/kg for Phenanthrene. The removal action for CS–5 was documented in a removal action report which was issued in April 2004.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-6/Fuel Spill-22 (CS–6/FS–22)

Site Location and History

CS–6/FS–22 is a nine-acre area located in Cantonment area of MMR, as shown in Figure 4. The coordinates for CS–6 in Easting and Northing coordinates (NAD27) are: 860916, 237702; 861142, 238157; 861650, 237928; 861426, 237463; and 860916, 237702. The coordinates for FS–22 in Easting and Northing coordinates (NAD27) are: 862327, 247882; 862853, 247110; 862794, 246747; 862334, 247011; 861977, 247666; 861907, 248078; and 862327, 247882. The area CS–6/FS–22 proposed for partial deletion includes all surface soils and existing structures at CS–6 within these coordinates.

CS–6/FS–22 includes Building 754 and the area immediately surrounding it which has been used as a vehicle maintenance shop since 1967.

Investigation and Feasibility Study Activities

CS–6/FS–22 was identified in a records search in 1986. CS–6 includes structures and features functioned as three waste discharge points including a former oil/water separator, a leaching well, and paved areas draining to the drainage structures or site perimeters. FS–22 is a drainage ditch located south of and adjacent to CS–6 where in 1984 a 4,500 gallon fuel spill resulted in a discharge of fuel to the drainage ditch.

Subsurface soil samples were collected during a sump investigation program and confirmed that the drainage structures have not caused any soil contamination since results were below action limits. Groundwater immediately downgradient of these structures was also not impacted.

A Site Inspection investigation was conducted between November 1992 and March 1993. The investigation included surface soil sampling and subsurface soil sampling at four areas, and groundwater sampling at upgradient and downgradient locations. A follow-up investigation was conducted in October 1994. Additional groundwater sampling in October 1998 supported that the site did not impact groundwater quality. Sampling in the drainage ditch (FS–22) confirmed the presence of fuel constituents but concentrations were below action levels.

No feasibility study was conducted since response actions in the form of a non-CERCLA spill response and soil removal action, investigation data, and a tiered human health and ecological risk evaluation support no further action.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in April 2000. No risks requiring action are present at CS–6/FS–22 and no institutional controls are required.

Response Actions and Cleanup Standards

In 1984, a 4,500 gallon fuel spill occurred in a drainage ditch associated with FS–22. All free product was removed and visibly contaminated soil was excavated in a non-CERCLA action. In 1989, piping between an oil/water separator and a leaching well was sealed. The leaching well was filled with sand.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-6 (U.S. Coast Guard) (CS–6 (CG))

Site Location and History

CS–6 (CG) is located in the south-central portion of the MMR, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 854635, 241470; 854816, 241814; 855350, 241395; 855074, 241085; 855015, 241118; and 854635, 241470. The area CS–6 (CG) proposed for partial deletion includes all surface soils and existing structures within these coordinates.

CS–6 (CG) is a six-acre area which includes U.S. Coast Guard Building 5215 in which maintenance shops have been housed since 1973. Prior to 1973, the building was used as a Noncommissioned Officers Club.

Investigation and Feasibility Study Activities

CS–6 (CG) was identified in a records search in 1986. CS–6 (CG) consists of the U.S. Coast Guard Building 5215 which houses maintenance shops. Wastes generated included oils, hydraulic fluid, and cleaning solvents. A 2,000 gallon underground storage tank and two aboveground storage tanks were noted at the site in an investigation in 1989.

Surface soil results collected in 1989 indicated minor fuel spills in the area around the former above ground storage tanks. Subsequent soil sampling in 1999 confirmed that the soil removal was complete. Groundwater sampling results show that site activities have not adversely affected the groundwater quality.

No feasibility study was conducted since response actions in the form of non-CERCLA removal actions and investigation data support no further action.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in June 2000. No further risks are present at CS–6 (CG) and no institutional controls are present.

Response Actions and Cleanup Standards

In September 1990, approximately six cubic yards of contaminated soil was removed in a non-CERCLA action after the removal of two above ground storage tanks. In May 1993, a 2,000 gallon UST was removed in a non-CERCLA action.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-8/Fuel Spill-21 (CS–8/FS–21)

Site Location and History

CS–8/FS–21 are located next to each other in a three-acre area which is located in the Cantonment portion of the MMR, as shown in Figure 5. CS–8 coordinates in Easting and Northing coordinates (NAD27) are: 862819, 237371; 862971, 237301; 862846, 237023; 862693, 237087; and 862819, 237371. FS–21 coordinates in Easting and Northing coordinates (NAD27) are: 862970, 237301; 863140, 237224; 862980, 236868; 862813, 236946; and 862970, 237301. The area CS–8/FS–21 proposed for partial deletion includes all surface soils and existing structures within these coordinates.

CS–8 is known as the Operational Motor Pool. It included an active and an abandoned concrete wash pad, a cesspool, and a 12,500 gallon diesel-fuel UST and pump island located west of a vehicle repair shop. The vehicle repair shop ceased operations in 1998. FS–21 is the former location of a 5,000 gallon motor vehicle gasoline UST known as Current Product Tank No. 90. Wastes generated included waste solvents, oils, battery electrolyte, and fuels.

Investigation and Feasibility Study Activities

CS–8/FS–21 was initially identified in a records search in 1986. Site investigations were developed to evaluate whether past maintenance activities, waste-disposal methods, and potential leaks from USTs posed a risk and required action. Investigation efforts, which included a soil-gas survey, ten test pits, six soil boring, four monitoring wells, soil samples, and groundwater samples, showed no significant contamination of soil or groundwater. Investigation confirmed that the UST removals were complete. Risks to human health and the environment from exposure to detections were below levels requiring action.

No feasibility study was conducted since response actions in the form of non-CERCLA removal actions and investigation data support no further action.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in October 2000. No risks requiring action are present at CS–8/FS–21, and no institutional controls are present.

Response Actions and Cleanup Standards

In 1988, a 5,000 gallon motor vehicle gasoline UST and a 12,500 gallon diesel fuel UST were removed in a non-CERCLA action and replaced with double-walled tanks of the same size. The 5,000 gallon UST and the 12,500 gallon UST were removed in a non-CERCLA action in 1996 and 1999, respectively. In 1996, a cesspool was removed in a CERCLA removal action as part of a basewide drainage structure removal program.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-8 (U.S. Coast Guard) (CS–8 (CG))

Site Location and History

CS–8 (CG) is located in the northern section of the MMR, as shown in Figure 3. CS–8 (CG) is a collection of three parcels whose coordinates in Easting and Northing coordinates (NAD27) are: 871484, 261883; 871510, 261938; 871570, 261911; 871544, 261854; and 871484, 261883 for parcel A; 872536, 261718; 872655, 261718; 872655, 261582; 872536, 261582; and 872536, 261718 for parcel B; 872547, 260877; 872645, 260877; 872645, 260751; 872547, 260751; and 872547, 260877 for parcel C. The area CS–8 (CG) proposed for partial deletion includes all surface soils within these coordinates.

CS–8 (CG) is a less than one-acre area (400 square feet) known as the Abandoned Radio Cabinet Area on the Coast Guard Transmitter Station property near the eastern boundary of the MMR.

Investigation and Feasibility Study Activities

CS–8 (CG) was investigated with a Preliminary Assessment in 1999 and a Site Investigation (SI) in 2001. The SI included the collection of soil samples which identified soil contamination within the vicinity of the radio cabinet. Human health and ecological risks were evaluated and the SI concluded that a removal action was necessary to address these risks.

An engineering evaluation/cost analysis was conducted to evaluate removal action alternatives.

Characterization of Risk and Decision Document Findings

The Site Inspection Report concluded that cadmium, manganese and PCB–1254 posed a human health and ecological risk. An Action Memorandum documenting this non-time critical removal action was finalized in August 2002.

Response Actions and Cleanup Standards

In December 2002, approximately 25 cubic yards of contaminated soil was removed and transported off-site for disposal in a CERCLA removal action. The removal action cleanup standards were: 1.8 mg/kg for cadmium; 274 mg/kg for manganese; and 1 mg/kg for PCB–1254 (Arochlor 1254). The removal action for CS–8 (USCG) was documented in a removal action report which was issued in August 2003.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-9 (CS–9)

Site Location and History

CS–9 is located in the Cantonment portion of the MMR adjacent to the Landfill-1 source area, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 856956, 244929; 857918, 246417; 858598, 245943; 858240, 245412; 858123, 245484; 857508, 244681; and 856956, 244929. The area CS–9 proposed for partial deletion includes all surface soils within these coordinates.

CS–9 is a 22-acre area which featured a former motor pool and vehicle maintenance area which was used from 1941 to 1946 and had five leaching wells, four sumps, and three underground storage tanks.

Investigation and Feasibility Study Activities

A site investigation was conducted in 1993. Fifteen test pits were excavated and stockpiled at a separate site. Soil and sump sediment samples were collected. Two monitoring wells were installed to evaluate the groundwater quality. The subsurface soil and groundwater data indicated that motor pool-related compounds have not migrated vertically within the site. Groundwater results from the investigation showed low levels of fuel- and solvent type compounds that are likely migrating from upgradient LF–1 rather than CS–9. Results of risk evaluations suggested no unacceptable risks to human health or the environment.

No feasibility study was conducted since response actions in the form of non-CERCLA removal actions and investigation data support no further action.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in June 1998. No further risks are present at CS–9 and no institutional controls are present.

Response Actions and Cleanup Standards

Three USTs were removed in a non-CERCLA action in 1985. In March 1994, sump structures and contents, and contaminated soil were removed in a CERLCA removal action. Approximately 3,663 tons of soil was treated between August and October 1995 at a low-temperature thermal treatment unit which was located at MMR for another project.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-11 (CS–11)

Site Location and History

Chemical Spill-11 (CS–11) is located in the southern section of the MMR, as shown in Figure 4 within the outline of the CS–10 groundwater plume. CS–11 coordinates in Easting and Northing coordinates (NAD27) are: 859381, 238984; 859576, 238898; 859476, 238677; 859280, 238764; and 859381, 238984. The area CS–11 proposed for partial deletion includes all surface soils and structures within these coordinates.

CS–11 is a one-acre area associated with Building 1116 which was used for the storage and mixing of pesticides and herbicides from 1970 to 1983. Mixing of pesticides occurred on an asphalt concrete pad on the eastern side of Building 1116.

Investigation and Feasibility Study Activities

A site investigation was completed in 1993 and identified pesticides as the contaminant of concern as there were no herbicides detected. The investigation activities included: Ten test pits; surface and surface soil samples; installation of one monitoring well; and groundwater samples. Investigations indicated that pesticides and inorganics were detected in soil and required action.

Groundwater sample results did not indicate contamination requiring action.

An engineering evaluation/cost analysis was conducted to evaluate removal action alternatives.

Characterization of Risk and Decision Document Findings

The Site Inspection Report concluded that: Dieldrin, Chromium, Cadmium, cyanide, lead, and zinc posed a human health and ecological risk. A multi-site Action Memorandum with CS–11 as one of the sites was issued in June 1999.

Response Actions and Cleanup Standards

In 1983, when the pesticide shop was closed, approximately 200 pounds of pesticides were removed in a non-CERCLA action from Building 1116. In 2002, approximately 1,157 cubic yards of contaminated soil was removed in a CERCLA removal action and transported off-site for treatment and/or disposal. The removal action cleanup standards were: 0.035 mg/kg for Dieldrin (ecological); 19 mg/kg for Chromium (ecological); 1.8 mg/kg for Cadmium (ecological); 1.0 mg/kg for cyanide (background); 99 mg/kg for lead (ecological); 68 mg/kg for zinc (ecological). The removal action for CS–11 was documented in a removal action report which was issued in April 2004.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-14 (CS–14)

Site Location and History

CS–14 is located in the southeastern portion of MMR within the secure flightline area, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 867564, 238219; 867679, 238124; 867451, 237847; 867335, 237946; and 867564, 238219. The area CS–14 proposed for

partial deletion includes all surface soils and structures within these coordinates.

CS–14 is a one-acre area associated with subsurface structures between Building 156 and Hangar 158. These structures received liquid waste such as solvents and petroleum products from these buildings.

Investigation and Feasibility Study Activities

CS–14 was identified in a records search as a site requiring additional investigation based on site history in 1986. Field investigations were conducted between 1989 and 1992, and additional groundwater samples were collected in 1999. Investigation activities included a soil gas survey, installation and multiple sampling of three groundwater wells, advancement of 12 Terraprobe borings and two test trenches, and soil sampling and analysis. Exploration locations were based on the findings of the records search and the observations of conditions.

Soil sampling and analysis was conducted during the completion of test pits, soil borings, and monitoring wells. There were no detections of surface or subsurface soil samples above action levels for VOCs, SVOCs, Pesticides, PCBs, and inorganics. Groundwater sampling also did not identify any actionable contamination as results were below action levels.

No feasibility study was conducted since response actions in the form of a CERCLA removal action were conducted as part of the basewide drainage structure removal program, and no human health or ecological risk was identified in a risk evaluation.

Characterization of Risk and Decision Document Findings

Due to the non-CERCLA response actions and the investigation findings of no risk, a No Further Action Decision Document was finalized in June 2000. No further risks are present at CS–14 and no institutional controls are present.

Response Actions and Cleanup Standards

In 1996, the leaching pit area was removed in a CERCLA removal action as part of a basewide drainage structure removal program. The oil/water separator associated with Hangar 158 and the sand/gas trap associated with Building 156 was abandoned in 1989. The oil/water separator was decontaminated in place and filled with concrete. Building 156 continues to be used as an aircraft parts maintenance facility with wastes managed according to the appropriate regulations. Hangar 158 continues to be used as an aircraft maintenance facility.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-15 (CS–15)

Site Location and History

CS–15, Former Run-up Area, is located on the southeast side of MMR, on Reilly Road, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 869859, 236971; 870462, 237541; 870880, 237294; 870809, 237171; 870285, 236746; 870193, 236734; 870112, 236759; and 869859, 236971. The area CS–15 proposed for partial deletion includes all surface soils within these coordinates.

CS–15 was used for jet engine testing from 1949 until 1985. This nine-acre site consisted for former Building 202, an outside testing stand, former Building 204, and enclosed testing stand, and the area surrounding these buildings.

Investigation and Feasibility Study Activities

CS–15 was identified in a records search as a site requiring additional investigation based on site history in 1986. Four field investigations were conducted between 1989 and 1995, and additional groundwater samples were collected in April 2000. Exploration locations were based on the findings of the records search and the observations of conditions. Three monitoring wells were installed.

Soil sampling and analysis was conducted during the completion of test pits, soil borings, and monitoring wells. There were no detections of surface or subsurface soil samples above action levels for VOCs, SVOCs, Pesticides, PCBs, and inorganics. Groundwater sampling also did not identify any actionable contamination.

No feasibility study was conducted since response actions in the form of a CERCLA removal actions were conducted as part of the basewide drainage structure removal program.

Characterization of Risk and Decision Document Findings

Due to the response actions conducted under the drainage structure removal program in 1996, a No Further Action Decision Document was finalized in December 2001. No further risks are present at CS–15 and no institutional controls are present.

Response Actions and Cleanup Standards

In 1994, three hanging transformers west of Building 204 were removed when Buildings 202 and 204 were demolished. In 1996, a gasoline trap east of Building 204 was removed as part of a CERCLA removal action known as the basewide drainage structure removal program. During the removal of the gas trap, approximately 74 cubic yards of contaminated soil was removed and treated at an on-base asphalt batching facility. There are no remaining structures at CS–15.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-16/Chemical Spill-17/ Drum Disposal Operable Unit (CS–16/ CS–17/DDOU)

Site Location and History

CS–16/CS–17/DDOU is located in the southern section of the MMR, as shown in Figure 4. CS–16/CS–17 coordinates in Easting and Northing coordinates (NAD27) are: 859039, 234905; 860401, 235488; 861416, 235483; 861432, 235364; 862700, 234602; 862795, 234287; 862364, 233663; and 859039, 234905. The area CS–16/CS–17 proposed for partial deletion includes all surface soils and structures within these coordinates.

Drum Disposal Operable Unit (DDOU) is located in the southern section of the MMR within the boundaries of CS–16/ CS–17, as shown in Figure 4, near the southeastern boundary. DDOU coordinates in Northing and Easting coordinates (NAD27) are: 862171, 244565; 862239, 234517; 862283, 234583; 862447, 234461; 862328, 234283; 862098, 234456; and 862171, 234565. The area DDOU proposed for partial deletion includes all surface soils within these coordinates.

CS–16/CS–17 is an 80-acre area which featured infiltration sand filter and sludge drying beds which are associated with a former, on-base sewage treatment plant which was decommissioned in 1997. Treated effluent from the treatment plant was discharged to these beds and contamination was suspected to have been caused by discharge of wastes from on-base operations. The former sewage treatment plant was replaced with an upgraded plant, and discharge effluent is piped off-site to new sand filter beds located near the Cape Cod Canal.

Drum Disposal Operable Unit (DDOU) was a one-acre area where a total of 11 drums were discovered during investigation activities at CS–16/CS–17.

Investigation and Feasibility Study Activities

CS–16/CS–17 was investigated several times beginning with a site investigation in 1987. This investigation included the collection of surface soil and sludge samples from the active, inactive and abandoned sludge drying beds, and the collection of groundwater samples. In 1990, another site investigation included eleven soil borings with installation of selected monitoring wells and 31 soil samples.

In the remedial investigation which was conducted in 1990 and 1994, CS–16/CS–17 was divided into seven areas for investigation: Active sand filter beds; inactive sand filter beds; abandoned sand filter beds; active sludge drying beds; inactive sludge drying beds; abandoned sludge drying beds; and former sewage sludge disposal area. Surface and subsurface soil sampling found that three of the seven areas contained contaminants which posed an ecological risk because of metals contamination.

A Feasibility Study was conducted to evaluate remedial action alternatives which ranged from no action to containment to excavation.

The DDOU was discovered in 1994 during remedial investigation activities as CS–16/CS–17. Based on the presences of drums, two surface soil samples were collected. A separate investigation was conducted and included 24 shallow soil borings and collection of soil samples for field screening of pesticides and confirmatory analysis, 4 deep soil borings as monitoring wells and groundwater samples, ten additional surface soil samples and groundwater sampling.

The investigation identified two areas containing DDT in high concentrations 3,600 mg/kg and 4.1 mg/kg in areas one and two, respectively. None of the four monitoring wells contained any detectable concentrations of pesticides. A risk evaluation summary concluded that site concentrations exceeded risk-based levels and a removal action was necessary.

An engineering evaluation/cost analysis for DDOU was conducted to evaluate removal action alternatives.

Characterization of Risk and Decision Document Findings

The Remedial Investigation Report for CS–16/CS–17 concluded that: Arochlor 1254; Dieldrin; Arsenic; chromium; Copper; lead; and Zinc posed an ecological risk and impact to groundwater risk. A ROD was issued in May 1999.

The Site Inspection Report for DDOU concluded that: 2-Chlorophenol; 1,2,4-Trichlorobenzene; 2,4-Dinitrotoluene; pentachlorophenol; phenanthrene; 4,4'-DDD; 4,4'-DDE; 4,4'DDT; Alpha-BHC; arsenic; chromium; lead; vanadium; and zinc posed a human health and ecological risk. A multi-site Action Memorandum with DDOU as one of the sites was issued in June 1999.

Response Actions and Cleanup Standards

In 1994, eleven drums were discovered and removed in a non-CERLCA action at DDOU. In 2002, approximately 213 cubic yards of contaminated soil was removed in a CERCLA removal action and transported off-site for incineration. The removal action cleanup standards were: 330 mg/kg for 2-Chlorophenol (ecological); 9,250 mg/kg for 1,2,4-Trichlorobenzene (human); 330 mg/kg for 2,4-Dinitrotoluene (human); 800 mg/kg for pentachlorophenol (human/ecological); 0.625 mg/kg for phenanthrene (ecological); 2.41 mg/kg for 4,4'-DDD (ecological); 0.227 mg/kg for 4,4'-DDE (ecological); 0.250 mg/kg for 4,4'DDT (ecological); 0.203 mg/kg for Alpha-BHC (ecological); 7.1 mg/kg for arsenic (ecological); 19 mg/kg for chromium (ecological); 99 mg/kg for lead; 47 mg/kg for vanadium; and 68 mg/kg for zinc. The removal action for DDOU was documented in a removal action report which was issued in April 2004.

In 2001, excavation activities under the CERCLA action authorities were completed. A total of 4,000 cubic yards of contaminated soil was removed and transported off-site for disposal. The remedial action cleanup standards were: 1.00 mg/kg for Arochlor 1254 (ecological); 0.035 mg/kg for Dieldrin (ecological); 7.10 mg/kg for Arsenic (ecological); 19 mg/kg for chromium (ecological); 61 mg/kg for Copper (ecological); 99 mg/kg for lead (ecological); and 68 mg/kg for Zinc (ecological). The remedial action for CS–16/CS–17 was documented in a remedial action report which was issued in April 2003.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Chemical Spill-22 (CS–22)

Site Location and History

CS–22 is located in the northern section of the MMR, as shown in Figure 4. CS–22 coordinates in Easting and Northing coordinates (NAD27) are: 862327, 247882; 862853, 247110; 862794, 246747; 862334, 247011; 861977, 247666; 861907, 248078; and 862327, 247882. The area CS–22 proposed for partial deletion includes all surface soils within these coordinates.

CS–22 is a 13-acre area near the east-central portion of MMR which was a former sand and gravel pit.

Investigation and Feasibility Study Activities

A preliminary assessment was completed in 1999 and identified petroleum-contaminated soil requiring action. In spring 2000, a non-CERCLA removal action was conducted. The site was further investigated in 2001.

Seventeen additional surface soil and subsurface soil samples were collected at the area of the previous excavation as well as debris piles at the site. The site investigation and risk evaluation for human health and ecological risk concluded that a removal action was needed to address metals, petroleum and polynuclear-aromatic hydrocarbon contamination. Prior to the removal action, an additional 95 soil samples were collected at 47 locations.

An engineering evaluation/cost analysis was conducted to evaluate removal action alternatives.

Characterization of Risk and Decision Document Findings

The Site Inspection Report concluded that aluminum, arsenic, chromium, lead, selenium, benzo(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, dibenz(a,h)anthracene, indeno(1,2,3-c,d)pyrene, petroleum hydrocarbons, and tetrachloroethylene posed a human health and ecological risk, and impact to groundwater risk. An Action Memorandum documenting this non-time critical removal action was finalized in August 2002.

Response Actions and Cleanup Standards

In Spring 2000, approximately 418 tons of petroleum contaminated soil was removed in a non-CERCLA action and transported off-site for disposal. In 2002, approximately 440 cubic yards of contaminated soil was removed in a CERCLA removal action and transported off-site for disposal. The removal action cleanup standards were: 8,900 mg/kg for aluminum (ecological); 3.6 mg/kg for arsenic (human); 19 mg/kg for chromium (ecological); 99 mg/kg for lead (ecological); 1.0 mg/kg for selenium (ecological); 0.7 mg/kg for benzo(a)anthracene (human); 0.625 mg/

kg (0–2 ft bgs) and 0.7 mg/kg (2–15 ft bgs) for benzo(a)pyrene (human/ecological); 0.7 mg/kg for benzo(b)fluoranthene (human); 0.7 mg/kg for dibenz(a,h)anthracene (human); 0.7 mg/kg for Indeno(1,2,3,-c,d)pyrene (human); 200 mg/kg for total petroleum hydrocarbons (human/impact to groundwater) (Aliphatic—100 mg/kg for C_5-C_8; 1,000 mg/kg for C_9-C_{12}; 1,000 mg/kg for C_{13}-C_{18}; 2,500 mg/kg for C_{19}-C_{36}; and Aromatic—100 mg/kg for C_9-C_{10}; and 200 mg/kg for C_{11}-C_{22}); and 10 ug/kg for tetrachloroethylene (impact to groundwater). The removal action for CS–22 was documented in a removal action report which was issued in July 2003.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-2 (FS–2)

Site Location and History

FS–2 is a seven-acre area located in the Cantonment area of the MMR near its southern boundary, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 856255, 237383; 857124, 237257; 857125, 236889; 857250, 237016; and 856255, 237383. The area FS–2 proposed for partial deletion includes all surface soils within these coordinates.

FS–2 was originally used for unloading and distributing jet fuel and aviation gasoline. The area contains one main-line railroad track and several rail sidings. Before decommissioning, the site contained a petroleum unloading rack, a pump house and associated underground piping. The unloading facility was taken out of service in 1965.

Investigation and Feasibility Study Activities

FS–2 was first investigated in 1985 with the excavation of 18 test pits and installation of two monitoring wells. A soil gas survey and soil sampling at two test pits and four soil borings were completed in 1989. One monitoring well was installed in each of the four borings.

Based on the investigations which were conducted in 1985 and 1989, an RI Report which was issued in 1991 recommended removing contaminated soil since historical fuel spills had caused near-surface soil stains and contributed to the petroleum contamination of shallow soil near the pump house and a monitoring well. A supplemental RI was carried out in April 2000 to investigate the extent of any remaining petroleum contamination in the surface and subsurface soil since a non-CERCLA removal action was conducted in 1996. Petroleum-related semivolatile organic compounds and metals were detected in soil and groundwater samples. However, the concentrations were below action levels, and did not pose a human health or ecological risk.

No feasibility study was conducted since response actions in the form of non-CERCLA removal actions were conducted and the supplemental RI concluded that there were no risks.

Characterization of Risk and Decision Document Findings

Due to the response action and the supplemental remedial investigation which concluded that there were no site risks, a No Further Action Record of Decision was finalized in February 2002.

No further risks are present at FS–2 and no institutional controls are present.

Response Actions and Cleanup Standards

In 1992, the header piping which was part of the fuel distribution system was removed. In 1996, approximately 520 tons of soil was removed in a non-CERCLA action, and treated at an on-base low-temperature thermal treatment system.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-4 (FS–4)

Site Location and History

FS–4 is located in the Cantonment area of the MMR near its southern boundary, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 865858, 238266; 866000, 238149; 865712, 237788; 865665, 237768; 865601, 237779; 865481, 237925; and 865858, 238266. The area FS–4 proposed for partial deletion includes all surface soils within these coordinates.

FS–4 is a two-acre area around the former Building 178 and a fuel pumphouse with five underground storage tanks which were located on the base airfield. From the late 1950s until the early 1970s, aviation gasoline was pumped to the pumphouse and the tanks from an area known as the Petroleum Fuels Storage Area.

Investigation and Feasibility Study Activities

FS–4 was first evaluated as part of a records search in 1985. The records search identified the presence of underground storage tanks. In October 1993, a site investigation was conducted which included two monitoring wells, one soil boring, and 30 soil gas samples. Although this report recommended no further action, residual fuel contamination was identified beneath several USTs based on qualitative photoionization detector results following the removal and upgrade of the fuel systems at FS–4 in 1994.

An engineering evaluation/cost analysis was conducted and alternatives included sampling and subsurface treatment of contaminated soils by biosparging/soil vapor extraction.

Characterization of Risk and Decision Document Findings

A multi-site Action Memorandum with FS–4 as one of the sites was finalized in 1999 and selected subsurface soil sampling to determine if biosparging/soil vapor extraction was needed to address risks from contaminants leaching to groundwater. During remedial design, soil sampling results demonstrated that concentrations of petroleum hydrocarbons, benzene, toluene, ethylbenzene and xylenes were below cleanup levels, and installation of the treatment system was unnecessary. No further risks are present at FS–4 and no institutional controls are present.

Response Actions and Cleanup Standards

In 1993, as part of the Fuel Systems Upgrade program, the five underground storage tanks along with a 25,000 gallon underground storage tank were removed in a non-CERCLA action.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-7 (FS–7)

Site Location and History

Fuel Spill-7 (FS–7) is located in the Cantonment section of the MMR, as shown in Figure 4, within the footprint of the CS–10 groundwater plume. FS–7 coordinates in Easting and Northing coordinates (NAD27) are: 860315, 243139; 860098, 243122; 860089, 243224; 860287, 243236; and 860315, 243139. The area FS–7 proposed for partial deletion includes all surface soils within these coordinates.

FS–7 consisted of a half-acre area in the vicinity of the former Building 1820. A 500-gallon underground storage tank was installed in 1970 to store No. 2 fuel oil.

Investigation and Feasibility Study Activities

A site investigation was completed in 1993. Investigation activities included: soil gas samples; surface and subsurface soil samples; and installation of one monitoring well. The site investigation concluded that surface soil was impacted by polynuclear aromatic hydrocarbons.

A follow-up investigation was conducted in 1995. Investigation activities included: test pitting; soil sampling from test pit and surface soil; installation of two soil borings for monitoring wells; and groundwater samples. This investigation confirmed the polynuclear aromatic hydrocarbon contamination and concluded that detections in groundwater were from another nearby site.

An engineering evaluation/cost analysis was conducted to evaluate removal action alternatives.

Characterization of Risk and Decision Document Findings

The Site Inspection Report concluded that Benzo(a)anthracene, Benzo(b)anthracene, Benzo(k)anthracene, Benzo(k)anthracene, Benzo(g,h,i)anthracene, Benzo(a)pyrene, Chrysene, Dibenzo(a,h)anthracene, Fluoranthene, Indeno(1,2,3-c,d)pyrene, and Phenanthrene posed a human health and ecological risk. A multi-site Action Memorandum with FS–7 as one of the sites was issued in 1999.

Response Actions and Cleanup Standards

In 1985, a 500-gallon underground storage tank was removed in a non-CERCLA action. In April 2001, approximately 18 cubic yards of contaminated soil was excavated in a CERCLA removal action and transported for off-site disposal. The removal action cleanup standards were: 5 mg/kg for Benzo(a)anthracene; 5 mg/kg for Benzo(b)anthracene; 5 mg/kg for Benzo(k)anthracene; 5 mg/kg for Benzo(k)anthracene; 5 mg/kg for Benzo(g,h,i)anthracene; 5 mg/kg for Benzo(a)pyrene; 0.625 mg/kg for Chrysene; 5 mg/kg for Dibenzo(a,h)anthracene; 7.81 mg/kg for Fluoranthene; 5 mg/kg for Indeno(1,2,3-c,d)pyrene; and 0.625 mg/kg for Phenanthrene. The removal action for FS–7 was documented in a removal action report which was issued in April 2004.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-9 (FS–9)

Site Location and History

Fuel Spill-9 (FS–9) is located in the south central portion of the MMR, as shown in Figure 4, within the footprint of the CS–10 groundwater plume. FS–9 coordinates in Easting and Northing coordinates (NAD27) are: 858342, 241473; 858076, 240908; 857678, 241088; 857748, 241225; 858005, 241279; 858146, 241586; and 858342, 241473. The area FS–9 proposed for partial deletion includes all surface soils and structures within these coordinates.

FS–9 is a four-acre area consisting of a motor pool which operated from 1941 until 1986 and an undeveloped vegetated portion.

Investigation and Feasibility Study Activities

The site was initially investigated in 1992. In 1998, a remedial investigation was completed over five areas at FS–9: the motor pool and fueling island and underground storage tanks; the leaching wells and catch basins; the waste disposal area; the drainage ditch/swale area; and the pond/wet area. Total petroleum hydrocarbons and several metals, chromium, lead, vanadium and zinc, were identified as the contaminants of concern posing human health and ecological risks.

A Feasibility Study evaluated alternatives which ranged from no action to excavation with soil treatment and disposal options.

Characterization of Risk and Decision Document Findings

The Remedial Investigation Report concluded that total petroleum hydrocarbons, chromium, lead, vanadium, and zinc posed human health and ecological risks, and a threat to leaching to groundwater. A Record of Decision was finalized in June 1999.

Response Actions and Cleanup Standards

In 1994, three underground storage tanks and associated contaminated soil were removed in a non-CERCLA action as part of the Fuel Systems Upgrade Program. In 1996, waste disposal leaching wells and a catch basin were removed in a CERCLA removal action as part of a basewide drainage structure removal program. The leaching well adjacent to Building 1369 was abandoned in place due to structural concerns relative to the building. In 2001, approximately 125 cubic yards of contaminated soil was excavated and transported off-site for disposal which implemented the selected remedy in the Record of Decision. The remedial action cleanup standards were: 19 mg/kg for chromium (ecological); 300 mg/kg for lead (human); 47 mg/kg for vanadium (ecological); 68 mg/kg for zinc (ecological); and petroleum hydrocarbons (impact to groundwater) (Aliphatic—100 mg/kg for C_5–C_8; 1,000 mg/kg for C_9–C_{12}; 1,000 mg/kg for C_{13}–C_{18}; 2,500 mg/kg for C_{19}–C_{36}; and Aromatic—100 mg/kg for C_9–C_{10}; and 200 mg/kg for C_{11}–C_{22}).

Sampling during remedial design determined that a contingency remedy for a soil vapor extraction system was not necessary. The remedial action for FS–9 was documented in a remedial action report which was issued in September 2002.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-13 (FS–13)

Site Location and History

Fuel Spill-13 (FS–13) is known as the Underground Fuel Line Cantonment and is located in the central portion of the MMR within the footprint of the CS–10 groundwater plume as shown in Figure 4. FS–13 coordinates in Easting and Northing coordinates (NAD27) are: 860489, 244233; 861055, 243973; 860571, 242911; 860391, 243006; 860283, 243360; 860352, 243494; 860343, 243638; 860260, 243718; and 860489, 244233. The area FS–13 proposed for partial deletion includes all surface soils within these coordinates.

FS–13 is a 13-acre open area bounded by several roads near the main rotary on base. A small portion of the site, east of the pipeline and south of North Truck Road extends into the restricted flightline operations area. A fuel spill was reported in 1972. Approximately 2,000 gallons of JP–4 jet fuel were observed at the ground surface during an inspection.

Investigation and Feasibility Study Activities

The site inspection was first conducted in 1996. Investigation activities included: a soil gas survey; trench excavation and soil sampling; soil boring completion and sampling; and monitoring well installation and

sampling. Dieldrin and several metals were detected which led to the need for additional investigations.

A supplemental site inspection was conducted in 2004. Investigation activities concentrated on previous detections in the subsurface. Ten soil borings were advanced and subsurface soil samples were collected for analysis. Later that year, additional soil samples were collected. In April 2005, a test pit was excavated to assess the mobility of metals and pesticides.

Risks to human health and the environment, and risk of soil contaminants leaching to groundwater were evaluated with the remaining site data. The Supplemental Site Inspection Report concluded that contaminants detected above screening levels did not pose a risk because they were at background concentrations or were infrequently detected.

No feasibility study was conducted since the Supplemental Site Inspection Report concluded that the site pose risk to human health, environment or groundwater.

Characterization of Risk and Decision Document Findings

The Supplemental Site Inspection Report concluded that did not pose a human health and ecological risks, and a threat to leaching to groundwater. A No Further Action Decision Document was finalized in September 2006.

Response Actions and Cleanup Standards

In 1972, a non-CERCLA removal action was conducted to remove contamination from a spill of 2,000 gallons of JP–4 jet fuel from a pipeline. In April 2005, approximately 14 tons of soil was removed from a test pit in a non-CERCLA removal action.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-14 (FS–14)

Site Location and History

FS–14 is located in the northern portion of the MMR as shown in Figure 3. Its coordinates in Easting and Northing coordinates (NAD27) are: 866044, 270557; 866268, 270558; 866267, 270300; 866047, 270299; and 866044, 270557. The area FS–14 proposed for partial deletion includes all surface soils within these coordinates.

FS–14 is a one-acre site where a motor vehicle gasoline fuel spill of approximately 500 gallons occurred in 1985.

Investigation and Feasibility Study Activities

The site was investigated in 1995 to evaluate any remaining contamination from the fuel spill. Surface and subsurface soil and groundwater samples from four newly installed monitoring wells were collected. An additional round of groundwater samples was collected in 1999, and it was determined that the site did not require any further action.

No feasibility study was conducted since response actions in the form of non-CERCLA removal actions were conducted and the investigations concluded that the site did not pose a risk to human health or the environment.

Characterization of Risk and Decision Document Findings

The risk assessment concluded no significant risk to human health and environment. A No Further Action Decision Document was finalized in April 2000. No further risks are present at FS–14 and no institutional controls are present.

Response Actions and Cleanup Standards

In 1985, thirty cubic yards of contaminated soil was removed in a non-CERCLA action immediately following a release of approximately 500 gallons of fuel.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-17 (FS–17)

Site Location and History

FS–17 was a three and a half-acre site which is located west of the former main base landfill in the south-central portion of the MMR, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 855913, 246894; 856532, 246671; 856441, 246447; 855816, 246677; and 855913, 246894. The area FS–17 proposed for partial deletion includes all surface soils within these coordinates.

FS–17 was a motor pool and vehicle maintenance facility which operated from World War II to 1946.

Investigation and Feasibility Study Activities

FS–17 was investigated in several phases from 1993 through 1998 through investigations and post-excavation sampling events. Surface and subsurface soil samples and groundwater samples from monitoring wells were collected based on the site's history. Data collected during the various investigative and removal activities indicated that minimal to no contamination for surface and subsurface soil, and groundwater, and that the response actions were complete.

No feasibility study was conducted since response actions in the form of non-CERCLA removal actions were conducted and the RI concluded that there were no risks to human health and the environment.

Characterization of Risk and Decision Document Findings

Due to the response actions and the remedial investigation which concluded that there were no site risks, a No Further Action Record of Decision was finalized in December 1999. No further risks are present at FS–17 and no institutional controls are present.

Response Actions and Cleanup Standards

In 1994, two underground storage tanks and a fuel pump island were removed in a non-CERCLA action. In 1996, a French drain, leaching well, dry well, vehicle maintenance bays and foundations for two buildings were removed in a CERLCA removal action as part of a basewide drainage structural removal program.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-18 (FS–18)

Site Location and History

Fuel Spill-18 (FS–18) is located in the south central section of the MMR, as shown in Figure 4, within the footprint of the CS–10 groundwater plume. FS–18 coordinates in Easting and Northing coordinates (NAD27) are: 857962, 244410; 859015, 243956; 859046, 243818; 858901, 243531; 858764, 243519; 858706, 243549; 858577, 243379; 858373, 243484; 858511, 243672; 857676, 244076; and 857962, 244410. The area FS–18 proposed for partial deletion includes all surface soils and structures within these coordinates.

FS–18 is a 14-acre site of a former motor pool and fuel transfer station. Four underground storage tanks were installed in 1941, two of which contained diesel fuel and the other two contained motor vehicle gasoline. Three

motor pool vehicle maintenance buildings were associated with FS–18.

Investigation and Feasibility Study Activities

Investigations were conducted in 1993 and 1995. The Phase I site investigation activities included installation and sampling of three monitoring wells and 45 soil gas samples. A total of six surface soil and three subsurface soil samples and three rounds of groundwater samples were collected in all investigation phases.

The soil investigation and sampling focused on three areas; the drainage course south of the study area and east of South Gaffney Street, a topographic depression west of the study area, and the area around the two former fuel islands and leaching wells.

The site investigation and risk evaluation for human health and ecological risk, and risk to groundwater from leaching of soil contaminants concluded that a removal action was needed to address petroleum hydrocarbon contamination in the topographical depression and the drainage swale.

An engineering evaluation/cost analysis was conducted to evaluate removal action alternatives.

Characterization of Risk and Decision Document Findings

The Site Inspection Report concluded that Total Petroleum Hydrocarbons posed a risk to groundwater from the leaching of contaminants from soil. A multi-site Action Memorandum with FS–18 as one of the sites was issued in 1999.

Response Actions and Cleanup Standards

In 1985, two of the four underground storage tanks were removed in a non-CERCLA action. In 1990, the buildings at FS–18 were demolished. In August 1994, the other two underground storage tanks were removed in a non-CERCLA action. In 1996 as part of a basewide drainage structure removal program, a total on nine drainage structures and approximately 430 cubic yards of contaminated soil were removed in a CERCLA removal action. Removal design sampling activities were conducted in 2001 and did not identify any contamination above cleanup levels, so a removal action was not conducted. The removal action cleanup standards for petroleum hydrocarbons (impact to groundwater) were: 100 mg/kg for C_5–C_8; 1,000 mg/kg for C_9–C_{12}; 1,000 mg/kg for C_{13}–C_{18}; 2,500 mg/kg for C_{19}–C_{36} for Aliphatic hydrocarbons; 100 mg/kg for C_9–C_{10}; and 200 mg/kg for C_{11}–C_{22} for Aromatic hydrocarbons. A removal action report which documented the additional soil sampling activities and no further action at FS–18 was issued in April 2004.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-19 (FS–19)

Site Location and History

FS–19 was a two-acre site which is located in the south-central portion of the MMR, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 856829, 241507; 856934, 241444; 856734, 241142; 856624, 241206; and 856829, 241507. The area FS–19 proposed for partial deletion includes all surface soils within these coordinates.

FS–19 is a one-acre former motor gas fuel storage and transfer point which began operations in 1941 when six 10,000-gallon underground storage tanks were installed and used to store motor gas until 1958. Between the years 1958 to 1965, the six underground storage tanks were used to store hazardous wastes.

Investigation and Feasibility Study Activities

FS–19 was investigated in several phases from 1989 through 1998 through investigations and post-excavation sampling events. Surface and subsurface soil samples and groundwater samples from monitoring wells were collected based on the site's history. Data collected during the various investigative and removal activities indicated that minimal to no contamination for surface and subsurface soil, and groundwater, and that the response actions were complete.

No feasibility study was conducted since response actions in the form of non-CERCLA removal actions were conducted and the RI concluded that there were no risks to human health and the environment.

Characterization of Risk and Decision Document Findings

Due to the response actions and the remedial investigation which concluded that there were no site risks, a No Further Action Record of Decision was finalized in December 1999. No further risks are present at FS–19 and no institutional controls are present.

Response Actions and Cleanup Standards

In 1989, six underground storage tanks were removed in a non-CERCLA action. In 1996, a drainage structure and contaminated soil were removed in a CERLCA removal action as part of a basewide drainage structural removal program.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-20 (FS–20)

Site Location and History

FS–20, former Current Product Tank (CPT) No. 88, is located in the Cantonment Area of the MMR, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 862957, 241292; 863022, 241435; 863119, 241393; 863052, 241251; and 862957, 241292. The area FS–20 proposed for partial deletion includes all surface soils and structures within these coordinates.

FS–20 is a half-acre area which featured former Current Product Tank No. 88 which was a 12,500 gallon underground storage tank that was removed in 1996.

Investigation and Feasibility Study Activities

A Phase I Records Search was completed in December 1986. In 1987, the site investigation activities included one test pit and installation of one groundwater monitoring well downgradient of the tank. Analytical results indicated no contamination of soil or groundwater. Investigation concluded that there was no significant potential for contamination and that the site did not pose a risk.

No feasibility study was conducted since the site investigation concluded that the site did not impact the soil and groundwater.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in July 1991. No risks are present at FS–20 and no institutional controls are present.

Response Actions and Cleanup Standards

In 1996, the 12,500 gallon underground storage tank was removed in a non-CERCLA action.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-23 (FS–23)

Site Location and History

FS–23, South Truck Road Fuel Spill, is located in the southern portion of the MMR, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 861731, 237487; 861881, 237420; 861807, 237237; 861652, 237308; and 861731, 237121. The area FS–23 proposed for partial deletion includes all surface soils within these coordinates.

FS–23 is a less than one-acre area in which a fuel spill occurred in 1965 when JP–4 leaked onto the ground from a fuel line clean-out valve.

Investigation and Feasibility Study Activities

Following a preliminary assessment in 1986, FS–23 was investigated and characterized during two site inspections in 1988 and 1989, and a groundwater sampling program in 1999.

Investigation activities included: a soil gas survey; excavation of test pits; installation of test boring and monitoring wells; and soil and groundwater sampling and analysis.

Soil and groundwater sampling detected minimal contamination. Results of the human health and ecological risk assessments suggest that unacceptable levels of risk are not anticipated.

No feasibility study was conducted since response actions in the form of non-CERCLA removal actions were conducted and the investigations concluded that the site did not pose a risk to human health or the environment.

Characterization of Risk and Decision Document Findings

The risk assessment concluded no significant risk to human health and environment. A No Further Action Decision Document was finalized in June 2000. No further risks are present at FS–23 and no institutional controls are present.

Response Actions and Cleanup Standards

During the Fuel System Upgrade Program in 1993, two underground 10-inch fuel lines were removed in a non-CERCLA action.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-25 (FS–25)

Site Location and History

FS–25 is located on the southeast portion of the MMR as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 866837, 237121; 867004, 237329; 867148, 237217; 866979, 237006; and 866837, 237121. The area FS–25 proposed for partial deletion includes all surface soils and structures within these coordinates.

FS–25 covers approximately one-acre and is located immediately northeast of Building 167. In 1989, petroleum-stained soil was discovered during the construction of a parking lot and 2,000 cubic yards was excavated. The history and cause of the contamination was unknown although the area was reported to have been used for heavy equipment maintenance which may have had spills and releases.

Investigation and Feasibility Study Activities

Investigation of the petroleum-stained soil began with excavation of test pits, completion of soil borings, and soil sampling of the investigation areas in December 1989. With the exception of a small portion of the soil from the excavation, soil data indicated that most of typical fuel compounds have degraded and there was no subsurface soil contamination requiring action.

No feasibility study was developed since investigation activities did not identify any contamination in the subsurface.

Characterization of Risk and Decision Document Findings

Based on sampling results and low-temperature thermal treatment of non-backfilled soil, a No Further Action Decision Document was finalized in June 1997. No further risks are present at FS–25 and no institutional controls are present.

Response Actions and Cleanup Standards

In November 1989, approximately 2,000 cubic yards of contaminated soil was removed in a non-CERCLA action and stockpiled on a taxiway of the airfield. In 1996, the stockpiled soil was sampled to determine remaining petroleum hydrocarbon concentrations and to evaluate disposal/reuse options. A majority of this soil was used as backfill, but 88 cubic yards was treated in a low-temperature thermal desorption system which was on-site treating contaminated soil from other projects. A cleanup standard of 1,235 parts per million for total petroleum hydrocarbons was selected.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Fuel Spill-26 (U.S. Coast Guard) (FS–26 (CG))

Site Location and History

FS–26 (CG) is located at the intersection of two unnamed paved roads at the southwesterly end of Building 3444 which is a U.S. Coast Guard warehouse, as shown in Figure 4. Its coordinates in Easting and Northing coordinates (NAD27) are: 856353, 242055; 856407, 242129; 856499, 242071; 856449, 241997; and 856353, 242055. The area FS–26 (CG) proposed for partial deletion includes all surface soils within these coordinates.

FS–26 (CG) is a less than one-acre former location of a 3,000-gallon underground storage tank which contained No. 2 heating oil and was installed in the early 1950s near Building 3444.

Investigation and Feasibility Study Activities

A soil boring was advanced in the backfilled UST excavation area to assess subsurface contamination. No contamination was detected in these samples. Groundwater samples from a nearby monitoring well also did not detect any site contamination.

No feasibility study was developed since investigation activities did not identify any contamination which remained from the UST removal.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in July 1997. No further risks are present at FS–26 (CG) and no institutional controls are present.

Response Actions and Cleanup Standards

In 1990, a 3,000 gallon underground storage tank and 70 cubic yards of contaminated soil was removed under non-CERCLA authority (*i.e.*, no Action Memorandum was issued). No structures are present at FS–26 (CG).

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Landfill-4 (LF–4)

Site Location and History

LF–4 is located outside the eastern border of the MMR, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 867744, 235225; 867650, 234793; 867382, 234858; 867302, 234920; 867295, 235037; 867351, 235121; 867416, 235321; 867491, 235357; and 867744, 235225. The area LF–4 proposed for partial deletion includes all surface soils within these coordinates.

LF–4 is a four-acre, former borrow pit which became an illegal dumping ground because it was located outside the border of the MMR. Although the property is currently owned by the town of Mashpee, it is under the control of the Air Force which obtained a limited easement to this property in 1960 to ensure safe operation at the airfield and to create a clear safety zone for the Otis Air National Guard Base Ammunition Storage Area.

Investigation and Feasibility Study Activities

Following the non-CERCLA removal action, a site investigation was conducted in 1999. The investigation activities included collection and analysis of surface and subsurface soil samples, review of existing groundwater data, collection of two groundwater samples, and a risk evaluation. All sampling results were below action levels.

The sampling results and an evaluation of potential risks to human health and environment demonstrated that the site did not pose a threat or require no action.

No feasibility study was developed since investigation activities after the removal action did not identify any contamination which could have been caused by the former landfill.

Characterization of Risk and Decision Document Findings

A No Further Action Decision Document was finalized in November 2000. No further risks are present at LF–4 and no institutional controls are present.

Response Actions and Cleanup Standards

In June 1998, the town and the Massachusetts Army National Guard conducted non-CERCLA removal actions under a DEP Administrative Consent Order. Approximately 950 cubic yards of solid waste were removed. No release of any hazardous substances was observed. In the removal, a 55-gallon drum containing five gallons of petroleum product was discovered and removed.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Storm Drain-2/Fuel Spill-6/Fuel Spill-8 (SD–2/FS–6/FS–8)

Site Location and History

SD–2/FS–6/FS–8 is located on the southern boundary of the MMR, as shown in Figure 5. Its coordinates in Easting and Northing coordinates (NAD27) are: 865636, 236155; 865932, 236045; 865653, 235179; 865140, 234242; 864849, 233949; 864760, 234141; 864949, 234459; 865265, 235096; and 865636, 236155. The area SD–2/FS–6/FS–8 proposed for partial deletion includes all surface soils within these coordinates.

SD–2/FS–6/FS–8 is a 15.6-acre area consisting of a storm drainage ditch which extends south-southwest from the southern boundary of the MMR towards Ashumet Pond. SD–2/FS–6/FS–8 received storm water discharge from the MMR runway/aircraft maintenance ramp storm sewer system from 1950 through 2001. FS–6 and FS–8 are related to SD–2 because they were two aviation gasoline fuel spills which occurred on the aircraft maintenance ramp and were reportedly washed directly to the storm sewer eventually making its way into the SD–2 ditch. There are reports of other releases into SD–2 of fuel and solvents which were used in the various maintenance shops. In 1968, an oil-water separator was constructed at the storm sewer outfall to intercept fuels from the aircraft maintenance ramp.

Investigation and Feasibility Study Activities

An initial investigation was conducted in 1988 with installation of two monitoring wells and collection of six sediment samples from the storm drainage ditch. In 1989, a remedial investigation expanded the investigation with additional groundwater and sediment samples. In 1993, a supplemental remedial investigation was conducted and included the collection of additional sediment samples.

The risk assessment in the remedial investigation identified an ecological risk due to inorganics, specifically chromium, lead, and zinc.

A feasibility study was developed and evaluated soil alternatives which were: no action; excavation and asphalt batching; and excavation and off-site treatment and disposal.

Characterization of Risk and Decision Document Findings

A multi-site Record of Decision which included SD–2/FS–6/FS–8 was finalized in September 1998 and selected excavation and asphalt batching as the remedy. Remedial action was required to address ecological risks. An Explanation of Significant Differences was issued in January 2003 and contained adjustments to the cleanup levels and allowed off-site disposal instead of asphalt batching which was deemed too expensive during remedial design and action.

Response Actions and Cleanup Standards

In 1996, approximately 480 cubic yards of contaminated soil from an adjacent site called the Petroleum Fuel Storage Area and approximately 120 cubic yards of fuel contaminated soil from SD–2 were removed in a non-CERCLA action. In 2002, approximately 350 cubic yards of contaminated soil was removed and transported off-site for disposal implementing the selected remedy in the ROD. The contaminants of concern and their cleanup levels were: chromium—19 mg/kg (ecological risk); lead—99 mg/kg (ecological risk); zinc—68 mg/kg (ecological risk). A remedial action report for SD–2/FS–6/FS–8 was issued in June 2004 and documents the completion of the selected remedy.

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

Storm Drain-3/Fire Training Area-3/Coal Yard-4 (SD–3/FTA–3/CY–4)

Site Location and History

SD–3/FTA–3/CY–4, is located in the southeastern corner of the MMR, as shown in Figure 5. SD–3 is composed of two parcels with the following Easting and Northing coordinates (NAD27) are: 867639, 236299; 867578, 236374; 867517, 236575; 867552, 236584; 867608, 236407; 867671, 236361; 867700, 236416; 867685, 236625; 867738, 236636; 867766, 236477; 867732, 236411; 867696, 236258; 867668, 236157; 867628, 236156; and

867639, 236299 for parcel A; and 868617, 236384; 868714, 236345; 868959, 236314; 868916, 236228; 868664, 236279; 868568, 236314; and 868617, 236384 for parcel B. FTA–3 is composed of the following Easting and Northing coordinates (NAD27) are: 867475, 235823; 867478, 235658; 867369, 235537; 867188, 235535; 867077, 235645; 867079, 235808; 867184, 235927; 867369, 235930; and 867475, 235823. CY–4 is composed of the following Easting and Northing coordinates (NAD27): 866878, 236000; 867230, 236439; 867144, 236510; 867471, 236945; 867708, 237077; 867754, 236551; 867693, 236192; 867545, 235935; 867611, 235687; 867063, 235857; and 866878, 236000. The area SD–3/FTA–3/CY–4 proposed for partial deletion includes all surface soils within these coordinates.

SD–3/FTA–3/CY–4 is a 19-acre area located in a moderately industrialized area on the eastern side of the runways. The SD–3 stormwater drainage ditch receives runoff from several areas which include the eastern edge of the aircraft maintenance ramp, a former Central Heating Plant, and associated stockpiles of coal and surficial coal ash. FTA–3 was used for fire training activities between 1956 and 1958 and then as a disposal area of construction debris and coal ash after construction of the Central Heating Plant. CY–4 is located 400 feet south of the Central Heating Plant and had coal stockpiled directly on the ground from 1955 to 1978. Coal ash was disposed on the ground surface south of the coal pile. Surficial drainage from the stockpile and ash disposal area flowed toward and into SD–3.

Investigation and Feasibility Study Activities

Initial investigation occurred in 1987 which was followed-up with a remedial investigation that was conducted over three phases from 1989, 1990, and 1993. The remedial investigation identified risk which was due to phenanthrene, chrysene, arsenic, chromium, lead, vanadium, and zinc.

An initial investigation was conducted in 1988 with installation of two monitoring wells and collection of six sediment samples from the storm drainage ditch. In 1989, a remedial investigation expanded the investigation with additional groundwater and sediment samples. In 1993, a supplemental remedial investigation was conducted and included the collection of additional sediment samples.

The risk assessment in the remedial investigation identified an ecological risk due to inorganics, specifically chromium, lead, and zinc.

A feasibility study was developed and evaluated soil alternatives which were: no action; excavation and asphalt batching; and excavation and off-site treatment and disposal.

Characterization of Risk and Decision Document Findings

A multi-site Record of Decision which included SD–3/FTA–3/CY–4 was finalized in September 1998 and selected excavation and asphalt batching as the remedy. Remedial action was required to address ecological risks. An Explanation of Significant Differences was issued in January 2003 and contained adjustments to the cleanup levels and allowed off-site disposal instead of asphalt batching which was deemed too expensive during remedial design and action.

Response Actions and Cleanup Standards

From February to April 1994, approximately 42,000 cubic yards of coal, coal ash, and contaminated soil from FTA–3 and CY–4 were excavated and used as subgrade fill for the landfill capping of Landfill No. 1, another site on MMR. In 2001, approximately 1,065 cubic yards of contaminated soil was excavated and transported off-site for disposal implementing the selected remedy in the ROD. A remedial action report for SD–3/FTA–3/CY–4 was finalized in August 2004 and documents the completion of the remedy. The contaminants of concern and their cleanup levels were: chromium—19 mg/kg (ecological risk); lead—99 mg/kg (ecological risk); zinc—68 mg/kg (ecological risk).

Operation and Maintenance & Five-Year Review

No operation and maintenance or Five-Year Reviews are required for this site.

B. Community Involvement

Community input has been sought by the Air Force throughout the MMR investigation and cleanup process. Community relations activities that have occurred include: monthly meetings of the Plume Cleanup Team which is a group composed of agency representatives and citizens who live near MMR; 30-day public comment periods for decision documents; public meetings/hearings for the issuance of Proposed Plans, and information meetings for neighborhoods that are affected by off-site plume migration and/or off-site construction; issuance of new releases, fact sheets, and annual reports; and operation and maintenance of a Web site specifically for MMR (*http://www.mmr.org*).

A copy of the Deletion Docket can be reviewed several ways. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the EPA's New England Region Superfund Records Center, One Congress Street, Suite 1100, Boston, MA 02114 and the Information Repositories at AFCEE/IRP Office at Building 322 on MMR, by appointment only Monday through Friday 8 a.m. to 5 p.m., (508) 968–4670 ext 1, and the Information Repositories in the Towns of Bourne, Falmouth, Sandwich, and Mashpee. The Deletion Docket includes this document, supporting appendices containing tables and figures, No Further Action Decision Documents, Records of Decision, Removal Action Reports, Remedial Action Reports, and correspondence documenting that no further remedial actions are necessary at the sites.

Public participation activities have been satisfied as required in CERCLA Section 113(k), 42 U.S.C. 9613(k), and CERCLA Section 117, 42 U.S.C. 9617. Documents in the deletion docket on which EPA relied for recommendation of the deletion from the NPL are available to the public in the information repository noted above or online at *http://www.regulations.gov*.

Community involvement for the sites that are the subject of this document has occurred by soliciting public comment on various documents depending on the individual site's investigation and cleanup (if needed) process. All No Further Action Decision Documents were issued for 30-day public comment periods. For those sites where Records of Decision were finalized, Proposed Plans were issued for 30-day public comment periods with comments, if any, addressed in the Responsiveness Summary of the Record of Decision. In addition, sites where non-time critical removal actions occurred provided public involvement with the issuance of the engineering evaluation/cost analysis for public comment.

Since there are a number of ongoing investigations and cleanup at MMR, community involvement activities such as monthly Plume Cleanup Team

meetings will continue to occur. Other activities such as neighborhood meetings, updates to the MMR Web site, and issuance of news releases will occur as needed.

C. Current Status

One of the three criteria for site deletion specifies that EPA may delete a site (or a portion of a site) from the NPL if ''responsible parties or other parties have implemented all appropriate response actions required.'' EPA believes that this criterion has been met for this partial deletion. In a letter the Commonwealth of Massachusetts provided their concurrence on the proposed deletion of the sites in this notice. A copy of this letter is available for review in the Information Repository as part of the Deletion Docket. EPA with concurrence from the Commonwealth of Massachusetts has determined that all appropriate CERCLA response actions have been completed at the sites in this notice and protection of human health and the environment has been achieved in these sites. Therefore, EPA makes this proposal to delete only the sites in Table 1 of the MMR Superfund Site from the NPL.

Based on the successful completion of removal actions and the extensive investigations and risk assessments performed, there are no further response actions planned or scheduled for these sites. Pursuant to the NCP, a five-year review will not need to be performed at all of the sites in this notice.

While EPA does not believe that any future response actions at any of the sites in this notice will be needed, if future conditions warrant such action, the proposed deletion sites of the MMR Site remain eligible for future Fund-financed response actions. Furthermore, this partial deletion does not alter the status of all the remaining sites and groundwater plumes of the MMR Site which are not proposed for partial deletion and remain on the NPL.

Dated: July 23, 2007.

Robert W. Varney,

Regional Administrator, EPA New England.

TABLE 1.—LIST OF PROPOSED SITES FOR PARTIAL DELETION

CS–1*	CS–12*	FS–17
CS–1 (CG)*	CS–14*	FS–18*
CS–2	CS–15	FS–19
CS–2 (CG)*	CS–16/CS–17/DDOU*	FS–20*
CS–3*	CS–22	FS–23
CS–3 (CG)*	CY–1*	FS–25*
CS–4*	CY–3	FS–26(CG)
CS–4 (CG)/FS–1 (CG)*	FS–2	FS–27
CS–5*	FS–2 (CG)	LF–1 (CG)
CS–5 (CG)*	FS–3*	LF–2 (CG)
CS–6*/FS–22	FS–4	LF–3
CS–6 (CG)*	FS–7	LF–3 (CG)
CS–7*	FS–9*	LF–4
CS–7 (CG)*	FS–13	LF–5
CS–8/FS–21*	FS–14	LF–6
CS–8 (CG)	FS–15	SD–2/FS–6/FS–8
CS–9	FS–16*	SD–3/FTA–3/CY–4
CS–11*		

Key: CS = Chemical Spill.
CY = Coal Yard.
DDOU = Drum Disposal Operable Unit.
FS = Fuel Spill.
FTA = Fire Training Area.
LF = Landfill.
SD = Storm Drain.
CG = U.S. Coast Guard.
* Includes structure(s) at site.

TABLE 2.—NO ACTION SITES

CS–5 (CG)*	FS–2 (CG)	LF–2 (CG)
CS–7*	FS–3*	LF–3
CS–7 (CG)*	FS–15	LF–3 (CG)
CS–12*	FS–16*	LF–5
CY–1*	FS–27	LF–6
CY–3	LF–1 (CG)	

Key: CS = Chemical Spill.
CY = Coal Yard.
FS = Fuel Spill.
FTA = Fire Training Area.
LF = Landfill.
SD = Storm Drain.
USCG = U.S. Coast Guard.
* Includes structure(s)

TABLE 3.—SITES WHERE ACTION OCCURRED

CS–1*	CS–8 (CG)*	
CS–1 (CG)*	CS–9	FS–14
CS–2	CS–11*	FS–17
CS–2 (CG)*	CS–14*	FS–18*
CS–3*	CS–15	FS–19

TABLE 3.—SITES WHERE ACTION OCCURRED—Continued

CS–3 (CG)*	CS–16/CS–17/DDOU*	FS–20*
CS–4*	CS–22	FS–23
CS–4 (CG)/FS–1 (CG)*	FS–2	FS–25*
CS–5*	FS–4	FS–26 (CG)
CS–6*/FS–22	FS–7	LF–4
CS–6 (CG)*	FS–9*	SD–2/FS–6/FS–8
CS–8/FS–21*	FS–13	SD–3/FTA–3/CY–4

Key: CS = Chemical Spill.
CY = Coal Yard.
DDOU = Drum Disposal Operable Unit.
FS = Fuel Spill.
FTA = Fire Training Area.
LF = Landfill.
SD = Storm Drain.
USCG = U.S. Coast Guard.
* Includes structure(s)

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 424

[CMS–6006–P]

RIN 0938–AO84

Medicare Program; Surety Bond Requirement for Suppliers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)

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

ACTION: Proposed rule.

SUMMARY: Consistent with section 4312(a) of the Balanced Budget Act of 1997 (BBA), this proposed rule implements section 1834(a)(16)(B) of the Social Security Act (the Act) by requiring all Medicare suppliers of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) to furnish CMS with a surety bond. We believe that this requirement would limit the Medicare program risk to fraudulent DME suppliers; enhance the Medicare enrollment process to help ensure that only legitimate DME suppliers are enrolled or are allowed to remain enrolled in the Medicare program; ensure that the Medicare program recoups erroneous payments that result from fraudulent or abusive billing practices by allowing CMS or its designated contractor to seek payments from a Surety up to the penal sum; and help ensure that Medicare beneficiaries receive products and services that are considered reasonable and necessary from legitimate DME suppliers.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on October 1, 2007.

ADDRESSES: In commenting, please refer to file code CMS–6006–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (no duplicates, please):

1. *Electronically.* You may submit electronic comments on specific issues in this regulation to *http://www.cms.hhs.gov/eRulemaking.* Click on the link ''Submit electronic comments on CMS regulations with an open comment period.'' (Attachments should be in Microsoft Word, WordPerfect, or Excel; however, we prefer Microsoft Word.)

2. *By regular mail.* You may mail written comments (one original and two copies) to the following address only:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–6006–P, P.O. Box 8017, Baltimore, MD 21244–8017.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments (one original and two copies) to the following address only:

Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–6006-P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

4. *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments (one original and two copies) before the close of the comment period to one of the following addresses. If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201; or 7500 Security Boulevard, Baltimore, MD 21244–1850.

(Because access to the interior of the HHH Building is not readily available to persons without Federal Government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by mailing your comments to the addresses provided at the end of the ''Collection of Information Requirements'' section in this document.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Frank Whelan, (410) 786-1302.

SUPPLEMENTARY INFORMATION:

Submitting Comments: We welcome comments from the public on all issues set forth in this rule to assist us in fully considering issues and developing policies. You can assist us by referencing the file code CMS–6006–P and the specific ''issue identifier'' that precedes the section on which you choose to comment.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential

business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://www.cms.hhs.gov/eRulemaking.* Click on the link ''Electronic Comments on CMS Regulations'' on that Web site to view public comments.

Comments received timely will also be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

SUPPLEMENTARY INFORMATION:

I. Background

A. General and Legislative History

Medicare services are furnished by two types of entities—providers and suppliers. At § 400.202, ''provider'' is defined as a hospital, a critical access hospital (CAH), a skilled nursing facility, a comprehensive outpatient rehabilitation facility, a home health agency (HHA), or a hospice that has in effect an agreement to participate in Medicare, or a clinic, a rehabilitation agency, or a public health agency that has in effect a similar agreement but only to furnish outpatient physical therapy or speech pathology services, or a community mental health center that has in effect a similar agreement but only to furnish partial hospitalization services. The term ''provider'' is also defined in sections 1861(u) and 1866(e) of the Social Security Act (the Act).

A supplier that furnishes durable medical equipment, prosthetics, orthotics, and suppliers (DMEPOS) is one category of supplier. Other supplier categories may include, for example, physicians, nurse practitioners, and physical therapists. The term ''DMEPOS'' encompasses the types of items included in the definition of medical equipment and supplies found at section 1834(j)(5) of the Act.

For purposes of the DMEPOS supplier standards, the term ''supplier'' is defined in § 424.57(a) as an entity or individual, including a physician or Part A provider, that sells or rents Part B covered DMEPOS items to Medicare beneficiaries and that meets the DMEPOS supplier standards. This proposed rule would apply to all DMEPOS suppliers. Those individuals or entities that do not furnish DMEPOS items but furnish other types of health care services only (for example, physician services or nurse practitioner services) would not be subject to this requirement.

B. Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)

1. Durable Medical Equipment

The term DME is defined at section 1861(n) of the Act. This definition, in part, excludes from coverage as DME items furnished in skilled nursing facilities and hospitals (equipment furnished in those facilities is paid for as part of their routine or ancillary costs). Also, the term DME is included in the definition of ''medical and other health services'' found at section 1861(s)(6) of the Act. Furthermore, the term is defined in § 414.202 as equipment furnished by a supplier or a HHA that—

(1) Can withstand repeated use;

(2) Is primarily and customarily used to serve a medical purpose;

(3) Generally is not useful to an individual in the absence of an illness or injury; and

(4) Is appropriate for use in the home.

Examples of DMEPOS supplies include items such as blood glucose monitors, hospital beds, nebulizers, oxygen delivery systems, and wheelchairs.

2. Prosthetic Devices

Prosthetic devices are included in the definition of ''medical and other health services'' under section 1861(s) (8) of the Act. Prosthetic devices are defined in this section of the Act as ''devices (other than dental) which replace all or part of an internal body organ (including colostomy bags and supplies directly related to colostomy care), including replacement of such devices, and including one pair of conventional eyeglasses or contact lenses furnished subsequent to each cataract surgery with insertion of an intraocular lens.'' Other examples of prosthetic devices include cardiac pacemakers, cochlear implants, electrical continence aids, electrical nerve stimulators, and tracheostomy speaking valves. Under section 1834(h)(4)(B), prosthetic devices do not include parenteral and enteral nutrition nutrients and implantable items payable under section 1833(t) of the Act.

3. Orthotics and Prosthetics

Section 1861(s)(9) of the Act provides for the coverage of ''leg, arm, back, and neck braces, and artificial legs, arms, and eyes including replacement of required because of a change in patient's physical condition.'' As indicated by section 1834(h)(4)(C) of the Act, these items are often referred to as ''orthotics and prosthetics.''

4. Supplies

Section 1861(s)(5) of the Act includes ''surgical dressings, splints, casts, and other devices used for reduction of fractures and dislocation'' as one of the ''medical and other health services'' that is covered by Medicare. Other items that may be furnished by suppliers would include (among others):

- Prescription drugs used in immunosuppressive therapy furnished to an individual who receives an organ transplant for which payment is made under this title, and that are furnished within a certain time period after the date of the transplant procedure as noted at section 1861(s)(2)(j) of the Act.
- Extra-depth shoes with inserts or custom molded shoes with inserts for an individual with diabetes as listed at section 1861(s)(12) of the Act.
- Home dialysis supplies and equipment, self-care home dialysis support services, and institutional dialysis services and supplies included at section 1861(s)(2)(F) of the Act.
- Oral drugs prescribed for use as an anticancer therapeutic agent as specified in section 1861(s)(2)(Q) of the Act.
- Self-administered erythropoietin as described in section 1861(s)(2)(O) of the Act.

II. General Overview of the Proposed Rule

In the January 20, 1998 **Federal Register** (63 FR 2926), we published a proposed rule to reflect the changes made to section 1834 of the Act by section 4312(a) of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33). Section 4312(a) of the BBA amended section 1834(a) of the Act by adding paragraph (a)(16)(B) which requires a DMEPOS supplier to provide us, on a continuing basis, with a surety bond of at least $65,000, as a condition of the issuance or renewal of a provider number. Section 1834(a)(16), as amended by section 4312(c) of the BBA, further provides that we may also require a surety bond from some or all providers or suppliers who furnish items or services under Medicare Part A or Part B. However, since section 902 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Pub. L. 108–173) (MMA) prohibits the Secretary from finalizing a proposed rule related to Title 18 that was published more than 3 years earlier except under exceptional circumstances, this rule was never finalized.

As a result, we are proposing this rule at this time to implement the statutory

surety bond requirement set forth in section 1834(a)(16)(B) of the Act. However, given the lapse in time between the statutory effective date and date of this proposed rule, we believe that it appropriate to adjust the amount of the surety bond from $50,000 in 1997 by the Consumer Price Index (CPI) and calculate a higher surety bond amount. In doing so, we have adjusted the initial surety bond amount of $50,000 by the CPI and have calculated that a $50,000 surety bond in 1997 would equate to a surety bond value of $64,907.17 in 2007. Further, we have rounded the calculated value of $64,907.17 to the nearest thousand to derive a surety bond amount of $65,000. We believe that establishing a $65,000 surety bond for DMEPOS suppliers would: (1) Limit the Medicare program risk to fraudulent DME suppliers; (2) enhance the Medicare enrollment process to help ensure that only legitimate DME suppliers are enrolled or are allowed to remain enrolled in the Medicare program; (3) ensure that the Medicare program recoups erroneous payments that result from fraudulent or abusive billing practices by allowing CMS or its designated contractor to seek payments from a Surety up to the penal sum; and (4) help ensure that Medicare beneficiaries receive products and services that are considered reasonable and necessary from legitimate DME suppliers.

III. Provisions of the Proposed Rule

[If you choose to comment on issues in this section, please include the caption ''PROVISIONS'' at the beginning of your comments.]

A. Special Payment Rules for Items Furnished by DMEPOS Suppliers and Issuance of DMEPOS Supplier Billing Numbers (§ 424.57)

In § 424.57, we are proposing to define the following terms as they are used throughout this regulation in the context of the surety bond requirements:

- Assessment.
- Authorized Surety.
- Civil money penalty.
- Government-Operated Suppliers.
- National Supplier Clearinghouse (NSC).
- Penal Sum.
- Rider.
- Sufficient evidence.
- Surety bond.
- Unauthorized Surety.
- Unpaid claim.

Although we are proposing to define ''unauthorized surety'', we clarify that we do not envision that we would need to declare a surety to be unauthorized except on rare occasions. We anticipate that virtually every surety would provide us, upon written request, information needed to verify the identity of a bondholder, the effective date of the bond, and proof that the surety issued the bond as represented by the supplier. However, if a surety fails to comply with our request for this information, we would consider that surety as unauthorized to provide bonds to DMEPOS suppliers seeking enrollment in the Medicare program. We believe that without this provision, some sureties may not be inclined to provide information we need on a timely basis.

Furthermore, a surety is unauthorized if it had previously failed to comply with a reasonable request from us for payment against a bond. An example of a reasonable request would be a request in writing, signed by an official of CMS or its representatives, or documentation about the amount payable by the supplier. This provision would allow us to take action to prevent a surety from issuing a bond to a Medicare DMEPOS supplier in cases where we have determined that the surety failed to meet its obligations to the Medicare program.

In § 424.57, we propose to add new (c)(26). Specifically, we propose that—

- § 424.57(c)(26) would specify the requirements for a DMEPOS supplier seeking to become a Medicare-enrolled DMEPOS supplier.
- § 424.57(c)(26)(i) would clarify the minimum requirements for a DMEPOS supplier. We specify that each Medicare-enrolled DMEPOS supplier must obtain a surety bond for each National Provider Identifier (NPI) from an authorized surety. The surety bond or government security must be in the amount of $65,000 and in the form specified by the Secretary. While we are proposing to adjust the amount of the surety bond from $50,000 in 1997 by the CPI and calculate a higher surety bond amount of $65,000 in 2007, we are not proposing to adjust the base surety bond amount by the CPI annually thereafter. However, we will consider whether any additional adjustments (increase or decrease) in the base surety amount are necessary in through a future rulemaking effort.
- § 424.57(c)(26)(i)(A) would specify that a DMEPOS supplier must submit a surety bond with its initial paper or electronic Medicare enrollment application (CMS–855S, OMB Number 0938–0685) or with its paper or electronic revalidation or reenrollment application.
- § 424.57(c)(26)(i)(B) specifies how a change of ownership interest affects the DMEPOS supplier.
- § 424.57(c)(26)(i)(C) specifies that a DMEPOS supplier seeking to enroll a new location must obtain a new surety bond for this new location since this new location is also required to be enumerated with a unique NPI.
- § 457.57(c)(26)(ii) would establish an exception to the bond requirement for a DMEPOS supplier operated by a Federal, State, local, or tribal government agency if the DME supplier has provided CMS with a comparable surety bond required under State law and if the supplier does not have any unpaid claims, Civil Money Penalties (CMPs), or assessments. However, a government-operated supplier that does not qualify for an exception must submit a surety bond. We have determined that an exception of the surety bond requirement for government-operated suppliers extends only to those suppliers that have a good history of paying their Medicare debts. The basis for this exception is principally that government-operated suppliers have the power to tax; therefore, it is unlikely the DMEPOS suppliers will be unable to pay their Medicare debts. Thus, government-operated DMEPOS suppliers, by their public nature, furnish a comparable or greater guarantee of payment than would be afforded us by a surety bond issued by a private surety.

Nevertheless, government-operated DMEPOS suppliers with a poor history of paying their Medicare debts are subject to the surety bond requirement. While the Medicare contractors collect overpayments in full or as part of a predetermined payment schedule, such as an extended repayment schedule, some DMEPOS suppliers default on their scheduled repayment plan. When this occurs and the repayment schedule cannot be extended, we will place the DMEPOS supplier on 100 percent payment withholding. In the event that a government-operated DMEPOS supplier is placed on 100 percent payment withholding due to non-payment of an overpayment, the DMEPOS supplier will also be required to obtain a surety bond. A supplier operating under a contract with a government agency but not owned and staffed by the government would not qualify for this exception. Our anecdotal experience with previously published rules suggests that a government-operated entity would timely pay their Medicare debts (see the HHA surety bond final rule published in the **Federal Register** on January 5, 1998 (63 FR 315); amended by a final rule published in the **Federal Register** on March 4, 1998 (63 FR 10731); a final rule published in the **Federal Register** on June 1, 1998 (63

FR 29656); and a final rule published in the **Federal Register** on July 21, 1998 (63 FR 41171)).

- We are soliciting comments on whether we should consider establishing an exception to the surety bond requirement for certain physicians and non-physician practitioners, such as those that occasionally furnish DMEPOS items for the convenience of their patients. While we are seeking comments about establishing an exception for physicians and non-physician practitioners, we are not certain about the scope of the exception that should be established for physicians and non-physician practitioners. As such, we are soliciting comments on how to identify whether a physician or non-physician practitioner should be given an exception to the surety bond requirement. We also are soliciting comments on any other appropriate criteria that we should use when considering the establishment of an exception to this requirement for certain physicians and non-physician practitioners.
- We are soliciting comments on whether we should establish an exception to the surety bond requirement for licensed pharmacists who furnish DMEPOS items for the convenience of their patients. We also are soliciting comments on any other appropriate criteria that we should consider in establishing an exception to this requirement for licensed pharmacists.
- We are also soliciting comments on any other appropriate criteria that we should consider in establishing an exception to this requirement as to these types of suppliers.
- We are also soliciting comment on whether we should establish an exception to the surety bond requirement for large, publicly traded chain suppliers of DMEPOS. We are soliciting comments on any appropriate criteria that we should consider in waiving this requirement as to these types of suppliers.
- We are also soliciting comments on the appropriate criteria that we may use for establishing exceptions for other types of DMEPOS suppliers from the requirement to purchase a surety bond.
- § 424.57(c)(26)(iii) would specify the terms of a bond submitted by a DMEPOS supplier.
- § 424.57(c)(26)(iv) would specify additional DMEPOS supplier bond requirements and would specify the surety's liability under the bond for unpaid claims, CMPs, or assessments that the surety is liable to us, up to a total of the full penal amount of the bond. Thus, since we are proposing that surety bonds be issued in an amount equal to $65,000, the surety is liable to us for up to $65,000.
- § 424.57(c)(26)(v) would specify the requirements to cancel a surety bond. Specifically, this section would allow a DMEPOS supplier to terminate or cancel a bond upon proper notice to the NSC. If another bond is submitted and there is a lapse in bond coverage, Medicare would not pay for items or services furnished during the gap in coverage, and the DMEPOS supplier would be held liable for the items or services (that is, the DMEPOS supplier would not be permitted to charge the beneficiary for the items or services). Failure by the DMEPOS supplier to submit another bond would result in revocation of the DMEPOS supplier's Medicare billing privileges. The supplier would be required to refund the beneficiary any amounts collected for services or supplies furnished during the gap in the surety bond coverage.

Also, a supplier or surety may not place any limitations on the surety bond except as specifically provided for in this section. Any attempt to do so may result in revocation of the DMEPOS supplier's billing privileges and a determination that the surety is an unauthorized surety.

- § 424.57(c)(26)(vi) would specify that the bond must provide that actions under the surety bond may be brought by our contractors or us.
- § 424.57(c)(26)(vii) would specify that the surety must provide information regarding their physical location including their name, street address, city, state, and zip code and, if different, their mailing address, including name, post office box, city, state, and zip code.
- § 424.57(c)(26)(viii) would specify the submission date and the term of the DMEPOS supplier bond.
- § 424.57(c)(26)(viii)(A) would specify that each enrolled DMEPOS supplier that does not meet the criteria for exception must submit to the NSC an initial surety bond before (60 days following the publication date of the final rule).
- § 424.57(c)(26)(viii)(B) would specify the type of bond required to be submitted by a DMEPOS supplier under this subpart must be either a continuous bond or an annual bond, with the exception of the initial bond which may differ as specified in this section.
- § 424.57(c)(26)(ix) would specify the loss of a DMEPOS supplier exception. A DMEPOS supplier that no longer qualifies for a exception as a government-operated DMEPOS supplier must submit a surety bond to the NSC within 60 days after it receives notice that it no longer meets the criteria for and exception.
- § 424.57(c)(26)(x) would specify the conditions under which a DMEPOS supplier changes a surety.
- § 424.57(c)(26)(xi) would specify who the parties are to the bond.
- § 424.57(c)(26)(xii) would specify the effect of a DMEPOS supplier's failure to obtain, maintain, and timely file a surety bond.
- § 424.57(c)(26)(xii)(A) would specify that we may revoke the DMEPOS supplier's billing privileges if an enrolled supplier fails to obtain, file timely, and maintain a surety bond as specified in this subpart and as instructed by us. The revocation is effective with the date the bond lapsed and any payments for items or services furnished on or after that date must be repaid to us by the DMEPOS supplier.
- § 424.57(c)(26)(xii)(B) would specify that we refuse to issue billing privileges to the DMEPOS supplier if a DMEPOS supplier seeking to become an enrolled DMEPOS supplier fails to obtain and file timely a surety bond as specified in this subpart and our instructions.
- § 424.57(c)(26)(xiii) would specify the documentation that a DMEPOS supplier must have to be in compliance with these requirements and that we may require a supplier to produce documentation that it has a bond and that it meets the requirements of this section.
- § 424.57(c)(26)(xiv) would specify the effect of subsequent DMEPOS supplier payments paid to us. If a surety has paid an amount to us on the basis of liability incurred under a bond and we subsequently collect from the DMEPOS supplier, in whole or in part, on the unpaid claims, CMPs, or assessments that were the basis for the surety's liability, we would reimburse the surety the amount that it collected from the DMEPOS supplier, up to the amount paid by the Surety to us, provided the surety has no other liability to us under the bond.
- § 424.57(c)(26)(xv) would specify the effect of a review reversing an appealed determination. We would refund to the DMEPOS supplier the amount that the DMEPOS supplier paid us, to the extent that the amount relates to the matter that was successfully appealed, provided all review, including judicial review, has been completed on the matter.

In addition, DMEPOS suppliers have the right to appeal any adverse decisions with respect to unpaid claims, CMPs or assessments. DMEPOS suppliers must use the following applicable appeals provisions specified

in 42 CFR associated with each adverse determination: Part 405, subpart I (claims appeals); Part 1003 (civil money penalties); and Part 498 (Medicare participation and enrollment).

We believe that the appeals processes as they apply to DMEPOS suppliers and sureties should be addressed through a private contract between the parties. Specifically, we believe that sureties should consider requiring DMEPOS suppliers to agree to repay the surety any payments made by a Medicare contractor resulting from a DMEPOS supplier's appeal of any adverse decisions with respect to unpaid claims, CMPs or assessments. Any such contract must be consistent with the applicable appeals processes referenced above. In determining whether a private contract is necessary, we suggest that the sureties and DMEPOS suppliers consider the following types provisions: appointment of representative, repayment of any bonding amounts paid to the DMEPOS supplier that were already paid by the surety and the potential cost of pursuing administrative appeals.

Furthermore, we are soliciting comments on requiring DMEPOS suppliers to obtain a surety bond of more than $65,000 if the DMEPOS supplier poses a significantly higher than average risk to the Medicare Trust Funds. Specifically, we are soliciting comments on how to establish elevated amounts of surety bonds for higher risk DMEPOS suppliers. We are considering the option of establishing elevated amounts of the surety bond at a rate of $65,000 per high risk factor. Also, we are soliciting comments on determining the high risk factors that should be used. We suggest several potential high risk factors below, but would consider any comments on these factors, as well as suggestions for additional factors.

We are considering a $65,000 increase in the surety amount for each occurrence when a DMEPOS supplier has a final adverse action as specified in section 221(g)(1)(A) of the Health Insurance Portability and Accountability Act of 1996 (Pub. L. 104–191) (HIPAA). Examples of final adverse actions include, but are not limited to, Federal and State criminal convictions related to the delivery of health care item or service, formal or official actions, such as revocation or suspension of a license, and exclusion from participation in Federal or State health care programs. The following is an example of how high-risk criteria would be used to increase the bond amount by $65,000 per occurrence.

- For example, a DMEPOS supplier would be required to obtain a surety bond in the amount of $130,000, an increase of $65,000 from the base surety bond amount of $65,000, if the DMEPOS supplier or any of its owners, authorized officials, or delegated officials had their billing privileges revoked within the last 10 years. If the DMEPOS supplier or any of its owners, authorized officials, or delegated officials had more than one revocation in the last 10 years, then the amount of the surety bond the DMEPOS supplier would be required to obtain would increase $65,000 per occurrence. For example, a DMEPOS supplier with three different revocations during the proceeding 10 years would be required to obtain a surety bond in the amount of $260,000; $65,000 for the base surety amount and $195,000 (3 x $65,000) for the multiple revocations.

In addition to the elevated risk-based model described above, we are soliciting comments regarding the establishment of elevated bond amounts by classifying DMEPOS suppliers into two or three general categories such as—

- New DMEPOS supplier applicants that have no prior billing history with the Medicare program that also would be required to secure a surety bond;
- Current Medicare enrolled DMEPOS suppliers that do not have any prior history of criminal, civil or administrative sanctions for billing-related problems; and,
- Current Medicare enrolled DMEPOS supplier with a prior ''adverse history'' of criminal, civil or administrative sanctions for billing-related problems for which the regulation would elevate the amount of the required surety by an appropriate amount per prior sanction.

We are soliciting comments regarding the appropriate elevated amounts of the surety bond using this categorical approach.

We are also soliciting comments on whether we should establish an exception for rural DMEPOS suppliers and the appropriate criteria that we should consider in establishing an exception for rural DMEPOS suppliers.

Finally, we are soliciting comments on the appropriate period of time that a DMEPOS supplier should be required to maintain a higher surety bond amount. Given the higher level of risk associated with DMEPOS suppliers that have one or more risk factors, we are proposing to establish a timeframe of 5 years.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), we are required to provide a 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of the following issues pertaining to the information collection requirements discussed in this proposed rule.

Special Payment Rules for Items Furnished by DMEPOS Suppliers and Issuance of DMEPOS Supplier Billing Numbers (§ 424.57)

Section 424.57(c)(26) outlines the surety bond requirements for DMEPOS suppliers. Specifically, § 424.57(c)(26) states that each Medicare-enrolled DMEPOS supplier must obtain and furnish to the National Supplier Clearinghouse (NSC) a surety bond in the amount of $65,000. The bond must be obtained from an authorized surety, and must be submitted for each NPI obtained by a Medicare enrolled DMEPOS supplier.

Section 424.57(c)(26)(i) outlines the minimum requirements for a DMEPOS supplier seeking to become a Medicare-enrolled DMEPOS supplier. Section 424.57(c)(26)(i)(A) requires a DMEPOS supplier seeking to become a Medicare-enrolled supplier to submit documentation verifying possession of a surety bond with its Medicare enrollment application. Section 424.57(c)(26)(i)(B) states that a DMEPOS supplier seeking to become an enrolled supplier through the purchase or transfer of assets or ownership interest of an enrolled or formerly enrolled DMEPOS supplier must provide a surety bond that is effective from the date of the purchase or transfer in order to exercise billing privileges as of that date. If the bond is effective at a later date, the effective date of the new DMEPOS supplier number will be the effective date of the surety bond as validated by the NSC rather than the date of the change of ownership.

Section 424.57(c)(26)(i)(C) requires a DMEPOS supplier that is seeking to enroll a new location to obtain a new surety bond for that new location since

that new location will also require a unique NPI.

Section 424.57(c)(26)(v) discusses the change of ownership process. DMEPOS suppliers are required to submit an updated enrollment application if they have undergone a change in ownership. As part of the updated application, the new owners are required to obtain and submit a surety bond to the NSC that is effective with the date of the change of ownership in order to obtain or retain billing privileges. If the bond is effective at a later date, the effective date of the change of ownership by the new DMEPOS supplier number is the date of the surety bond as validated by the NSC rather than the date of the transfer of ownership.

The burden associated with all of the requirements in § 424.57(c)(26)(i) through (iv) is the time and effort required for a DMEPOS supplier to obtain a surety bond and to submit the bond as part of its Medicare Enrollment Application.

A DMEPOS supplier is required to submit a Medicare enrollment application if it is:

- Enrolling in Medicare for the first time as a DMEPOS supplier.
- Currently enrolled in Medicare as a DMEPOS supplier and needs to report changes to its business, other than enrolling a new business location. Changes must be reported within 30 days of the effective date of the change.
- Currently enrolled in Medicare as a DMEPOS supplier but need to enroll a new business location. This is to add a new location to an organization with a TIN already listed with the NSC. (This differs from changing information on an already existing location.)
- Currently enrolled in Medicare as a DMEPOS supplier and has been asked to verify or update its information. This includes situations where it has been asked to attest that its organization is still eligible to receive Medicare payments.
- Reactivating its Medicare DMEPOS supplier billing number (for example, its Medicare supplier billing number was deactivated because of non-billing, and they wish to receive payment from Medicare for future claims).
- Voluntarily terminating its Medicare DMEPOS supplier billing number.

The burden associated with submitting an updated enrollment application is approved under OMB control number 0938–0685 with an expiration date of April 30, 2009. We believe the requirements in § 424.57(c)(26) impose a marginal increase in burden as DMEPOS suppliers are already required to submit the Medicare Enrollment Application.

We estimate the burden associated with the requirements in § 424.57(c)(26)(i) through (v) to be 60 minutes per DMEPOS supplier. In addition, we estimate that approximately 116,500 DMEPOS suppliers will comply with these requirements. Therefore, the estimated total annual burden is 116,500 hours.

Section 424.57(c)(26)(v) states that a surety bond may be cancelled with written notice from the DMEPOS supplier to the NSC. The burden associated with this requirement is the time and effort necessary for either DMEPOS supplier to draft and submit the notice of cancellation to the NSC. We estimate the burden associated with this requirement to be 30 minutes. In addition, we anticipate that 1,000 suppliers will draft and submit the necessary documentation. We estimate the total annual burden to be 500 hours.

Section 424.57(c)(26)(ix) requires a DMEPOS supplier that no longer qualifies as a government-operated DMEPOS supplier to submit a surety bond to the NSC within 60 days of receiving notice that it no longer qualifies for a exception. The burden associated with this requirement is the time and effort necessary for the DMEPOS supplier to obtain and submit a surety bond to the NSC within 60 days of receiving notice that it no longer qualifies for a exception. We estimate the burden associated with this requirement to be 30 minutes. In addition, we anticipate that 10 suppliers will draft and submit the necessary documentation. We estimate the total annual burden to be 5 hours.

Section 424.57(c)(26)(x) requires a DMEPOS supplier that obtains a replacement surety bond from a different surety to cover the remaining term of a previously obtained bond to submit the new surety bond to the NSC within 30 days of expiration of the previous bond. The burden associated with this requirement is the time and effort necessary to obtain and submit the new surety bond to the NSC. We estimate the burden associated with this requirement to be 30 minutes. In addition, we anticipate that 1,000 suppliers will comply with this requirement. We estimate the total annual burden to be 500 hours.

Section 424.57(c)(26)(xiii) imposes recordkeeping and reporting requirements. Section 424.57(c)(26)(xvi)(A) states that CMS may at any time require a DMEPOS supplier to show compliance with the requirements associated with 42 CFR part 424. The burden for this requirement is the time and effort associated with maintaining the necessary documentation on file. While this requirement is subject to the PRA, we believe the burden is exempt as stated in 5 CFR 1320.3(b)(2) because the time, effort, and financial resources necessary to comply with the requirement would be incurred by persons in the normal course of their activities.

The burden associated with producing the documents upon request from CMS is estimated to be 30 minutes per DMEPOS supplier. We estimate that 1,000 DMEPOS suppliers will be asked to submit the requested documentation. The total annual burden associated with this requirement is estimated to be 500 hours.

TABLE 1.—ESTIMATED ANNUAL REPORTING AND RECORDKEEPING BURDEN

Regulation section	OMB control number	Number of respondents	Number of responses	Total annual burden hours
424.57(c)(26)(i through iv)	0938–New	116,500	116,500	116,500
	0938–0685	400,000	400,000	1,000,000
§ 424.57(c)(26)(v)	0938–New	1,000	1,000	500
§ 424.57(c)(26)(ix)	0938–New	10	10	5
§ 424.57(c)(26)(xi)	0938–New	1,000	1,000	500
§ 424.57(c)(26)(xii)	0938–New	1,000	1,000	500
Total				1,118,005

We submitted a copy of this proposed rule with comment to the OMB for its review of the information collection requirements. These requirements are not effective until approved by OMB.

If you comment on any of these information collection and recordkeeping requirements, please mail copies directly to the following:

Centers for Medicare and Medicaid Services, Office of Strategic Operations and Regulatory Affairs, Regulations Development Group Attn.: William N. Parham, III, CMS–6006–P Room C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850; and

Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503.

Attn.: Carolyn Lovett, CMS Desk Officer, CMS–6006–P, *carolyn_lovett@omb.eop.gov*. Fax (202) 395–6974.

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VI. Regulatory Impact Analysis

[If you choose to comment on issues in this section, please include the caption ''IMPACT'' at the beginning of your comments.]

A. Introduction

We have examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132.

Executive Order 12866 (as amended by Executive Order 13258, which merely reassigns responsibility of duties) directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year).

We estimate that the surety bond requirement as specified in § 424.57(c)(26)(i) would cost approximately $198 million annually. This cost is based on the number of suppliers furnishing DMEPOS (approximately 99,000) multiplied by the average annual cost of a bond ($2,000). Based on information received from the industry, we estimated that the average bond cost is approximately $2,000 or 3 percent of the bond's value. We are seeking comments on the accuracy of this estimate.

A surety charges its underwriting fee based on the penal sum of the bond. We have determined that for this type of surety bond the industry usually has an underwriting charge of 2 to 3 percent. We believe that there is little variation of the charge based on geographical location or type of DMEPOS supplier although the DMEPOS supplier's financial soundness probably would be a factor in the rate charged by the surety for the bond. We are unable to make an estimate of the range of financial soundness of DMEPOS suppliers, or its impact on the cost of surety bonds for Medicare.

While it is not possible to estimate with accuracy the savings that would result from the implementation of this proposed rule, we believe that surety bonds combined with other program integrity efforts should reduce the number of DMEPOS suppliers that currently bill Medicare fraudulently because DMEPOS suppliers would be subject to the scrutiny of surety companies. In addition, surety bonds would serve as a deterrent to others tempted to engage in fraudulent behavior because of the cost of the bond and the possibility of the need to post collateral.

The RFA requires agencies to analyze options for regulatory relief of small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6.5 million to $31.5 million in any 1 year.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We are not preparing a rural impact statement since we have determined, and certify, that this proposed rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

Table 2 examines the allowed charges to the unique billing numbers (a DMEPOS supplier may have multiple locations, for example, a chain organization, but use only one unique billing number), the vast majority of DMEPOS suppliers are small entities (based on Medicare reimbursement alone).

TABLE 2.—TOTAL NUMBER OF SUPPLIERS ARRANGED BY ALLOWED CHARGES FOR DATES OF SERVICE (JANUARY THROUGH DECEMBER 2005 BASED ON UNIQUE BILLING NUMBERS)

Allowed charge	Number of suppliers reimbursed for DME	Number of DMEPOS suppliers reimbursed for non-DME only
$0	2,016	4,655
$0.01–$999	2,544	6,624
$1,000–$2,499	2,099	4,993
$2,500–$4,999	2,285	4,459
$5,000–$9,999	2,964	4,153
$10,000–$24,999	4,568	4,328
$25,000–$49,999	3,378	2,100
$50,000–$99,999	2,780	1,245

TABLE 2.—TOTAL NUMBER OF SUPPLIERS ARRANGED BY ALLOWED CHARGES FOR DATES OF SERVICE (JANUARY THROUGH DECEMBER 2005 BASED ON UNIQUE BILLING NUMBERS)—Continued

Allowed charge	Number of suppliers reimbursed for DME	Number of DMEPOS suppliers reimbursed for non-DME only
$100,000–$499,999	5,955	1,191
$500,000–$999,999	1,762	220
$1,000,000–4,999,999	1,345	105
$5,000,000 or more	208	7
Total	31,904	34,080

In reviewing Table 2, the term, durable medical equipment (DME) is defined at section 1861(n) of the Act. This definition, in part, excludes from coverage as DME, items furnished in skilled nursing facilities and hospitals (equipment furnished in those facilities is paid for as part of their routine or ancillary costs). Also, the term DME is included in the definition of ''medical and other health services'' found at section 1861(s)(6) of the Act. Furthermore, the term is defined in § 414.202 as equipment furnished by a supplier or a HHA that—

- Can withstand repeated use;
- Is primarily and customarily used to serve a medical purpose;
- Generally is not useful to an individual in the absence of an illness or injury; and
- Is appropriate for use in the home.

Examples of DMEPOS supplies include items such as blood glucose monitors, hospital beds, nebulizers, oxygen delivery systems, and wheelchairs.

Conversely, suppliers of non-DME only refers to items or services furnished by prosthetics, orthotist, and supplies found in section 1861(s)(5) of the Act.

As of April 2007, there were 116,471 individual DMEPOS suppliers. However, due to the affiliation of some DMEPOS suppliers with chains, there were only approximately 65,984 unique billing numbers (31,904 + 34,080). According to Table 2, for fiscal year 2005, approximately 15,800 billing suppliers with allowed charges of less than $1,000 (2,016 + 4,655 + 2,544 + 6,624) would have been required to submit a surety bond if this proposed rule is implemented. Based on our analysis, we anticipate that almost all of these DMEPOS suppliers, excluding physician and other practitioners as defined in section 1842(b)(18)(C) of the Act, would elect to cease their enrollment in Medicare because their bond cost would exceed their profit from dealing in Medicare-covered items. Furthermore, the majority of the 13,836 DMEPOS suppliers with allowed charges $1,000 to $4,999 (2,099 + 4,993 + 2,285 + 4,459) would not recoup their bond costs from Medicare business. Also, a portion of DMEPOS suppliers in higher charge categories may decide to forego their Medicare enrollment as a DMEPOS supplier because of the added cost of the bond. We estimate that as many as 15,000 DMEPOS suppliers, or 23 percent of the 65,984 entities, and 15 percent (or 17,471) of the 116,471 individual suppliers currently enrolled in Medicare could decide to cease providing items to Medicare beneficiaries if this proposed rule is implemented. We believe that approximately 22 percent of the 15,000 DMEPOS suppliers are located in rural areas. We further believe that most, if not all, of the Medicare business conducted by these DMEPOS suppliers would be assumed by other DMEPOS suppliers remaining in the program (for example, by mail order or via the World Wide Web). To assist Medicare beneficiaries locate a replacement DMEPOS supplier who qualifies to continue to participate in the Medicare program, we would conduct education and outreach efforts to ease the transition from a departing DMEPOS supplier to a DMEPOS supplier that will remain in the program.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. That threshold is currently approximately $120 million. This proposed rule would have no consequential effect on State, local, or tribal governments. We believe that the private sector costs of this rule are greater than these thresholds.

Executive Order 13132 established certain requirements that an agency must meet when it issues a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. We have reviewed this rule under the threshold criteria of Executive Order 13132 and have determined that it does not significantly affect the rights, roles, and responsibilities of States.

B. Alternatives Considered

As specified in section 4312(a) of the BBA, a surety bond is required as long as an entity remains a DMEPOS supplier. In the proposed rule published in the January 20, 1998 **Federal Register** (63 FR 2926), we proposed that a DMEPOS supplier would be required to obtain a surety bond equal to $65,000 per TIN, the basic identification element for a DMEPOS supplier. However, with the more recent assignment of the National Provider Identifier (NPI), the TIN is no longer the basic identification element for a DMEPOS supplier. Accordingly, requiring a surety bond for each TIN is not consistent with the Agency's NPI implementation or with current Medicare regulations. In the Agency's Medicare Subpart Expectation Paper, the Agency states that each enrolled supplier of DMEPOS that is a covered entity under HIPAA must designate each practice location (if it has more than one) as a subpart and ensure that each subpart obtains its own unique NPI. Further, § 424.57(b)(1) requires that each practice location of a supplier of DMEPOS (if it has more than one) must, by law, be separately enrolled in Medicare and have its own unique Medicare billing number or NPI.

Accordingly, we are proposing a $65,000 bond per DMEPOS supplier NPI; the basic identification element for a DMEPOS supplier.

C. Conclusion

Any burden imposed by this proposed rule is legislatively mandated, and we have taken steps to ensure that the burden on DMEPOS suppliers is minimal. Surety bonds use a private sector mechanism to screen DMEPOS

suppliers that provide items and services to Medicare's beneficiaries and help ensure that they are financially responsible. Also, surety bonds help to ensure that the government can recoup taxpayer money from DME suppliers who default on their obligations to the Medicare program.

We use a financial guarantee bond for the return of overpayments regardless of their source. A guarantee bond would ensure more scrutiny and benefits to Medicare. In underwriting this type of bond, a surety would pay particular attention to financial statements, business practices, and overpayment history. This scrutiny would provide the Medicare program with some of the following benefits: (1) Proprietors who do not have relevant program experience would be deterred from entering the program; (2) existing Medicare DMEPOS suppliers would be examined as to their business soundness; and (3) DMEPOS suppliers with overpayments that do not repay their overpayments would be unlikely to obtain a subsequent surety bond and would be removed from the Medicare business. Generally, all DMEPOS suppliers would be deterred from incurring overpayments and would have an incentive to repay any overpayments that are discovered.

Screening by a surety appears to be most useful for new DMEPOS suppliers. The large number of DMEPOS suppliers entering the Medicare program with little scrutiny makes requiring surety bonds a useful mechanism for screening DMEPOS suppliers already in the program. However, the value of this scrutiny would probably diminish with a DMEPOS supplier's continued participation in Medicare.

We believe that the impact on benefit payments is indeterminable. In accordance with the provisions of Executive Order 12866, this rule was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 424

Emergency medical services, Health facilities, Health professions, Medicare.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV, as set forth below:

PART 424—CONDITIONS FOR MEDICARE PAYMENT

1. The authority citation for part 424 is revised to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

Subpart D—To Whom Payment Is Ordinarily Made

2. Section 424.57 is amended by—

A. Amending paragraph (a) to add the following definitions in alphabetical order: ''Assessment'', ''Authorized surety'', ''Civil money penalty'', ''Government-operated supplier'', ''National Supplier Clearinghouse (NSC)'', ''Penal sum'', ''Rider'', ''Sufficient evidence'', ''Surety bond'', ''Unauthorized surety'', and ''Unpaid claim''.

B. Adding paragraph (c)(26).

The additions read as follows:

§ 424.57 Special payment rules for items furnished by DMEPOS suppliers and issuance of DMEPOS supplier billing privileges.

(a) * * *

Assessment means a sum certain that CMS or the Office of Inspector General (OIG) may assess against a DMEPOS supplier under Titles XI, XVIII, or XXI of the Social Security Act or as specified in this chapter.

Authorized surety means a surety that—

(1) Has been issued a Certificate of Authority by the U.S. Department of the Treasury as an acceptable surety on Federal bonds and the certificate has neither expired nor been revoked; and

(2) Has not been determined by CMS to be an unauthorized surety under this section.

Civil money penalty (CMP) means a sum that CMS has the authority, as implemented by 42 CFR 402.1(c); or OIG has the authority under section 1128A of the Act or 42 CFR part 1003, to impose on a supplier as a penalty.

* * * * *

Government-operated supplier is a DMEPOS supplier owned or operated by a Federal, State, or Tribal entity.

* * * * *

National Supplier Clearinghouse (NSC) is the contractor that is responsible for the enrollment and re-enrollment process for DMEPOS suppliers.

Penal sum is a sum to be paid (up to the value of the bond) by the surety as a penalty under the terms of the surety bond when a loss has occurred.

Rider means a notice issued by a surety that a change in the bond has occurred or would occur.

Sufficient evidence means the documentation that CMS may supply to the surety in order to establish that a DMEPOS supplier had received Medicare funds in excess of amounts due and payable under the statute and regulations.

Surety bond means a bond issued by one or more sureties under 31 U.S.C. 9304 through 9308 and 31 CFR parts 223, 224, and 225.

Unauthorized surety mean a surety that—

(1) Fails, upon written request by the National Supplier Clearinghouse or CMS, to furnish confirmation of the issuance of a surety bond within 30 days.

(2) Fails to furnish evidence of the validity and accuracy of information appearing on a surety bond that a supplier has presented to the NSC or CMS showing the company as surety on the bond.

(3) Fails to pay CMS in full the amount requested, up to the penal sum of the bond when presented with a request for payment within 30 days of written notification.

Unpaid claim means an overpayment made by the Medicare program to the DMEPOS supplier for which the DMEPOS supplier is responsible, plus accrued interest that is effective 90 days after the date of the notice sent to the DMEPOS supplier of the overpayment. If a written agreement for payment, acceptable to CMS, is made, an *unpaid claim* also means a Medicare overpayment for which the DMEPOS supplier is responsible, plus accrued interest after the DME supplier's default on the arrangement.

* * * * *

(c) * * *

(26) *Surety bond requirements for DMEPOS suppliers.* Except as provided in paragraph (c)(26)(ii) of this section, each DMEPOS supplier that is a Medicare-enrolled DMEPOS supplier must obtain and furnish to the NSC, a surety bond of at least $65,000, from an authorized surety, as defined in paragraph (a) of this section of this section, for each NPI issued by Medicare.

(i) *Minimum requirements for a DMEPOS supplier.*

(A) A supplier enrolling in the Medicare program, making a change in their existing enrollment information, or responding to a revalidation or reenrollment request must submit a surety bond of $65,000 with its paper or electronic Medicare enrollment application (CMS–855S, OMB number 0938–0685). The term of the initial surety bond must be effective on the date that the application is submitted to the NSC.

(B) A supplier that seeks to become an enrolled DMEPOS supplier through purchase or transfer of assets or ownership interest must provide a surety bond that is effective from the date of the purchase or transfer in order to exercise billing privileges as of that

date. If the bond is effective at a later date, the effective date of the new DMEPOS supplier number will be no sooner than the effective date of the surety bond as validated by the NSC.

(C) A DMEPOS supplier seeking to enroll a new location under a tax identification number for which it already has a DMEPOS surety bond in place may obtain a new surety bond or can submit an amendment or rider to the existing bond, showing that the new location is covered by an additional $65,000 surety bond.

(ii) *Exception for Government-operated suppliers.* Government-operated DMEPOS suppliers are provided an exception of the surety bond requirement if the DME supplier has provided CMS with a comparable surety bond under State law, and if it does not have any unpaid claims, CMPs or assessments.

(iii) *Terms of the surety bond.* The terms of the bond submitted by a DMEPOS supplier for the purpose of complying with this section must meet the minimum requirements of liability coverage ($65,000) and surety and DMEPOS supplier responsibility as set forth in this section. CMS requires a supplier to submit a bond that on its face reflects the requirements of this section. CMS will revoke or deny a DMEPOS supplier's billing privileges based upon the submission of a bond that does not reflect the requirements of this section.

(iv) *Specific surety bond requirements.*

(A) The bond must guarantee that the surety must, within 30 days of receiving written notice from CMS containing sufficient evidence to establish the surety's liability under the bond of unpaid claims, CMPs, or assessments, pay CMS a total of up to the full penal amount of the bond in the following amounts:

(*1*) The amount of any unpaid claim, plus accrued interest, for which the DMEPOS supplier is responsible.

(*2*) The amount of any unpaid claims, CMPs, or assessments imposed by CMS or OIG on the DMEPOS supplier, plus accrued interest.

(B) The bond must provide the following: The surety is liable for unpaid claims, CMPs, or assessments that are presented to the surety for payment when the surety bond is in effect, regardless of when the payment, overpayment, or other event giving rise to the claim, CMPs, or assessment occurred, provided CMS or OIG make a written demand for payment from the surety during the term of the bond except or after such term in accordance with paragraph (c)(26)(iv)(C) of this section.

(C) If the DMEPOS supplier fails to furnish a bond meeting the requirements of this subpart, fails to submit a rider when required, or if the DMEPOS supplier's billing privileges are revoked, the last bond or rider submitted by the DMEPOS supplier remains in effect until the last day of the surety bond coverage period and the surety remains liable for unpaid claims, CMPs, or assessments that—

(*1*) CMS or the OIG imposes or asserts against the DMEPOS supplier based on overpayments or other events that took place during the term of the bond or rider; and

(*2*) Were imposed or assessed by CMS or the OIG during the 2 years following the date that the DMEPOS supplier failed to submit a bond or required rider, or the date the DMEPOS supplier's billing privileges were terminated, whichever is later.

(v) *Cancellation of a bond.* The bond may be canceled by written notice from the DMEPOS supplier to the NSC and the surety. The DMEPOS supplier must provide written notice at least 30 days before the effective date of the action to the NSC and the surety. Cancellation of a surety bond is grounds for revocation of the DMEPOS supplier's Medicare billing privileges unless the DMEPOS supplier provides a new bond before the effective date of the cancellation. The liability of the surety continues through the termination effective date. The bond is automatically canceled and the surety is excused from any liability for future claims after the termination effective date. If CMS receives notification of a lapse in bond coverage from the surety, the DMEPOS supplier's billing privileges will be revoked. The surety must immediately notify the NSC if there is a lapse in bond coverage. The liability of the DMEPOS supplier and the surety to CMS is not extinguished by any of the following:

(A) Any action by the DMEPOS supplier or the surety to make amendment to a conforming bond that will terminate or limit the scope or term of the bond in a manner resulting in the bond no longer conforming to this regulation.

(B) The DMEPOS supplier's failure to continue to meet the requirements of paragraph (c)(26)(i) of this section or CMS determination that the surety is an unauthorized surety as defined in paragraph (a) of this section.

(C) Revocation of the DMEPOS supplier's billing privileges.

(D) Any action by CMS to suspend, offset, or otherwise recover payments to the DMEPOS supplier unless the action results in complete and final recovery of the debt.

(E) Any action by the DMEPOS supplier to—

(*1*) Cease operation.

(*2*) Sell or transfer any asset or ownership interest.

(*3*) File for bankruptcy.

(*4*) Fail to pay the surety.

(F) Any fraud, misrepresentation, or negligence by the DMEPOS supplier in obtaining the surety bond or by the surety (or the surety's agent) in issuing the surety bond.

(G) The DMEPOS supplier's failure to exercise available appeal rights under Medicare or to assign the rights to the surety.

(vi) *Actions under the bond.* The bond must provide that actions under the bond may be brought by CMS or by CMS contractors.

(vii) *Required surety information.* The bond must provide the surety's name, street address or post office box number, city, state, and zip code.

(viii) *Submission date and term of the DMEPOS supplier bond.*

(A) Each enrolled DMEPOS supplier that does not meet the criteria for an exception under paragraph (c)(26)(i)(D) of this section must submit to the NSC an initial surety bond before (60 days following the publication date of the final rule).

(B) The type of bond required to be submitted by a DMEPOS supplier under this subpart must be either a continuous bond or an annual bond.

(ix) *Loss of a DMEPOS supplier exception.* A DMEPOS supplier that no longer qualifies for an exception as a government-operated DMEPOS supplier described in paragraph (c)(26)(ii) of this section must submit a surety bond to the NSC within 60 days after it knows or has reason to know that it no longer meets the criteria for an exception.

(x) *Change of surety.* A DMEPOS supplier that obtains a replacement surety bond from a different surety to cover the remaining term of a previously obtained bond must submit the new surety bond to the NSC at least 30 days prior to the expiration of the previous bond. There must be no gap in the coverage of the bond periods. If a gap in coverage exists, the NSC will revoke the supplier's billing privileges and not pay for any items or services furnished by the DMEPOS supplier during the period for which no bond coverage was available. If a DMEPOS supplier changes its surety during the term of the bond, the new surety will be responsible for any overpayments, CMPs, or assessments incurred by the DMEPOS supplier beginning with the effective date of the new surety bond. The

previous surety is responsible for any overpayments, CMPs, or assessments that occurred up to the date of the change of surety.

(xi) *Parties to the bond.* The surety bond must name the DMEPOS supplier as Principal, CMS as Obligee, and the surety (and its heirs, executors, administrators, successors and assignees, jointly and severally) as surety.

(xii) *Effect of DMEPOS supplier's failure to obtain, maintain, and timely file a surety bond.*

(A) CMS will revoke the DMEPOS supplier's billing privileges if an enrolled supplier fails to obtain, file timely, or maintain a surety bond as specified in this subpart and CMS instructions. Notwithstanding paragraph (d) of this section, the revocation will be effective with the date the bond lapsed and any payments for items furnished on or after that date must be repaid to CMS by the DMEPOS supplier.

(B) CMS will deny billing privileges to a supplier if the supplier seeking to become an enrolled DMEPOS supplier fails to obtain and file timely a surety bond as specified with this subpart and CMS instructions.

(xiii) *Evidence of DMEPOS supplier's compliance.* CMS may at any time require a DMEPOS supplier to show compliance with the requirements of this subpart.

(xiv) *Effect of subsequent DMEPOS supplier payment.* If a surety has paid an amount to CMS on the basis of liability incurred under a bond and CMS subsequently collects from the DMEPOS supplier, in whole or in part, on the unpaid claim, CMPs, or assessment that was the basis for the surety's liability, CMS will reimburse the surety the amount that it collected from the DMEPOS supplier, up to the amount paid by the surety to CMS, provided the surety has no other liability to CMS under the bond.

(xv) *Effect of review reversing determination.* If a DMEPOS supplier has paid CMS on the basis of liability incurred under a bond and to the extent the DMEPOS supplier that obtained the bond (or the surety under paragraph (m) of this section) is subsequently successful in appealing the determination that was the basis of the unpaid claim or CMPs, or assessment that caused the DMEPOS supplier to pay CMS under the bond, CMS would refund the DMEPOS supplier the amount the DMEPOS supplier paid to CMS to the extent that the amount relates to the matter that was successfully appealed, provided all review, including judicial review, has been completed on the matter.

(Catalog of Federal Domestic Program No. 93.774, Medicare—Supplementary Medical Insurance Program)

Dated: April 10, 2007.

Leslie V. Norwalk,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: June 22, 2007.

Michael O. Leavitt,

Secretary.

[FR Doc. 07–3746 Filed 7–27–07; 4:00 pm]

BILLING CODE 4120–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 15

[ET Docket No. 03–201; FCC 07–117]

Unlicensed Devices and Equipment Approval

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document seeks comment on recommendations for a spectrum etiquette in a Further Notice of Proposed Rule Making (Further NPRM) in this proceeding. Specifically, the Further NPRM seeks comment on a specific spectrum etiquette for unlicensed transmitters that operate in the 915 MHz band. The goal is to ensure that the different types of unlicensed devices that operate in a band have an opportunity for spectrum access.

DATES: Comments must be filed on or before October 15, 2007, and reply comments must be filed on or before November 14, 2007.

FOR FURTHER INFORMATION CONTACT: Hugh Van Tuyl, Office of Engineering and Technology, (202) 418–7506, e-mail: *Hugh.VanTuyl@fcc.gov,* TTY (202) 418–2989.

ADDRESSES: You may submit comments, identified by ET Docket No. 03–201, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- *E-mail:* [Optional: Include the E-mail address only if you plan to accept comments from the general public]. Include the docket number(s) in the subject line of the message.
- *Mail:* [Optional: Include the mailing address for paper, disk or CD–ROM submissions needed/requested by your Bureau or Office. Do not include the Office of the Secretary's mailing address here.]
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Further Notice of Proposed Rule Making,* ET Docket No. 03–201, FCC 07–117, adopted June 19, 2007, and released June 22, 2007. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room, CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov.*

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the *Federal eRulemaking Portal: http://www.regulations.gov.* Filers should follow the instructions provided on the Web site for submitting comments.
- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov,* and include the

following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.

• *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

• U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

People with Disabilities: 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).

Summary of Notice of Proposed Rulemaking

1. In the Further NPRM, the Commission seeks comment on whether there is a need to require unlicensed transmitters operating in the 915 MHz band under §§ 15.247 and 15.249 of the rules to comply with a spectrum etiquette requirement, and the impact that requiring an etiquette would have on the development and operation of unlicensed 915 MHz devices operating under those rule sections. The Commission also seeks comment on the particular etiquette suggested by Cellnet that would require digitally modulated spread spectrum transmitters operating in the 915 MHz band under § 15.247 of the rules to operate at less than the 1 Watt maximum power if they are continuously silent less than 90% of the time within a 0.4 second interval. This etiquette would require that the maximum permitted power level decrease in accordance with a specified formula as the silent interval between transmission decreases. The Commission further seeks comment on alternatives to the etiquette suggested by Cellnet.

2. The Commission concluded in the *Report and Order,* 69 FR 54027, September 7, 2004, that design flexibility has helped industry to develop efficient sharing and modulation schemes and that the existing regulations with no etiquette requirements have resulted in very efficient use of available unlicensed spectrum. However, the Commission notes Cellnet's observations regarding emerging products and its concern that digitally modulated 915 MHz devices operating under § 15.247 have no duty cycle limitation and may therefore transmit continuously at the maximum power permitted by the rules. Additionally, the Commission observes that there is no limitation on the maximum transmit bandwidth for digitally modulated 915 MHz devices other than the requirement to maintain the fundamental emissions within the authorized band of operation. Thus, there appears to be a potential for a digitally modulated device or a group of digitally modulated devices to essentially occupy the entire 915 MHz band, leaving little or no opportunity for other devices to gain access to the spectrum. The Commission believes that this has not been a problem in the past because the majority of spread spectrum devices operate at less than the maximum output power permitted in the rules to conserve battery power or because higher power is not necessary in many applications. Also, most spread spectrum devices that have been on the market in this band do not occupy the entire band simultaneously. However, as Cellnet and Itron observe, recently there has been increased use of the unlicensed 915 MHz band by parties providing wireless broadband services. These applications require operation at higher power and greater bandwidth than other unlicensed devices to provide service to users. While the Commission encourages the provision of wireless broadband service to all Americans, it recognizes that there is the potential under our rules for some unlicensed devices to preclude the operation of other unlicensed devices. The Commission believes it is now appropriate for it to consider whether there is a need for a spectrum etiquette for unlicensed operation in the 915 MHz band. However, it recognizes concerns about the potential for a spectrum etiquette to limit design flexibility and stifle unlicensed product development and innovation. Therefore, the Commission seeks to balance the concerns about the co-existence of different types of unlicensed devices with the concerns about inhibiting unlicensed device innovation in determining whether a spectrum etiquette is necessary and the form that an etiquette would take.

3. The Commission used the term ''spectrum etiquette'' in the Notice of Proposed Rule Making (NPRM), 68 FR 68823, September 17, 2003, to refer to a set of requirements to enable better sharing of spectrum between devices. The Commission cited the unlicensed personal communication services (UPCS) rules as an example of a spectrum etiquette. These rules contain a ''listen-before-talk'' requirement for UPCS devices to monitor spectrum to ensure that it is not being used before transmitting. However, a spectrum etiquette could be comprised of other requirements that enable better sharing of spectrum, such as trade-offs between the transmission duty cycle, output power and bandwidth to enable more devices to co-exist within the same band of spectrum.

4. The Commission seeks comment on whether it should adopt a spectrum etiquette for unlicensed 915 MHz devices operating under §§ 15.247 and 15.249 of the rules. In considering the need for an etiquette, the Commission's intent is not to establish interference protection rights for unlicensed devices or to ensure that unlicensed devices are always able to operate without interference. Rather, the goal is to ensure that the different types of unlicensed devices that operate in a band have an opportunity for spectrum access. The Commission specifically seeks comment on Cellnet's contention that digitally modulated devices in the 915 MHz band that transmit continuously at maximum power and occupy wide bandwidths are creating emissions at levels that can cause interference to incumbent devices, irrespective of how well the incumbent devices may have been designed to operate in the presence of other users. In this regard, the Commission seeks comment on the tolerance of currently operating devices to emissions from other devices in the same frequency band. It also seeks comment on how effective an etiquette would be in improving spectrum sharing between unlicensed devices in the 915 MHz

band. The Commission further seeks comment about the potential for a spectrum etiquette to limit design flexibility and stifle unlicensed product innovation.

5. The Commission believes that the general approach to a 915 MHz spectrum etiquette recommended by Cellnet that would limit unlicensed devices that operate under §§ 15.247 and 15.249 with a high duty cycle to lower power is one possible way to enable more efficient spectrum sharing among unlicensed devices. Therefore, the Commission seeks comment on the proposed requirement that digitally modulated 915 MHz spread spectrum devices with a continuous silent interval of less than 90% within a 0.4 second window (0.36 seconds) operate with a lower power level than the 30 dBm (1 Watt) maximum currently permitted by the rules. Specifically, the maximum permitted power would range from 30 dBm (1 Watt) when there is a continuous silent interval of at least 90% between transmissions, down to 0 dBm (0.001 Watt) when there is no silent interval between transmissions, with the power limit in dBm linearly interpolated between the 90% silent and continuous operation duty cycle values. These recommended requirements could ensure that devices operating at high power levels leave a silent interval between transmissions that would provide an opportunity for other devices to transmit, and would prevent a high power device from operating continuously and precluding operation of other devices within a band. Devices that operate with shorter silent intervals between transmissions would be required to operate at less than the one watt maximum power to offset the increased interference potential of the longer duration transmissions. The decreasing power output limit would reduce the range at which interference can occur, thus increasing the likelihood that other devices could co-exist with them. The minimum power level of 0 dBm (0.001 Watt) that Cellnet recommends for devices that transmit continuously is comparable to the maximum level permitted for devices operating under § 15.249.

6. The Commission seeks comment on whether this type of spectrum etiquette is appropriate to enable more efficient sharing of spectrum between unlicensed 915 MHz devices and, if so, whether the suggested power levels and duty cycles are appropriate. It also seeks comment on whether an alternative type of etiquette would be more appropriate. For example, should an etiquette include limitations on the frequency range or bandwidth that a digitally modulated device may occupy and/or a ''listen-before-talk'' requirement? Parties who believe that alternative approaches to an etiquette or different power levels are more appropriate are requested to supply specific technical details and justification for their recommendations. In addition, the Commission seeks comment on the impact an etiquette like the one suggested would have on other devices that operate in the 915 MHz band or other bands where it may be applied. For example, would manufacturers have to redesign or cease marketing certain equipment if all equipment in a band were required to comply with an etiquette? If so, what particular types of equipment would be affected?

7. If the Commission were to require a spectrum etiquette for the 915 MHz band, it seeks comment on whether there would be a need to prohibit the synchronization of transmissions from multiple devices in a system or otherwise under control of the same party in such a way as to more fully occupy the silent intervals between transmissions. Permitting synchronized transmissions of this nature could allow a group of devices to transmit essentially continuously, thus defeating the purpose of a spectrum etiquette.

8. The Commission seeks comment on whether a device operating under such a spectrum etiquette should be permitted to automatically change the power level and duty cycle at which it operates, or if the device should be required to operate using only one fixed duty cycle/power level combination. Could allowing automatic adjustments of the power level and duty cycle encourage efficient spectrum sharing between unlicensed devices since there is incentive to use only the transmit power necessary for the desired output data rates?

9. Cellnet recommends applying an etiquette only to digitally modulated devices operating under § 15.247 of the rules. The Commission seeks comment on the types of devices to which an etiquette should apply. For example, is an etiquette necessary for frequency hopping spread spectrum transmitters operating under § 15.247? The Commission notes that these transmitters have channel separation requirements and continually hop between a number of different channels, and that § 15.247(h) prohibits the synchronized hopping by a group of spread spectrum transmitters. These requirements would appear to obviate the need for an etiquette for frequency hopping spread spectrum transmitters. Is an etiquette necessary for devices operating under § 15.249 that are permitted maximum field strength levels that are significantly less than the maximum permitted output for spread spectrum transmitters? The Commission also seeks comment on whether requiring an etiquette for digitally modulated transmitters but not frequency hopping transmitters would place digitally modulated transmitters at operational or other disadvantages.

10. The Commission notes that the 915 MHz band is the only one where a co-existence problem between unlicensed devices has been raised. However, it recognizes that unlicensed use of the 2.4 GHz and 5.8 GHz bands is also continuing to increase. These bands are used by many types of unlicensed devices, including cordless telephones and wireless broadband networking equipment. The Commission is aware that industry standards such as Wi-Fi, Bluetooth, and ZigBee have been developed for the various unlicensed frequency bands and these standards are designed to facilitate sharing among multiple unlicensed devices. The Commission has no intention of disrupting the private sector standards process. At the same time, it believes it is appropriate to consider whether its regulations should be amended to ensure that a single device or group of devices does not occupy all of the spectrum all of the time and thereby deny access to others. Accordingly, the Commission seeks comment on whether there is a similar need to adopt rules for digitally modulated transmitters or other devices operating in the 2.4 GHz and 5.8 GHz bands to better facilitate shared used of the spectrum among unlicensed devices.

11. The Commission seeks comment on the appropriate transition requirements if the Commission were to adopt a spectrum etiquette for unlicensed devices operating under §§ 15.247 and 15.249. In particular, it seeks comment on whether there should be a cutoff date after which new devices must comply with an etiquette requirement. The Commission also seeks comment on whether equipment certified before a cutoff date should be permanently grandfathered, or whether there should be a specific cutoff date on the manufacturing, importation, marketing and/or use of equipment that does not comply with any etiquette rules adopted in this proceeding. If so, for which of these actions should there be a cutoff date, and what is the appropriate date?

Initial Regulatory Flexibility Analysis

12. As required by the Regulatory Flexibility Act of 1980, as amended

(RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities small entities by the policies and rules proposed in the Further Notice of Proposed Rule Making (NPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided in the item. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2]

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

13. This Further NPRM seeks comment on whether the Commission should require unlicensed devices to comply with rules to designed to ensure more efficient sharing of spectrum (i.e., a ''spectrum etiquette'') such as the one suggested by Cellnet. Cellnet's recommended spectrum etiquette would be a trade-off between transmitter power and transmission duration. Devices that operate with a duty cycle of 10% or less would be permitted to operate at the same one Watt power level currently permitted in the rules. As the transmission duty cycle is increased, the maximum permitted power would decrease, down to 0.001 Watts (1 milliwatt) for devices that transmit continuously.

B. Legal Basis

14. The proposed action is authorized under sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307.

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

15. 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.[3] The RFA defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small business concern'' under section 3 of the Small Business Act.[4] Under the Small Business Act, a ''small business concern'' is one that: (1) Is independently owned and operated; (2) is not dominant in its field of operations; and (3) meets may additional criteria established by the Small Business Administration (SBA).[5]

16. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: ''This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.'' [6] The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.[7] According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year.[8] Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999.[9] Thus, under this size standard, the majority of firms can be considered small.

17. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of ''Paging'' [10] and ''Cellular and Other Wireless Telecommunications.'' [11] Under both categories, the SBA deems a wireless business to be small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 2002 show that there were 807 firms in this category that operated for the entire year.[12] Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.[13] Thus, under this category and associated small business size standard, the majority of firms can be considered small. For the census category of Cellular and Other Wireless Telecommunications, Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.[14] Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.[15] Thus, under this second category and size standard, the majority of firms can, again, be considered small.

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

18. Digitally modulated spread spectrum transmitters are already required to be authorized under the Commission's certification procedure as a prerequisite to marketing and importation, and no changes to that requirement are proposed. There would, however, be changes to the compliance requirements.

19. The applicant for certification would have to demonstrate in the application that the equipment complies with the etiquette requirements. These requirements may include a trade-off between the silent period between transmissions and output power as suggested by Cellnet, or other requirements such as the equipment monitoring spectrum to ensure it is unused before transmitting (listen-before-talk).[16]

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[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 103–121, Title 11, 110 Stat. 857 (1996)

[2] *See* 5 U.S.C. 603(a).

[3] *See* 5 U.S.C. 603(b)(3).

[4] *Id.* 601(3).

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

[6] U.S. Census Bureau, 2002 NAICS Definitions, ''334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing''; *http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342.*

[7] 13 CFR 121.201, NAICS code 334220.

[8] U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (released May 26, 2005); *http://factfinder.census.gov.* The number of ''establishments'' is a less helpful indicator of small business prevalence in this context than would be the number of ''firms'' or ''companies,'' because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 929.

[9] *Id.* An additional 18 establishments had employment of 1,000 or more.

[10] 13 CFR 121.201, NAICS code 517211.

[11] 13 CFR 121.201, NAICS code 517212.

[12] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517211 (issued Nov. 2005).

[13] 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 for firms with ''1000 employees or more.''

[14] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization,'' Table 5, NAICS code 517212 (issued Nov. 2005).

[15] *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 for firms with ''1000 employees or more.''

[16] *See* 47 CFR 15.323(c) and 15.407(h) for examples of listen-before-talk requirements currently in the rules.

20. Most unlicensed transmitters can be approved by either the Commission's Laboratory or a designated Telecommunication Certification Body (TCB). TCBs are private sector organizations that are permitted to issue equipment certifications in the same manner as the Commission. TCBs would not be permitted to certify equipment subject to the etiquette requirement until the Commission has experience with them and can properly advise TCBs on how to apply the applicable rules.

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

21. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): '' the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; the use of performance, rather than design standards; and an exemption from coverage of the rule, or any part thereof, for small entities.'' [17]

22. If the rules proposed in this notice are adopted, the Commission believes they might have a significant economic impact on a substantial number of small entities. For an entity that chooses to manufacture or import digitally modulated spread spectrum transmitters, the rules would impose costs for compliance with equipment technical requirements, such as modifying or redesigning equipment that does not comply with any new etiquette requirement. However, the burdens for complying with the proposed rules would be the same for both large and small entities. Further, the proposals in the *NPRM* are ultimately beneficial for both large and small entities. The Commission cannot find electrical engineering alternatives that would achieve our goals while treating small entities differently. Nonetheless, it solicits comment on any alternatives commenters may wish to suggest for the purpose of facilitating the Commission's intention to minimize the compliance burden on smaller entities.

[17] 5 U.S.C. 603(c)(1)–(c)(4).

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

None.

Ordering Clauses

23. The Further Notice of Proposed Rule Making is hereby adopted. This action is taken pursuant to the authority contained in sections 4(i), 301, 302, 303(e), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302, 303(e), 303(f), and 303(r).

24. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 15

Communications equipment.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E7–14930 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 07–3158; MB Docket No. 07–131; RM–11377]

Radio Broadcasting Services; Live Oak, FL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed by RTG Radio, LLC (''Petitioner'') proposing to substitute Channel *261A for Channel 259A* at Live Oak, Florida and to reserve the channel for noncommercial educational use. The proposed coordinates for Channel *261A at Live Oak are 30–12–26 NL and 83–01–26 WL with a site restriction of 10.4 Km (6.5 miles) south of city reference. Petitioner proposes the channel substitution to accommodate is pending construction permit application to increase the maximum effective radiated power of its Station WKAA(FM), Channel 258C1, Willacoochee, Georgia.

DATES: Comments must be filed on or before September 3, 2007, and reply comments on or before September 18, 2007.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the Petitioner's counsel, as follows: David G. O'Neil, Esquire, Rini Coran, PC, 1615 L Street, NW., Suite 1325, Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Helen McLean, Media Bureau, (202) 418–2738.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rule Making,* MB Docket No. 07–131, adopted July 11, 2007, and released July 13, 2007. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center, 445 Twelfth Street, SW., Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed 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).

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* contact.

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, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Florida, is amended by removing Channel *259A and by adding Channel *261A at Live Oak.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E7–14879 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 07–3151; MB Docket No. 07–130; RM–11372]

Radio Broadcasting Services; Silverton, CO

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rulemaking filed by Laramie Mountain Broadcasting, LLC, requesting the allotment of Channel 281A at Silverton, Colorado, as the community's second local aural transmission service. Channel 281A can be allotted at Silverton, Colorado, without a site restriction at coordinates 37–07–43 NL and 107–39–50 WL.

DATES: Comments must be filed on or before September 3, 2007, and reply comments on or before September 18, 2007.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner as follows: A. Wray Fitch, Esquire, Gammon & Grange, PC, 8280 Greensboro Drive, 7th Floor, McLean, VA 22102–3807.

FOR FURTHER INFORMATION CONTACT: Victoria McCauley, Media Bureau, (202) 418–2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 07–130, adopted July 11, 2007 and released July 13, 2007. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 Twelfth Street, SW., Washington, DC 20554. This document 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 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com*.

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed 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). 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, 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Colorado is amended by adding Silverton, Channel 281A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E7–14878 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 238

[Docket No. FRA–2006–25268, Notice No. 1]

RIN 2130–AB80

Passenger Equipment Safety Standards; Front-End Strength of Cab Cars and Multiple-Unit Locomotives

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA is proposing to further the safety of passenger train occupants by amending existing regulations to enhance structural strength requirements for the front end of cab cars and multiple-unit locomotives. These enhancements would include the addition of deformation and energy absorption requirements specified in revised American Public Transportation Association (APTA) standards for front-end collision posts and corner posts for this equipment. FRA is also proposing to make miscellaneous clarifying amendments to current regulations for the structural strength of passenger equipment.

DATES: (1) Written comments must be received by October 1, 2007. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

(2) FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However, if FRA receives a specific request for a public, oral hearing prior to August 31, 2007, one will be scheduled, and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: *Comments:* Comments related to Docket No. FRA–2006–25268, Notice No. 1, may be submitted by any of the following methods:

- *Web Site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.
- *Hand Delivery:* Docket Management Facility, U.S. Department of

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I. Statutory Background

In September of 1994, the Secretary of Transportation convened a meeting of representatives from all sectors of the rail industry with the goal of enhancing rail safety. As one of the initiatives arising from this Rail Safety Summit, the Secretary announced that DOT would begin developing safety standards for rail passenger equipment over a five-year period. In November of 1994, Congress adopted the Secretary's schedule for implementing rail passenger equipment safety regulations and included it in the Federal Railroad Safety Authorization Act of 1994 (the Act), Pub. L. No. 103–440, 108 Stat. 4619, 4623–4624 (November 2, 1994). Congress also authorized the Secretary to consult with various organizations involved in passenger train operations for purposes of prescribing and amending these regulations, as well as issuing orders pursuant to them. Section 215 of the Act is codified at 49 U.S.C. 20133.

II. Proceedings to Date

A. Proceedings to Carry Out the Initial Rulemaking Mandate

The Secretary of Transportation delegated these rulemaking responsibilities to the Federal Railroad Administrator, *see* 49 CFR 1.49(m), and FRA formed the Passenger Equipment Safety Standards Working Group to provide FRA advice in developing the regulations. On June 17, 1996, FRA published an advance notice of proposed rulemaking (ANPRM) concerning the establishment of comprehensive safety standards for railroad passenger equipment. *See* 61 FR 30672. The ANPRM provided background information on the need for such standards, offered preliminary ideas on approaching passenger safety issues, and presented questions on various passenger safety topics. Following consideration of comments received on the ANPRM and advice from FRA's Passenger Equipment Safety Standards Working Group, FRA published an NPRM on September 23, 1997, to establish comprehensive safety standards for railroad passenger equipment. *See* 62 FR 49728. In addition to requesting written comment on the NPRM, FRA also solicited oral comment at a public hearing held on November 21, 1997. FRA considered the comments received on the NPRM and prepared a final rule establishing comprehensive safety standards for passenger equipment, which was published on May 12, 1999. *See* 64 FR 25540.

After publication of the final rule, interested parties filed petitions seeking FRA's reconsideration of certain requirements contained in the rule. These petitions generally related to the following subject areas: structural design; fire safety; training; inspection, testing, and maintenance; and movement of defective equipment. To address the petitions, FRA grouped issues together and published in the **Federal Register** three sets of amendments to the final rule. Each set of amendments summarized the petition requests at issue, explained what action, if any, FRA decided to take in response to the issues raised, and described FRA's justifications for its decisions and any action taken. Specifically, on July 3, 2000, FRA issued a response to the petitions for reconsideration relating to the inspection, testing, and maintenance of passenger equipment, the movement of defective passenger equipment, and other miscellaneous provisions related to mechanical issues contained in the final rule. *See* 65 FR 41284. On April 23, 2002, FRA responded to all remaining issues raised in the petitions for reconsideration, with the exception of those relating to fire safety. *See* 67 FR 19970. Finally, on June 25, 2002, FRA completed its response to the petitions for reconsideration by publishing a response to the petitions for reconsideration concerning the fire safety portion of the rule. *See* 67 FR 42892. (For more detailed information on the petitions for reconsideration and FRA's response to them, please see these three rulemaking documents.) The

product of this rulemaking was codified primarily at 49 CFR part 238 (part 238) and also at 49 CFR parts 216, 223, 229, 231, and 232.

Meanwhile, another rulemaking on passenger train emergency preparedness produced a final rule codified at 49 CFR part 239. *See* 63 FR 24629; May 4, 1998. The rule addresses passenger train emergencies of various kinds, including security situations, and requires the preparation, adoption, and implementation of emergency preparedness plans by railroads connected with the operation of passenger trains. The rule requires railroads that operate intercity or commuter passenger train service or that host the operation of such service to adopt and comply with written emergency preparedness plans. The emergency preparedness plans must address subjects such as communication, employee training and qualification, joint operations, tunnel safety, liaison with emergency responders, on-board emergency equipment, and passenger safety information. The rule requires each affected railroad to instruct its employees on the applicable provisions of its plan, and the plan adopted by each railroad is subject to formal review and approval by FRA. The rule also requires each railroad operating passenger train service to conduct emergency simulations to determine its capability to execute the emergency preparedness plan under the variety of emergency scenarios that could reasonably be expected to occur. In addition, the rule contains requirements for the identification and usage of emergency window exits, rescue access windows, and door exits.

B. Key Issues Identified for Future Rulemaking

Although FRA had completed these rulemakings, FRA had identified various issues for possible future rulemaking, including those to be addressed following the completion of additional research, the gathering of additional operating experience, or the development of industry standards, or all three. One such issue concerned enhancing the requirements for corner posts on cab cars and MU locomotives. *See* 64 FR 25607; May 12, 1999. Current FRA requirements for corner posts are based on conventional industry practice at the time, which had not proven adequate in then-recent side swipe collisions with cab cars leading. *Id.* FRA explained that the current requirements were being adopted as an interim measure to prevent the introduction of equipment not meeting the requirements, that FRA was assisting APTA in preparing an industry standard for corner post arrangements on cab cars and MU locomotives, and that adoption of a suitable Federal standard would be an immediate priority. *Id.* In broader terms, this issue concerned the behavior of cab car and MU locomotive end frames when overloaded, as during an impact with maintenance-of-way equipment or with a highway vehicle at a highway-rail grade crossing, and thus concerned collision post strength as well. FRA and interested industry members also began identifying other issues related to the passenger equipment safety standards and the passenger train emergency preparedness regulations. FRA decided to address these issues with the assistance of FRA's Railroad Safety Advisory Committee.

C. Railroad Safety Advisory Committee (RSAC) Overview

In March 1996 FRA established RSAC, which provides a forum for developing consensus recommendations to FRA's Administrator on rulemakings and other safety program issues. The Committee includes representation from all of the agency's major customer groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of current member groups follows:

- American Association of Private Railroad Car Owners (AARPCO);
- American Association of State Highway and Transportation Officials (AASHTO);
- American Chemistry Council;
- American Petroleum Institute;
- APTA;
- American Short Line and Regional Railroad Association (ASLRRA);
- American Train Dispatchers Association;
- Association of American Railroads (AAR);
- Association of Railway Museums;
- Association of State Rail Safety Managers (ASRSM);
- Brotherhood of Locomotive Engineers and Trainmen (BLET);
- Brotherhood of Maintenance of Way Employees Division;
- Brotherhood of Railroad Signalmen (BRS);
- Chlorine Institute;
- Federal Transit Administration (FTA)*;
- Fertilizer Institute;
- High Speed Ground Transportation Association;
- Institute of Makers of Explosives;
- International Association of Machinists and Aerospace Workers;
- International Brotherhood of Electrical Workers (IBEW);
- Labor Council for Latin American Advancement*;
- League of Railway Industry Women*;
- National Association of Railroad Passengers (NARP);
- National Association of Railway Business Women*;
- National Conference of Firemen & Oilers;
- National Railroad Construction and Maintenance Association;
- National Railroad Passenger Corporation (Amtrak);
- National Transportation Safety Board (NTSB)*;
- Railway Supply Institute (RSI);
- Safe Travel America (STA);
- Secretaria de Comunicaciones y Transporte*;
- Sheet Metal Workers International Association (SMWIA);
- Tourist Railway Association, Inc.;
- Transport Canada*;
- Transport Workers Union of America (TWU);
- Transportation Communications International Union/BRC (TCIU/BRC);
- Transportation Security Administration*; and
- United Transportation Union (UTU).

*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If the task is accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The task force then provides that information to the working group for consideration. If a working group comes to unanimous consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation, and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly

supported, and is in accordance with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA moves ahead to resolve the issue through traditional rulemaking proceedings.

D. Establishment of the Passenger Safety Working Group

On May 20, 2003, FRA presented, and RSAC accepted, the task of reviewing existing passenger equipment safety needs and programs and recommending consideration of specific actions that could be useful in advancing the safety of rail passenger service. The RSAC established the Passenger Safety Working Group (Working Group) to handle this task and develop recommendations for the full RSAC to consider. Members of the Working Group, in addition to FRA, include the following:

- AAR, including members from BNSF Railway Company, CSX Transportation, Inc., and Union Pacific Railroad Company;
- AAPRCO;
- AASHTO;
- Amtrak;
- APTA, including members from Bombardier, Inc., LDK Engineering, Herzog Transit Services, Inc., Long Island Rail Road (LIRR), Metro-North Commuter Railroad Company (Metro-North), Northeast Illinois Regional Commuter Railroad Corporation (Metra), Southern California Regional Rail Authority (Metrolink), and Southeastern Pennsylvania Transportation Authority (SEPTA);
- BLET;
- BRS;
- FTA;
- HSGTA;
- IBEW;
- NARP;
- RSI;
- SMWIA;
- STA;
- TCIU/BRC;
- TWU; and
- UTU.

Staff from DOT's John A. Volpe National Transportation Systems Center (Volpe Center) attended all of the meetings and contributed to the technical discussions. In addition, staff from the NTSB met with the Working Group when possible. The Working Group has held nine meetings on the following dates and locations:

- September 9–10, 2003, in Washington, DC;
- November 6, 2003, in Philadelphia, PA;
- May 11, 2004, in Schaumburg, IL;
- October 26–27, 2004, in Linthicum/Baltimore, MD;
- March 9–10, 2005, in Ft. Lauderdale, FL;
- September 7, 2005, in Chicago, IL;
- March 21–22, 2006, in Ft. Lauderdale, FL;
- September 12–13, 2006, in Orlando, FL; and
- April 17–18, 2007, in Orlando, FL.

At the meetings in Chicago and Ft. Lauderdale in 2005, FRA met with representatives of Tri-County Commuter Rail and Metra, respectively, and toured their passenger equipment. The visits were open to all members of the Working Group, and FRA believes they have added to the collective understanding of the Group in identifying and addressing passenger equipment safety issues.

E. Establishment of the Crashworthiness/Glazing Task Force

Due to the variety of issues involved, at its November 2003 meeting the Working Group established four task forces—smaller groups to develop recommendations on specific issues within each group's particular area of expertise. Members of the task forces include various representatives from the respective organizations that were part of the larger Working Group. One of these task forces was assigned the job of identifying and developing issues and recommendations specifically related to the inspection, testing, and operation of passenger equipment as well as concerns related to the attachment of safety appliances on passenger equipment. An NPRM on these topics was published on December 8, 2005, *see* 70 FR 73069, and a final rule was published on October 19, 2006, *see* 71 FR 61835. Another of these task forces was established to identify issues and develop recommendations related to emergency systems, procedures, and equipment, and helped to develop an NPRM on these topics that was published on August 24, 2006, *see* 71 FR 50276. Another task force, the Crashworthiness/Glazing Task Force (Task Force), was assigned the job of developing recommendations related to glazing integrity, structural crashworthiness, and the protection of occupants during accidents and incidents. Specifically, this Task Force was charged with developing recommendations for glazing qualification testing and for cab car/MU locomotive end frame optimization. Although being developed by the same Task Force, the glazing and cab car/MU locomotive end frame recommendations are being handled separately, and glazing is not a subject of this NPRM. The Task Force was also given the responsibility of addressing a number of other issues related to glazing, structural crashworthiness, and occupant protection and recommending any research necessary to facilitate their resolution. Members of the Task Force, in addition to FRA, include the following:

- AAR;
- Amtrak;
- APTA, including members from Bombardier, Inc., General Electric Transportation Systems, General Motors—Electro-Motive Division, Kawasaki Rail Car, Inc., LDK Engineering, LIRR, LTK Engineering Services, Maryland Transit Administration, Massachusetts Bay Commuter Rail Corporation (MBCR), Metrolink, Metro-North, Northern Indiana Commuter Transportation District (NICTD), Rotem Company, Saint Gobian Sully NA, San Diego Northern Commuter Railroad (Coaster), SEPTA, and STV, Inc.;
- BLET;
- California Department of Transportation (Caltrans);
- NARP;
- RSI; and
- UTU.

While not voting members of the Task Force, representatives from the NTSB attended certain of the meetings and contributed to the discussions of the Task Force. In addition, staff from the Volpe Center attended all of the meetings and contributed to the technical discussions.

The Task Force held six meetings on the following dates and locations:

- March 17–18, 2004, in Cambridge, MA;
- May 13, 2004, in Schaumberg, IL;
- November 9, 2004, in Boston, MA;
- February 2–3, 2005, in Cambridge, MA;
- April 21–22, 2005, in Cambridge, MA; and
- August 11, 2005, in Cambridge, MA.

F. Development of the NPRM

This NPRM was developed to address concerns raised and issues discussed about cab car and MU locomotive front-end frame structures during the Task Force meetings and pertinent Working Group meetings. Minutes of each of these meetings have been made part of the docket in this proceeding and are available for public inspection. With the exception discussed below, the Working

Group reached consensus on the principal regulatory provisions contained in this NPRM at its meeting in September 2005. After the September 2005 meeting, the Working Group presented its recommendations to the full RSAC for concurrence at its meeting in October 2005. All of the members of the full RSAC in attendance at its October 2005 meeting accepted the regulatory recommendations submitted by the Working Group. Thus, the Working Group's recommendations became the full RSAC's recommendations to FRA in this matter. After reviewing the full RSAC's recommendations, FRA agreed that the recommendations provided a good basis for a proposed rule, but that test standards and performance criteria more suitable to cab cars and MU locomotives without a flat forward end or with energy absorbing structures used as part of a crash energy management design (CEM), or both, should be specified. As discussed below, the NPRM provides an option for the dynamic testing of cab cars and MU locomotives as a means of demonstrating compliance with the rule. However, FRA makes clear that this proposal was not the result of an RSAC recommendation. Otherwise, FRA has adopted the RSAC's recommendations with generally minor changes for purposes of clarity and formatting in the **Federal Register**.

Overall, this NPRM is the product of FRA's review, consideration, and acceptance of the recommendations of the Task Force, Working Group, and full RSAC. In the preamble discussion of this proposal, FRA refers to comments, views, suggestions, or recommendations made by members of the Task Force, Working Group, and full RSAC, as they are identified or contained in the minutes of their meetings. FRA does so to show the origin of certain issues and the nature of discussions concerning those issues at the Task Force, Working Group, and full RSAC level. FRA believes this serves to illuminate factors it has weighed in making its regulatory decisions, as well as the logic behind those decisions. The reader should keep in mind, of course, that only the full RSAC makes recommendations to FRA. However, as noted above, FRA is in no way bound to follow the recommendations, and the agency exercises its independent judgment on whether the recommendations achieve the agency's regulatory goal(s), are soundly supported, and are in accordance with policy and legal requirements.

III. Technical Background

Transporting passengers by rail is very safe. Since 1978, more than 11.2 billion passengers have traveled by rail, based on reports filed monthly with FRA. The number of rail passengers has steadily increased over the years, and since the year 2000 has averaged more than 500 million per year. On a passenger-mile basis, with an average of about 15.5 billion passenger-miles per year, rail travel is about as safe as scheduled airline service and intercity bus transportation, and it is far safer than private motor vehicle travel. Passenger rail accidents—while always to be avoided—have a very high passenger survival rate.

Yet, as in any form of transportation, there are risks inherent in passenger rail travel. Although no passengers died in train collision or derailments in 2006, 12 passengers did in 2005. For this reason, FRA continually works to improve the safety of passenger rail operations. FRA's efforts include sponsoring the research and development of safety technology, providing technical support for industry specifications and standards, and engaging in cooperative rulemaking efforts with key industry stakeholders. FRA has focused in particular on enhancing the crashworthiness of passenger trains.

In a passenger train collision or derailment, the principal crashworthiness risks that occupants face are the loss of safe space inside the train from crushing of the train structure and, as the train decelerates, the risk of secondary impacts with interior surfaces. Therefore, the principal goals of the crashworthiness research sponsored by FRA are twofold: First, to preserve a safe space in which occupants can ride out the collision or derailment, and, then, to minimize the physical forces to which occupants are subjected when impacting surfaces inside a passenger car as the train decelerates. Though not a part of this NPRM, other crashworthiness research focuses on related issues such as fuel tank safety, for equipment with a fuel tank, and the associated risk of fire if the fuel tank is breached during the collision or derailment.

The results of ongoing research on cab car and MU locomotive front-end frame structures help demonstrate both the effectiveness and the practicality of the structural enhancements proposed in this NPRM to make this equipment more crashworthy. This research is discussed below, along with other technical information providing the background for FRA's proposal.

A. Predominant Types of Passenger Rail Service

FRA's focus on cab car and MU locomotive crashworthiness should be considered in the context of the predominant types of passenger rail service in North America. The first involves operation of passenger trains with conventional locomotives in the lead, typically pulling consists of passenger coaches and other cars such as baggage cars, dining cars, and sleeping cars. Such trains are common on long-distance, intercity rail routes operated by Amtrak. On a daily basis, however, most passenger rail service is provided by commuter railroads, which typically operate one or both of the two most predominant types of service: Push-pull service and MU locomotive service.

Push-pull service is passenger train service typically operated in one direction of travel with a conventional locomotive in the rear of the train pushing the consist (the ''push mode'') and with a cab car in the lead position of the train; and, in the opposite direction of travel, the service is operated with the conventional locomotive in the lead position of the train pulling the consist (the ''pull mode'') and with the cab car in the rear of the train. (A cab car is both a passenger car, in that it has seats for passengers, and a locomotive, in that it has a control cab from which the engineer can operate the train.) Control cables run the length of the train, as do electrical lines providing power for heat, lights, and other purposes.

MU locomotive service is passenger rail service involving trains consisting of self-propelled electric or diesel MU locomotives. MU locomotives typically operate semi-permanently coupled together as a pair or triplet with a control cab at each end of the consist. During peak commuting hours, multiple pairs or triplets of MU locomotives, or a combination of both, are typically operated together as a single passenger train in MU service. This type of service does not make use of a conventional locomotive as a primary means of motive power. MU locomotive service is very similar to push-pull service as operated in the push mode with the cab car in the lead.

By focusing on enhancements to cab car and MU locomotive crashworthiness, FRA seeks to enhance the safety of the two most typical forms of passenger rail service in the U.S.

B. Front-End Frame Structures of Cab Cars and MU locomotives

Structurally, MU locomotives and cab cars built in the same period are very similar, and both are designed to transport and be occupied by passengers. The principal distinction is that cab cars do not have motors to propel themselves. Unlike MU locomotives and cab cars, conventional locomotives are not designed to be occupied by passengers—only by operating crewmembers. Concern has been raised about the safety of cab car-led and MU locomotive train service due to the closer proximity of the engineer and passengers to the leading end of the train than in conventional locomotive-led service.

The principal purpose of cab car and MU locomotive end frame structures is to provide protection for the engineer and passengers in the event of a collision where the superstructure of the vehicle is directly engaged and the underframe is either not engaged or only indirectly engaged in the collision. In the event of impacts with objects above the underframe of a cab car or MU locomotive, the end frame members are the primary source of protection for the engineer and the passengers. There are various types of cab cars and MU locomotives in current use. As discussed below, a flat-nosed, single-level cab car has been used for purposes of FRA-sponsored crashworthiness research. (The cab car was originally constructed as an MU locomotive but had its traction motors removed for testing.) Flat-nosed designs are representative of a large proportion of the cab car and MU locomotive fleet.

In a typical flat-nosed cab car, the end frame is composed of several structural elements that act together to resist inward deformations under load. The base of the end frame structure is composed of the end/buffer beam, which is directly connected to the draft sill of the vehicle. For cars that include stepwells, the side sills of the underframe generally do not directly connect to the end/buffer beam. There are four major vertical members connected to the end/buffer beam: two collision posts located approximately at the one-third points along the length of the beam, and two corner posts located at the outermost points of the beam. These structural elements are also connected together through two additional lateral members: a lateral member/shelf located just below the window frame structure, and an anti-telescoping plate at the top. The attachment of the end frame structure to the rest of the vehicle typically occurs at three locations. The first location is at the draft sill at the level of the underframe. This is the main connection where a majority of any longitudinal load applied to the end frame is reacted into the underframe of the vehicle. There are two other connections at the cant/roof rail located at either side of the car just below the level of the roof. When a longitudinal load is applied to the end frame, it is reacted by the draft sill and the cant rails into the main carbody structure. A schematic of a typical arrangement is depicted in Figure 1.

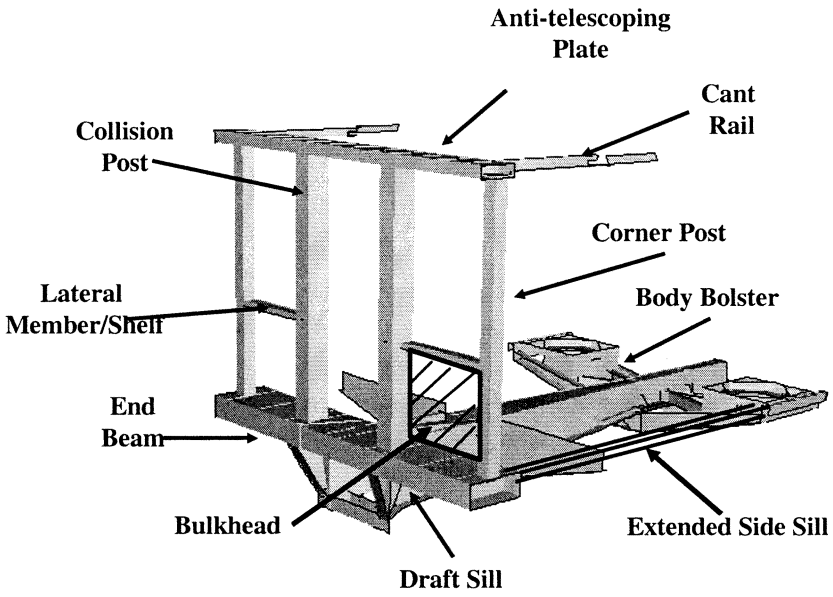


Figure 1. Schematic of the Main Structural Components of the Front-End of a Flat-Nosed Cab Car and MU Locomotive

C. Accident History

In a collision involving the front end of a cab car or an MU locomotive, it is vitally important that the end frame behaves in a ductile manner, absorbing some of the collision energy in order to maintain sufficient space in which the engineer and passengers can ride out the event. An example of a collision where the end frame did not effectively absorb collision energy occurred in Portage, IN, in 1998 when a NICTD train consisting of MU locomotives struck a tractor-tandem trailer carrying steel coils that had become immobilized on a grade crossing.[1] The leading MU locomotive impacted a steel coil at a point centered on one of its collision posts, the collision post failed, and the steel coil penetrated into the interior of the locomotive, resulting in three fatalities. Little of the collision energy was absorbed by the collision post, because the post had failed before it could deform in any significant way.

There are additional examples of incidents where the end frame of a cab car or an MU locomotive was engaged during a collision and a loss of survivable volume ensued due to the failure of end frame structures. As detailed in the NTSB accident reports referenced below, one such incident was the 1996 Secaucus, NJ collision between a cab car-led consist with a conventional locomotive-led consist,[2] in which the right corner post of the cab car and its supporting end frame structure had separated from the car.

[1] National Transportation Safety Board, ''Collision of Northern Indiana Commuter Transportation District Train 102 with a Tractor-Trailer Portage, Indiana, June 18, 1998,'' RAR–99–03, 07/26/1999.

[2] National Transportation Safety Board, ''Railroad Accident Report: Near Head-On Collision and Derailment of Two New Jersey Transit Commuter Trains Near Secaucus, New Jersey, February 9, 1996,'' RAR–97–01, 03/25/1997.

Another such incident was the 1996 Silver Spring, MD collision between a cab car-led consist with a locomotive-led consist, in which the cab car's left corner post and its supporting end frame structure had separated from the car.[3] Although the speeds associated with certain past events are greater than what can be fully protected against, and even though enhancements to passenger train emergency features and other requirements unrelated to crashworthiness, such as fire safety, may overall do as much or more to prevent or mitigate the consequences of these types of events, they do provide indicative loading conditions for developing structural enhancements that can improve crashworthiness performance.

FRA also notes that on January 26, 2005 in Glendale, CA, a collision involving an unoccupied sport utility vehicle (SUV) that was parked on the track, two Metrolink commuter trains, and a standing freight train resulted in 11 deaths and numerous injuries. Eight of the fatalities occurred on a cab car-led passenger train which derailed after striking the SUV, causing the cab car to be guided down a railroad siding, which resulted in an impact at an approximate speed of 49 mph with the standing freight train. After the collision with the standing freight train, the rear end of the lead cab car buckled laterally, obstructing the right-of-way of an oncoming, conventional locomotive-led passenger train. The rear end of the cab car raked the side of the conventional locomotive-led train, which was moving at an approximate speed of 51 mph, crushing occupied areas of that train. This incident involved enormous quantities of kinetic energy, and the underframe of the leading cab car crushed more than 20 feet inward. Because the strength of the end frame is ultimately dependent on the strength of the underframe, which failed, stronger collision posts and corner posts on the front end of the leading cab car would have been, in themselves, of little benefit in absorbing the collision energy. For this reason, as discussed below, FRA has been exploring other crashworthiness strategies, such as CEM, to help mitigate the effects of collisions involving higher impact speeds. Nevertheless, CEM will also require proper end frame performance in order to function as intended.

[3] National Transportation Safety Board, ''Collision and Derailment of Maryland Rail Commuter MARC Train 286 and National Railroad Passenger Corporation AMTRAK Train 29 Near Silver Spring, Maryland, February 16, 1996,'' RAR–97–02, 06/17/1997.

D. FRA and Industry Standards for Front-End Frame Structures of Cab Cars and MU Locomotives

Both the Federal government and the passenger railroad industry have been working together to improve the crashworthiness of cab cars and MU locomotives. As noted above, in 1999, after several years of development and in consultation with a working group comprised of key industry stakeholders, FRA promulgated the Passenger Equipment Safety Standards final rule. The rule included end frame structure requirements and other crashworthiness-related requirements for cab cars, MU locomotives, and other passenger equipment. In particular, the final rule provided for strengthened collision posts for new cab cars and MU locomotives (i.e., those ordered on or after September 8, 2000, or placed in service for the first time on or after September 9, 2002).

APTA also issued industry standards in 1999, in furtherance of its initiative to continue the development and maintenance of voluntary industry standards for the safety of railroad passenger equipment. In particular, APTA Standards SS–C&S–013–99 and SS–C&S–014–99 included provisions on end frame designs for cab cars and MU locomotives.[4] Specifically, APTA's standards included increased industry requirements for the strength of cab car and MU locomotive vertical end frame members—collision posts and corner posts. The 1999 APTA standards also included industry requirements for the deformation of these end frame vertical members, specifying that they must be able to sustain ''severe deformation'' before failure of the connections to the underframe and roof structures.

In January 2000, APTA requested that FRA develop information on the effectiveness of APTA's then-recently introduced Manual of Standards and Recommended Practices for passenger rail equipment, which included APTA SS–C&S–013–99 and APTA SS–C&S–014–99, and FRA's then-recently issued Passenger Equipment Safety Standards rule. This review was intended to look in particular at what increase in crashworthiness was obtained for cab cars and MU locomotives through the combination of these standards and regulations. FRA shared APTA's interest and included full-scale impact tests and associated planning and analysis activities in its overall research plan to gather this information. FRA then developed the details of the testing process in conjunction with APTA's Passenger Rail Equipment Safety Standards (PRESS) Construction-Structural (C&S) Subcommittee.

Around this same time, questions arose in the passenger rail industry in applying the APTA standards for collision posts and corner posts to new cab cars and MU locomotives. Views differed as to what the standards actually specified-namely, the meaning of ''severe deformation'' in the provisions calling for corner and collision posts to sustain ''severe deformation'' before failure of the posts' attachments. Consequently, there was not common agreement as to whether particular designs met the standards. On May 22, 2003, APTA's PRESS Committee accepted the recommendation of its C&S Subcommittee to replace these provisions in the standards with a recommended practice that the corner and collision post attachments be able to sustain minimum prescribed loads with negligible deformation.[5] Both APTA Standards SS–C&S–013–99 and SS–C&S–014–99 were then otherwise incorporated in their entirety into APTA SS–C&S–034–99, Standard for the Design and Construction of Passenger Railroad Rolling Stock. (APTA combined these and other structural standards for the design of rail passenger equipment into a single document, for ease of reference for railroads and car builders.)

Nevertheless, when the decision to turn these provisions into a recommended practice was made, ongoing research from full-scale impact tests was showing that a substantial increase in cab car and MU locomotive crashworthiness could be achieved by designing the posts to first deform and, thereby, absorb collision energy before failing.[6] As discussed below, in August 2005, APTA's PRESS C&S Subcommittee accepted a revised ''severe deformation'' standard for collision and corner posts. The standard includes requirements for minimum energy absorption and maximum deflection. The standard thereby eliminates a deficiency in the 1999 APTA standards by specifying test criteria to objectively measure ''severe

[4] American Public Transportation Association, Member Services Department, *Manual of Standards and Recommended Practices for Passenger Rail Equipment,* Issue of July 1, 1999.

[5] American Public Transportation Association, Member Service Department, *Manual of Standards and Recommended Practices for Passenger Rail Equipment,* Issue of May 1, 2004.

[6] Mayville, R., Johnson, K., Tyrell, D., Stringfellow, R., ''Rail Vehicle Cab Car Collision and Corner Post Designs According to APTA S–034 Requirements,'' American Society of Mechanical Engineers, Paper No. MECE2003–44114, November 2003.

deformation.'' This NPRM proposes to codify this standard.

E. Testing of Front-End Frame Structures of Cab Cars and MU locomotives

This section summarizes the work done by FRA and the passenger rail industry on developing the technical information to make recommendations for regulations requiring that corner and collision posts in cab car and MU locomotive front-end frames fail in a controlled manner when overloaded. Due to the collaborative work of FRA with the passenger rail industry, APTA's current passenger rail equipment standards include deformation requirements, which prescribe how these vertical members should perform when overloaded.

1. Designs Evaluated by FRA

Two end frame designs were developed for purposes of evaluating incremental improvements in the crashworthiness performance, in highway-rail grade crossing collision scenarios, of modern corner and collision post designs when compared against the performance of older designs. The first end frame design was representative of typical designs of passenger rail vehicles in the 1990s prior to 1999. (The first end frame design is referred to as the ''1990s design.'') The second end frame design incorporated all the enhancements required beginning in 1999 by FRA's Passenger Equipment Safety Standards rule in part 238 and also recommended beginning in 1999 by APTA's standards for corner post and collision post structures, respectively, SS–C&S–013 and SS–C&S–014. (The second end frame design is referred to as the State-of-the-Art (SOA) design.) The two end frame designs developed were then retrofitted onto two Budd Pioneer passenger rail cars for testing.

The SOA design differed principally from the 1990s design by having higher values for static loading of the end structure and by specifically addressing the performance of the collision and corner posts when overloaded. As noted above, the 1999 APTA standards for cab car and MU locomotive end structures included the following statement for both corner and collision posts:

> [The] post and its supporting structure shall be designed so that when it is overloaded * * * failure shall begin as bending or buckling in the post. The connections of the post to the supporting structure, and the supporting car body structure, shall support the post up to its ultimate capacity. The ultimate shear and tensile strength of the connecting fasteners or welds shall be sufficient to resist the forces causing the deformation, so that shear and tensile failure of the fasteners or welds shall not occur, even with severe deformation of the post and its connecting and supporting structural elements.

(See paragraph 4.1 of APTA SS–C&S–013–99, and paragraph 3.1 of APTA SS–C&S–014–99.) Although the term ''severe deformation'' was not specifically defined in the APTA standards, discussions with APTA technical staff led to specifying ''severe deformation'' in the SOA design as a horizontal crush of the corner and collisions posts for a distance equal to the posts' depth. Some failure of the parent material in the posts was allowable, but no failure would be allowed in the welded connections, as the integrity of the welded connections prevents complete separation of the posts from their connections.

An additional difference in the designs was the exclusion of the stepwells for the SOA design, to allow for extended side sills from the body bolster to the end/buffer beam. By bringing the side sills forward to support the end/buffer beam directly at the corners, the end/buffer beam can be developed to a size similar to the one for the 1990s design. In fact, recent cab car procurements have provided for elimination of the stepwells at the ends of the cars.

As compared to the 1990s design, the SOA design had the following enhancements: More substantial corner posts; a bulkhead sheet connecting the collision and corner posts, extending from the floor to the transverse member connecting the posts; and a longer side sill that extended along the engineer's compartment to the end beam, removing the presence of a stepwell. In addition to changes in the cross-sectional sizes and thickness of some structural members, another change in the SOA design was associated with the connection details for the corner posts. In comparison to the corner posts, the collision posts of both the 1990s and SOA designs penetrated both the top and bottom flanges of both the end/buffer beam and the anti-telescoping plate. This was based upon typical practice in the early 1990s for the 1990s design, and a provision in the APTA standard for the SOA design. Yet, the corner posts differed in that the corner posts for the 1990s design did not penetrate both top and bottom flanges of the end/buffer and anti-telescoping beams, while those in the SOA design did. The SOA design therefore had a significantly stiffer connection that was better able to resist torsional loads transferred to the anti-telescoping plate.

2. FRA Dynamic Impact Testing

Two full-scale, grade crossing impact tests were conducted as part of an ongoing series of crashworthiness tests of passenger rail equipment. The grade crossing tests were designed to address the concern of occupant vulnerability to bulk crushing resulting from offset/oblique collisions where the primary load-resisting-structure is the equipment's end frame design. Both tests were conducted in June 2002, and in each test a single cab car impacted a 40,000-lb steel coil resting on a frangible table at a nominal speed of 14 mph. The steel coil was situated such that it impacted the corner post above the cab car's end sill. The principal difference between the two tests involved the end frame design tested: in one test, the cab car was fitted with the 1990s end frame design; in the other, the cab car was fitted with the SOA end frame design.

Prior to the tests, the crush behaviors of the cars and their dynamic responses were simulated with car crush and collision dynamics models. The car crush model was used to determine the force/crush characteristics of the corner posts, as well as their modes of deformation.[7] The collision dynamics model was used to predict the extent of crush of the corner posts as a function of impact velocity, as well as the three-dimensional accelerations, velocities, and displacements of the cars and coil.[8] Pre-test analyses of the models were used in determining the initial test conditions and instrumentation test requirements.

The impact speed of approximately 14 mph for both tests was chosen so that there would be significant intrusion (more than 12 inches) into the engineer's cab in the test of the 1990s design, and limited intrusion (less than 12 inches) in the test of the SOA design. This 12-inch deformation metric was chosen to demarcate the amount of intrusion that leaves sufficient space for the engineer to ride out the collision safely.

During the full-scale tests, the impact force transmitted to the 1990s design end structure exceeded the corner post's predicted strength, and the corner post separated from its upper attachment. Upon impact, the corner post began to hinge near the contact point with the coil; subsequently, tearing at the upper connection occurred. The intensity of

[7] Martinez, E., Tyrell, D., Zolock, J., ''Rail-Car Impact Tests with Steel Coil: Car Crush,'' American Society of Mechanical Engineers, Paper No. JRC2003–1656, April 2003.

[8] Jacobsen, K., Tyrell, D., Perlman, A.B., ''Rail-Car Impact Tests with Steel Coil: Collision Dynamics,'' American Society of Mechanical Engineers, Paper No. JRC2003–1655, April 2003.

the impact ultimately resulted in the failure of the upper connection of the corner post to the anti-telescoping plate. More than 30 inches of deformation occurred.

The SOA design performed very closely to pre-test predictions made by the finite element and collision dynamics models. See Figure 2. The SOA design crushed approximately 9 inches in the longitudinal direction.

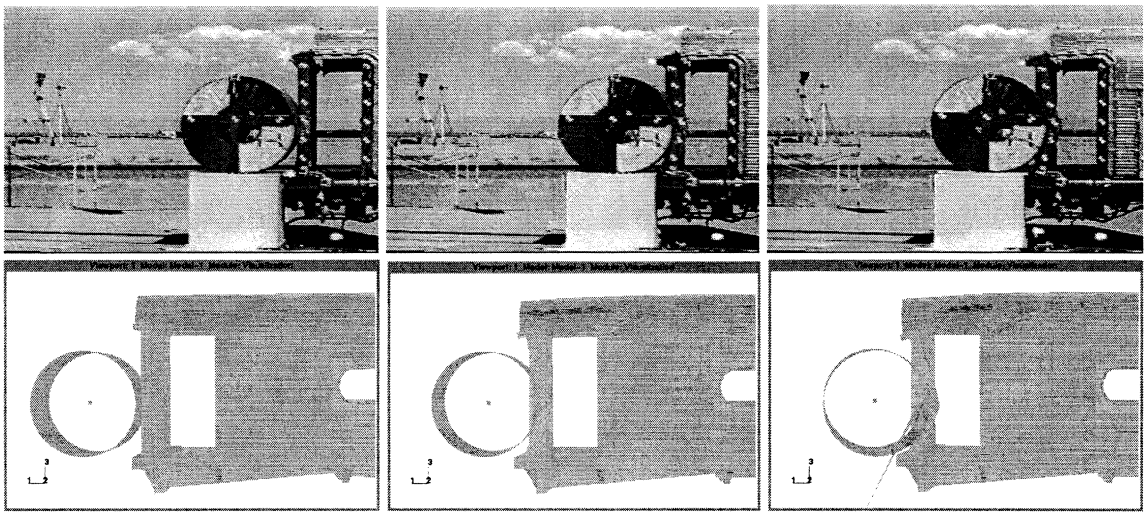


Figure 2. Still Photographs from Dynamic Full-Scale Tests of the SOA End Frame and Corresponding Dynamic Analysis

Pre-test analyses for the 1990s design using the car crush model and collision dynamics model were in close agreement with the measurements taken during the actual testing of the cab car end frame built to this design. The pre-test analyses also nearly overlay the test results for the force/crush characteristic of the SOA design. As a result, FRA believes that both sets of models are capable of predicting the modes of structural deformation and the total amount of energy consumed during a collision. Careful application of finite-element modeling allows accurate prediction of the crush behavior of rail car structures.

Both the methodologies used to design the cab car end frames and the results of the tests show that significant increases in rail passenger equipment crashworthiness can be achieved if greater consideration is given to the manner in which structural elements deform when overloaded. Modern methods of analysis can accurately predict structural crush (severe deformation) and consequently can be used with confidence to develop structures that collapse in a controlled manner. Modern testing techniques allow the verification of the crush behavior of such structures.

3. Industry Quasi-Static Testing

While FRA's full-scale, dynamic testing program was being planned and conducted with input from key industry representatives, several passenger railroads were incorporating in procurement specifications the then-newly promulgated Federal regulations and industry standards issued in 1999. Specifically, both LIRR and Metro-North had contracted with Bombardier for the development of a new MU locomotive design, the M7 series. Bombardier conducted a series of qualifying quasi-static tests on a mock-up, front-end structure of an M7, including a severe deformation test of the collision post. In addition to the severe deformation test, the other end frame members were also tested elastically at the enhanced loads specified in the APTA standards. The severe deformation qualification test was conducted on February 20, 2001.

The quasi-static testing of the M7 collision post was conducted on a mock-up test article. The first 19.25 feet of the car structure was fabricated, from the car's body bolster to the front end, so that the mock-up contained all structural elements. Load was applied at incrementally increasing levels with hydraulic jacks while being measured by load cells at the rear of the longitudinal end frame members. Initially, the elastic limit was determined for the post, and then the large deformation test was conducted. The test was stopped, for safety considerations, prior to full separation of the collision post with the end/buffer beam.

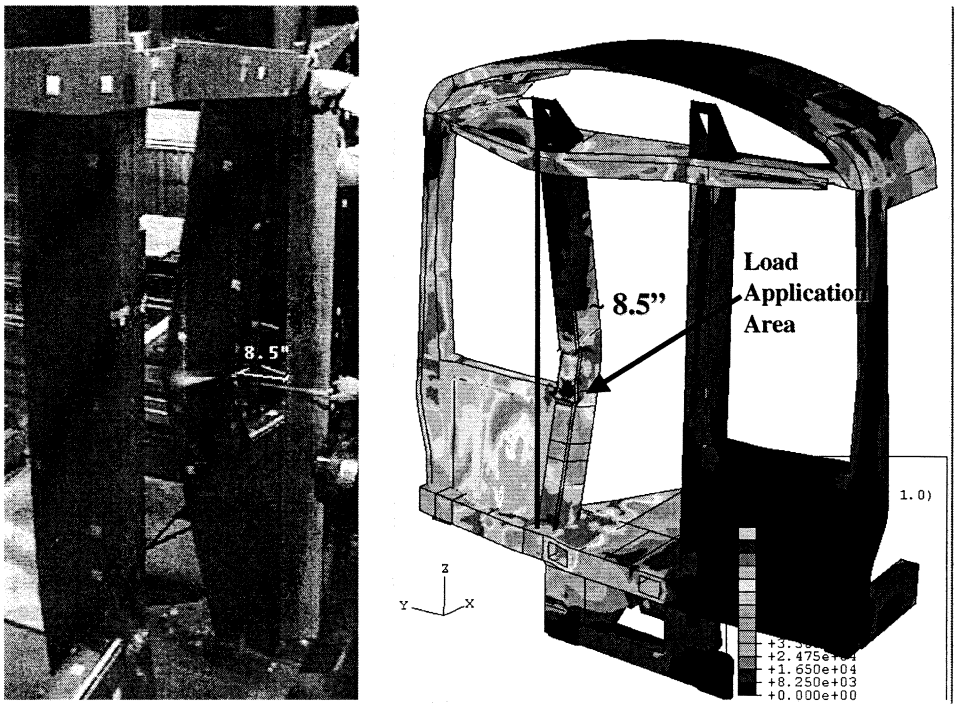
The maximum deflection in the collision post before yielding occurred at a position 42 inches above the end beam, near the top of the plates used to reinforce the collision post. The plastic shape the collision post acquired during testing was 'V'-shaped, with a plastic hinge occurring at 42 inches above the end beam. Some cracking and material failure occurred at the connection of the post with the end beam. The anti-telescoping plate was pulled down roughly three inches, and load was shed to the corner post via the shelf member and the bulkhead sheet. The shape that the collision post experienced is very similar to what was observed from the dynamic testing of the SOA corner post, as discussed above.

4. Comparative Analyses

Under FRA sponsorship, the Volpe Center, with cooperation from Bombardier, conducted non-linear, large deformation analyses to evaluate the performance of the cab car corner and collision posts of the SOA end frame design and the Bombardier M7 design under dynamic test conditions. One of the purposes of this research was to determine whether the level of crashworthiness demonstrated by the SOA prototype design could actually be achieved by a general production design—here, the M7 design. Pre-test

analysis predictions of the dynamic performance of the SOA corner post closely matched test measurements.[9] A similar analysis of the corner post was performed on the M7 design, and the results compared closely with the SOA design test and analysis results. Overall, the crashworthiness performance of the collision posts of the SOA and M7 designs were found to be essentially the same, and the M7 corner post design was even found to perform better than the SOA corner post design. This latter difference in performance is attributable to the sidewall support in the M7 design, which is not present in the SOA design.

Having established the fidelity of the models and modeling approach, a number of comparative simulations were conducted of both the SOA end frame and the M7 end frame under both dynamic and quasi-static test conditions to assess the equivalency of the two different tests for demonstrating compliance with the severe deformation standard. For both sets of tests, the modes of deformation were very similar at the same extent of longitudinal displacement, and the locations where material failure occurred were also similar. In addition, the predicted force-crush characteristics showed reasonable agreement within the repeatability of the tests. Figure 3, below, shows a comparison of the deformation modes for the M7, as observed from the quasi-static testing and as predicted for the dynamic coil loading condition.



Quasi-static test Dynamic analysis

Figure 3. Comparison of Quasi-Statically Tested and Dynamically Predicted Modes of Deformation and Failure for the M7 MU Locomotive End Frame

F. Approaches for Specifying Large Deformation Requirements

As discussed above, APTA's initial ''severe deformation'' standard, published in 1999, did not contain specific methodologies or criteria for demonstrating compliance with the standard. Consequently, the dynamic tests performed by FRA and the Volpe Center, static tests performed by members of the rail industry, and analyses conducted by the Volpe Center and its contractors all helped to develop the base of information needed to identify the types of analyses and test methodologies to use. Further, evaluation of the test data, with the analyses providing a supporting framework, allowed development of appropriate criteria to demonstrate compliance.

The principal criteria developed involve energy absorption through end frame deformation and the maximum amount of that deformation. As shown by FRA and industry testing, energy can be imparted to conventional flat-nosed cab cars and MU locomotives either dynamically or quasi-statically. As shown by Volpe Center analyses, currently available engineering tools can be used to predict the results of such tests. Given the complexity of such analyses, and commensurate uncertainties, there is a benefit to maintaining dynamic testing as an option for evaluating compliance with any ''severe deformation'' standard.

There are tradeoffs between quasi-static and dynamic end frame testing of cab cars and MU locomotives. Both sets of tests prescribe a minimum amount of energy for end frame deformation. However, the manner in which the energy is applied is different, and the setup of the two types of tests is different. As demonstrated by the tests

[9] Martinez, E., Tyrell, D., Zolock, J. Brassard, J., ''Review of Severe Deformation Recommended Practice Through Analyses—Comparison of Two Cab Car End Frame Designs,'' American Society of Mechanical Engineers, Paper No. IMECE2005–70043, March 2005.

conducted by Bombardier, quasi-static tests can be conducted by rail equipment manufacturers at their own facilities. Dynamic tests require a segment of railroad track with appropriate wayside facilities; there are few such test tracks available. Nevertheless, dynamic tests do not require detailed knowledge of the car structure to be tested, and allow for a wide range of structural designs. Quasi-static tests require intimate knowledge of the structure being tested, to assure appropriate support and loading conditions, and development of quasi-static test protocols requires assumptions about the layout of the structure, confining structural designs. In addition, dynamic tests more closely approximate accident conditions than quasi-static tests do.

In August 2005, APTA's PRESS C&S Subcommittee accepted a revised ''severe deformation'' standard for collision and corner posts. The standard includes requirements for minimum energy absorption and maximum deflection. The form of the standard is largely based on the testing done by Bombardier, and therefore is quasi-static. The standard eliminates a deficiency of the 1999 standards by specifying test criteria to objectively measure ''severe deformation.'' The standard can be readily applied to conventional flat-end cab cars and MU locomotives, but is more difficult to apply to shaped-nosed cab cars and MU locomotives or those with crash energy management designs.

In addition, APTA as well as several equipment manufacturers have expressed an interest in maintaining the presence of a stairwell on the side of the cab car or MU locomotive opposite from where the locomotive engineer is situated. This feature enables multi-level boarding from both low and higher platforms. As such, FRA and the APTA PRESS C&S group worked together to develop language associated with providing a safety equivalent to the requirements stipulated for cab car and MU locomotive corner posts in terms of energy absorption and graceful deformations. The group agreed that for this arrangement there is sufficient protection afforded by the presence of two corner posts (an end corner post and an internal adjacent body corner post) that are situated in front of the occupied space. The load requirements stipulated for such posts differ in that longitudinal requirements are not equal to the transverse requirements. This in effect changes the shape of these posts so that they are not equal in both width and height. For the end corner post the longitudinal loads are smaller than the transverse loads. The opposite is true for the body corner post. Despite the changes in the loading requirements from longitudinal to transverse, it was agreed to allow for the combined contribution of both sets of corner posts to provide an equivalent level of protection to that required for corner posts in other cab car and MU locomotive configurations. See the discussion in the section-by-section on the structural requirements for cab cars and MU locomotives with a stairwell located on the side of the equipment opposite from where the locomotive engineer is situated.

G. Crash Energy Management and the Design of Front-End Structures of Cab Cars and MU Locomotives

Research has shown that passenger rail equipment crashworthiness in train-to-train collisions can be significantly increased if the equipment structure is engineered to crush in a controlled manner. One manner of doing so is to design sacrificial crush zones into unoccupied locations in the equipment. These crush zones are designed to crush gracefully, with a lower initial force and increased average force. With such crush zones, energy absorption is shared by multiple cars during the collision, consequently helping to preserve the integrity of the occupied areas. While developed principally to protect occupants in train-to-train collisions, such crush zones can also potentially significantly increase crashworthiness in highway-rail grade-crossing collisions.[10]

The approach of including crush zones in passenger rail equipment is termed CEM, and it extends from current, conventional practice. Current practice for passenger equipment operated at speeds not exceeding 125 mph (i.e., Tier I passenger equipment under part 238) requires that the equipment be able to support large loads without permanent deformation or failure, but does not specifically address how the equipment behaves when it crushes. CEM prescribes that car structures crush in a controlled manner when overloaded and absorb collision energy. In fact, for passenger equipment operating at speeds exceeding 125 mph but not exceeding 150 mph (i.e., Tier II passenger equipment under part 238), FRA requires that the equipment be designed with a CEM system to dissipate kinetic energy during a collision, see § 238.403, and Amtrak's Acela Express trainsets were designed with a CEM system complying with this requirement.

FRA notes that Metrolink is in the process of procuring a new fleet of cars utilizing CEM technology. As part of its response to the Glendale, CA train incident on January 26, 2005, Metrolink determined that CEM design specifications should be included in this planned procurement, and, in coordination with APTA, approached FRA and FTA to draft such specifications. In turn, FRA and FTA formed the ad hoc Crash Energy Management Working Group in May 2005. This working group included government engineers and participants from the rail industry, including passenger railroads, suppliers, labor organizations, and industry consultants, many of whom also participated in the Crashworthiness/Glazing Task Force. The working group developed a detailed technical specification for crush zones in passenger cars for Metrolink to include in its procurement specification, as well as for other passenger railroads to include in future procurements of their own. Metrolink released its specification as part of an invitation for bid, and then awarded the contract to manufacture the equipment to Rotem, a division of Hyundai.

Rotem is currently developing a shaped-nose, CEM design for new Metrolink cab cars. Because of the shaped-nose, it is more difficult to engineer structural members identifiable as full-height collision posts and corner posts that extend from the underframe to the cantrail or roofline at the front end, as specified in the current APTA standard. Consequently, to meet the APTA standard, FRA believes that Rotem will need to locate the collision and corner posts inboard of the crush zone, rather than place them at the extreme front end of the cab car. Further, as currently written, the APTA quasi-static standard does not expressly take into account the energy absorption capability of the crush zone, even if the crush zone would likely be engaged in a grade-crossing impact. Although the APTA standard acknowledges the use of shaped-nose and CEM designs, there remains uncertainty in the standard associated with demonstration of compliance with such designs. (The APTA standard does provide that on cars with CEM designs, compliance be demonstrated either through analysis or testing as agreed to by the vehicle builder and purchaser, but no test methodology or criteria are provided.)

A dynamic test standard would place fewer constraints on the layout of the cab car end structure and would allow

[10] Tyrell, D.C., Perlman, A.B., ''Evaluation of Rail Passenger Equipment Crashworthiness Strategies,'' Transportation Research Record No. 1825, pp. 8–14, National Academy Press, 2003.

the energy absorption capability of the crush zone to be expressly taken into account in the design of the collision and corner post structures. As noted, the NPRM provides an option for the dynamic testing of cab cars and MU locomotives. Nevertheless, FRA makes clear that the Task Force did not reach consensus on recommending the inclusion of dynamic testing in this NPRM. However, FRA believes that the results of the crashworthiness research discussed above provide strong support for including dynamic testing in the rule, and that it is particularly necessary to address what FRA believes will be a growing number of cab cars and MU locomotives utilizing CEM designs. This need has become more apparent since the Task Force meetings occurred, and FRA has scheduled additional, full-scale crash testing to facilitate the use of both quasi-static and dynamic test standards.

IV. Section-by-Section Analysis

Proposed Amendments to 49 CFR Part 238, Passenger Equipment Safety Standards

Subpart A—General

Section 238.13 Preemptive Effect

Existing § 238.13 informs the public as to FRA's views regarding the preemptive effect of this part by citing and restating the statutory provision that governed the regulation's preemptive effect at the time that it was promulgated (49 U.S.C. 20106). See 64 FR 25581. This statutory provision was amended by the Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135, 2319 (November 25, 2002), subsequent to the issuance of the May 12, 1999 final rule promulgating the Passenger Equipment Safety Standards. Consequently, FRA is proposing to amend § 238.13 so that it is more consistent with the revised statutory language expressly addressing railroad security.

As amended to date, 49 U.S.C. 20106 provides that all regulations and orders prescribed or issued by the Secretary of Transportation (with respect to railroad safety matters) and the Secretary of Homeland Security (with respect to railroad security matters) preempt any State law, regulation, or order covering the same subject matter, except an additional or more stringent provision necessary to eliminate or reduce an essentially local safety or security hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. The Congressional intent behind the statute is to promote national uniformity in railroad safety and security standards and to avoid subjecting the railroads to a variety of enforcement in 50 different State judicial and administrative systems. The courts have construed the ''essentially local safety or security'' exception very narrowly, holding that it is designed to enable States to respond to local situations which are not statewide in character and not capable of being adequately encompassed within uniform national standards. With the exception of such a provision directed at an essentially local safety or security hazard, 49 U.S.C. 20106 preempts any State statutory, regulatory, or common law standard covering the same subject matter as a Federal law, regulation, or order, including an FRA regulation or order.

In addition, since issues have arisen regarding the preemptive effect of this part on the safety of operating a cab car as the leading unit of a passenger train, FRA believes that clarification of its views on the matter is needed to address any misunderstanding. As described below, through a variety of initiatives spanning more than a decade, FRA has comprehensively and intentionally covered the subject matter of the requirements for passenger equipment, planning for the safe use of passenger equipment, and the manner in which passenger equipment is used. In so doing, FRA believes that it has preempted any State law, regulation, or order, including State common law, concerning the operation of a cab car or MU locomotive as the leading unit of a passenger train. This NPRM on cab car and MU locomotive crashworthiness further refines FRA's comprehensive regulation of passenger equipment safety and serves to show that the operation of cab cars and MU locomotives is a matter regulated by FRA, and not one which FRA has left subject to State statutory, regulatory, or common law standards covering that subject matter.

Emergency Order No. 20

In the wake of two serious accidents, each involving a passenger train operating with a cab car in the lead position in ''push-pull service,'' FRA issued Emergency Order No. 20 (EO 20) on February 22, 1996 (61 FR 6876), amended on March 5, 1996 (61 FR 8703). EO 20 generally required passenger railroads operating push-pull or MU locomotive service to have in their operating rules a delayed-in-block rule and a rule requiring communication of wayside signals, and required passenger railroads to mark and test exits used for emergency egress. EO 20 also required passenger railroads which operated push-pull or MU locomotive service to develop and submit interim system safety plans for the purpose of enhancing the safety of such operations. FRA noted that it would review the plans submitted and, based on that review, it would ''determine whether other mandatory action appears necessary to address hazards associated with the subject rail passenger service.'' 61 FR 6882. Thus, FRA's approach was to have passenger railroads review their approach to push-pull and MU operations, and FRA would then review the railroads' plans and determine what further action to take. FRA ultimately did take further action to regulate push-pull and MU operations as part of its overall regulation of passenger equipment safety.

Passenger Safety Rulemakings

At the time EO 20 was issued in February 1996, FRA had been moving forward with rulemakings to establish comprehensive safety standards for railroad passenger equipment. As noted above, the rulemakings arose out of the Secretary of Transportation's commitment in 1994 to develop safety standards for railroad passenger equipment, soon followed by enactment of the Federal Railroad Safety Authorization Act of 1994. In Section 215 of the Act, Congress directed the Secretary to specifically consider a number of matters before prescribing regulations, such as the crashworthiness of the cars, interior features (including luggage restraints, seat belts, and exposed surfaces) that may affect passenger safety, and any operating rules and conditions that directly affect safety not otherwise governed by regulations. Congress granted the Secretary the authority to make applicable some or all of the standards to cars existing at the time the regulations were prescribed, as well as to new cars. Moreover, as noted above, Congress authorized the Secretary, when prescribing regulations, issuing orders, and making amendments under this section, to consult with Amtrak, public authorities operating railroad passenger service, other railroad carriers transporting passengers, organizations of passengers, and organizations of employees. 49 U.S.C. 20133. As delegated from the Secretary, FRA has exercised these grants of authority.

Passenger Train Emergency Preparedness

Using the consultative authority granted by Congress, FRA convened the first meeting of the Passenger Train Emergency Preparedness Working

Group in August 1995, focused on the development of emergency preparedness planning requirements for commuter and intercity passenger train operations. The rulemaking culminated in the publication of a final rule on Passenger Train Emergency Preparedness on May 4, 1998. 63 FR 24630.

As described above, this regulation requires railroads that operate intercity or commuter passenger train service or that host the operation of such service to adopt and comply with written emergency preparedness plans approved by FRA. In addition, as noted above, the regulation specifies marking and instruction requirements for emergency window and door exits, and provides for the inspection, maintenance, and repair of emergency window and door exits. The regulation therefore codified and expanded EO 20's requirements to mark and inspect emergency exits.

In formalizing a planning requirement for emergency preparedness, FRA acknowledged that the plans would be integrated into commuter railroads' overall system safety planning efforts. 63 FR at 24636. FRA announced that it would monitor the implementation of the rule and evaluate whether further rulemaking or other action were necessary to achieve the desired improvements in emergency preparedness. *Id.*

Passenger Equipment Safety Standards

Using the same consultative authority granted by Congress, FRA convened the first meeting of the Passenger Equipment Safety Standards Working Group in June 1995, as mentioned above. Thereafter in June 1996, FRA issued an ANPRM on Passenger Equipment Safety Standards. 61 FR 30672. In that notice, FRA stated its views and solicited comments on possible safety regulations, including requirements addressing inspection, testing, and maintenance procedures, equipment design and performance criteria related to passenger and crew survivability in the event of a train accident, and the safe operation of passenger train service. FRA considered system safety planning to be the heart of its approach to passenger equipment safety. 61 FR 30684.

In the ANPRM, FRA stressed the need for flexibility in the development of system safety plans, noting that they could range from a relatively simple document to a detailed document laying out a comprehensive approach for designing, testing, and operating state-of-the-art high-speed passenger rail systems. In this regard, FRA provided an example of how system safety could be approached, breaking down the railroad system into four major component systems: interfaces; right-of-way; equipment; and transportation. 61 FR 30685. FRA noted that many passenger railroads operate at least partially as a tenant on the right-of-way and property of another railroad, and may have little or no control over some of the major risk components of the risk analysis, such as the interfaces and right-of-way components. 61 FR 30686. Nevertheless, FRA explained that the ''systems'' methodology still has considerable merit when applied to the remaining subsystems, in that the analysis could help define the equipment crashworthiness features required for its intended purpose or the operational limitations needed to improve or retain safety levels, but that a true system safety approach cannot be applied to a system that has major risk components that are constrained.

FRA also solicited comments on various aspects of system safety planning, including information regarding any existing plans in use at the time. FRA was particularly interested in ways to tailor system safety programs to fit individual situations, so that the process made good business sense and addressed safety needs, and was not a regulatory burden that did not benefit safety.

Following the consideration of comments received on the ANPRM and recommendations of the Working Group, FRA issued an NPRM to establish comprehensive safety standards for passenger equipment, including cab cars, as discussed above. 62 FR 49728; September 23, 1997. Among FRA's proposals in the NPRM were requirements for system safety plans and programs which would apply to both Tier I and Tier II passenger equipment. FRA indicated that through the system safety process, railroads would be required to identify, evaluate, and seek to eliminate or reduce the hazards associated with the use of passenger equipment over the railroad system. FRA noted that the importance of system safety planning had been recognized in EO 20, and that the commuter railroads had subsequently committed to the development of comprehensive system safety plans, which went beyond the limited scope of the interim system safety plans that had been required by EO 20. 62 FR 49733.

In the NPRM, FRA explained that while consensus was reached within the Working Group on system safety planning requirements as they would apply to Tier II passenger equipment, the Working Group did not reach consensus on the requirements as they would apply to Tier I passenger equipment. 62 FR 49760. Although the Working Group agreed that passenger rail systems should apply system safety planning to Tier I passenger equipment, some members of the Working Group questioned whether this should be required by law. In particular, FRA noted the position of the American Public Transit Association (now American Public Transportation Association, APTA), which objected to FRA's regulation of any aspect of system safety planning. 62 FR 49734. APTA suggested that the commuter railroads be allowed to regulate themselves in this area because the system safety efforts they were undertaking were more comprehensive in nature than anything FRA sought to require, and were not limited to rail equipment issues. FRA therefore invited comment on APTA's suggestion and on a number of other issues with respect to system safety planning requirements, so that it could decide what approach to take in the final rule with respect to system safety plans. In addition, FRA proposed numerous other requirements for the safe operation of passenger train service, including equipment design and performance criteria related to passenger and crew survivability in the event of a train accident, and inspection, testing, and maintenance procedures.

FRA received extensive comments on the NPRM, including comments regarding the question of system safety planning. Some comments suggested that system safety planning should be completely voluntary, to allow for maximum flexibility. Other commenters, however, argued that FRA had to prescribe specific mandatory requirements for those aspects of system safety that it chose to address. All of the comments received on the proposed rule, both written and oral, were considered by FRA in promulgating the final rule on May 12, 1999. 64 FR 25540. FRA's ultimate regulatory decision in issuing a final rule on passenger equipment safety standards was to address only certain aspects of system safety planning, focused primarily on rail passenger equipment, rather than to require generally that the railroads implement comprehensive system safety plans. 64 FR 25549. While FRA acknowledged that the plans required by the regulation would be part of larger system safety planning efforts, only the elements specifically addressed in the rule would be enforced. As with most of FRA's regulations, the final rule prescribed minimum Federal safety

standards and did not restrict a railroad and other persons subject to the regulation from adopting additional or more stringent requirements not inconsistent with the final rule. 64 FR 25575.

FRA made a conscious decision to regulate in a way that allowed greater flexibility in overall system safety planning for Tier I passenger equipment, stating in the final rule that:

> FRA will closely monitor Tier I railroad operations in their development and adherence to voluntary, comprehensive system safety plans. FRA has already established a liaison relationship with APTA and has already begun participating in system safety plan audits on commuter railroads. FRA is using this involvement to enrich FRA's Safety Assurance and Compliance Program (SACP) efforts on these railroads-which, unlike the triennial audit process for system safety plans, is a continuous activity with frequent on-property involvement by FRA safety professionals. FRA will reconsider its decision not to impose a general requirement for system safety plans on Tier I railroad operations if the need to do so arises. 64 Fed. Reg. at 25549.

FRA's participation in the APTA audit process was intended to complement FRA's regulatory requirements, and other initiatives such as the SACP process. It was not, however, a delegation of responsibility to the industry to regulate itself.

FRA did not impose system safety planning requirements that specifically addressed push-pull or MU locomotive operations for Tier I passenger equipment. However, FRA considered the proper scope of system safety planning requirements that it should impose for such operations, and chose not to impose general system safety requirements for this equipment. Instead, in the 1999 final rule FRA imposed a myriad of substantive requirements intended to ensure the safety of the equipment in whatever operational mode it is used. For instance, using the statutory authority to apply requirements of the final rule to existing passenger equipment, FRA generally required that all Tier I passenger equipment, including both new and existing cab cars, have a minimum buff strength of 800,000 pounds, as specified in 49 CFR 238.203. FRA also noted that these substantive requirements, like the system safety planning requirements, might be further addressed in subsequent rulemaking. For example, FRA specifically stated in the final rule that additional effort needed to be made to enhance corner post safety standards for cab cars and MU locomotives—leading to the NPRM that FRA is issuing today. 64 FR at 25607. However, FRA made clear that the very fact that it identified the possibility of specifying additional regulations did not nullify the preemptive effect of the final rule, both in terms of the issues addressed by the specific requirements imposed, and those as to which FRA considered specific requirements but ultimately chose to allow a more flexible approach.

FRA extended additional requirements to Tier II passenger equipment, both in terms of system safety planning and substantive requirements that eliminated the possibility of operating Tier II passenger equipment in the push-pull mode, or in any mode with passengers occupying the leading car in a train. In addition to the specific system safety planning requirements generally applicable to all passenger equipment (fire safety; hardware and software safety; inspection, testing, and maintenance; training, qualifications, and designations; and pre-revenue service testing), FRA required additional system safety planning for Tier II passenger equipment. Railroads are required to have a written plan for the safe operation of the equipment, both prior to its operation and also before introducing new technology in the equipment that affects a safety system on the equipment. These plans may be combined with the other plans required for all passenger equipment. See 64 FR 25646–25647; 49 CFR 238.601 and 238.603. Although the rule does not require FRA approval of the plans, it does generally require FRA approval of Tier II passenger equipment operations, pursuant to 49 CFR 238.111(b)(7).

FRA also adopted structural requirements for Tier II passenger equipment that require the equipment to withstand collision forces not possible for conventional cab cars or MU locomotives to withstand, thus effectively prohibiting the use of such equipment in Tier II passenger trains. FRA specifically stated with regard to Tier II passenger equipment that the crash energy management requirements ''will effectively prevent a conventional cab car from operating as the lead vehicle in a Tier II passenger train because such equipment cannot absorb 5 MJ of collision energy ahead of the train operator's position.'' 64 FR at 25630. Morever, FRA expressly prohibited passenger seating in the leading unit of Tier II passenger trains, see 49 CFR 238.403(f), which, in turn, effectively prohibits the operation of push-pull or MU locomotive service-methods of operation in which passengers can occupy the lead unit of a train. In fact, FRA specifically stated that cab cars ''should not be used in the forward position of a train that travels at speeds greater than 125 mph.'' *Id.* FRA imposed no such prohibition on passenger seating in the lead unit of a Tier I passenger train.

FRA's decisions to require more general system safety planning for Tier II passenger operations, and to impose substantive requirements that in both effect and application prohibit passenger seating in the leading unit of Tier II passenger trains, make clear that these issues were carefully considered in the 1999 final rule. Of course, by virtue of imposing stricter standards on Tier II passenger equipment than Tier I passenger equipment, FRA did not intend States to step in and regulate Tier I passenger equipment. On the contrary, FRA recognized the operational differences between Tier I and Tier II passenger equipment, and purposely chose to address these two types of equipment differently. Where FRA has prohibited one thing and chosen not to prohibit another, such as prohibiting cab car-forward operations for Tier II and not for Tier I, FRA intended to allow a railroad to do that which FRA did not prohibit. FRA's regulatory choice was intended to be preemptive of State standards with regard to both Tier I and Tier II passenger equipment.

As FRA understands the Supreme Court's standard for covering the subject matter, State or local governments, courts or litigants may not carve out subsets of subject matters FRA has covered. Accordingly, when FRA has regulated the construction of a railcar, FRA clearly permits its operation on the general system of railroad transportation unless FRA explicitly sets limits on its operation, and State or local governments may not prohibit certain of those operations or impose an independent duty of care with respect to those operations. FRA's comprehensive regulation of this area has covered the subject matter of all aspects of the safe operation of cab cars and MU locomotives, leaving no room for State standards. States are free of course to craft standards to address the extremely rare ''essentially local safety or security hazard,'' so long as the standards otherwise meet the three part test of 49 U.S.C. 20106.

Nevertheless, as explained below, a State or local entity which owns or controls a railroad may direct that railroad to exceed FRA's requirements, provided that it does so in a capacity that is wholly distinct, and does not derive, from the statutory provision governing the preemptive effect of FRA's regulation of this area. Commuter rail service is typically provided by

public benefit corporations chartered by State or local governments, whereas freight rail service is provided almost exclusively by non-governmental entities. Just as the owner of a freight railroad may direct that its railroad's operations exceed FRA's minimum safety standards, so may a State or local body, acting through the public benefit corporation that it has chartered, direct its railroad to operate in a manner more restrictive than, but not inconsistent with, FRA's requirements. FRA makes clear that, when a State or local government entity acts in this capacity, it is not acting as a regulator of railroad operations. It is effectively acting in a private capacity concerning the operation of its *own* railroad, and the fact that it is a public entity does not somehow change its action into a law, regulation, or order related to railroad safety or security that invokes the statutory provision governing the preemptive effect of FRA's regulation of this area. A State or local entity's ability to act in this capacity concerning its *own* railroad is wholly distinct, and does not derive, from any provision of 49 U.S.C. 20106.

Because FRA's safety standards are minimum safety standards, a State or local entity's ability to act in this manner is the same ability that a non-governmental entity which owns a freight railroad would have, should it decide to provide passenger service, to direct its passenger operations in a manner more stringent than, but not inconsistent with, FRA's requirements. The fact that a State or local entity is involved—and not a private entity—does not alter in any way FRA's views as to the preemptive effect of FRA's comprehensive regulation of passenger equipment safety, and the safe operation of cab cars and MU locomotives in particular.

Similarly, where FRA has required passenger railroads to engage in system safety planning or has not required such planning because the passenger railroads, in FRA's judgment, are doing an adequate job of system safety planning, FRA intends to preempt State and local regulation precisely because FRA has already decided what system safety planning each railroad should be doing based on its own circumstances. The relevant circumstances vary more widely among passenger railroads than among freight railroads and, at this level of specificity, the best and most effective planning is aimed squarely at the circumstances of each individual passenger railroad. Therefore, State or local regulation of such system safety planning is also preempted.

Further, FRA's decision to revisit in this NPRM subjects addressed in the 1999 final rule does not change the preemptive effect of the comprehensive requirements imposed in that rule. As noted earlier, FRA's recognition in the 1999 final rule that additional work needed to be completed to enhance the crashworthiness of cab cars and MU locomotives does not nullify the preemptive effect of the standards then imposed for this equipment. In the same way, FRA's recognition in this NPRM that fuller application of crash energy management technologies to cab cars and MU locomotives could enhance their safety would not nullify the preemptive effect of the standards arising from the rulemaking. FRA continually strives to enhance railroad safety, has an active research program focused on doing so, and sets safety standards that it believes are necessary and appropriate for the time that they are issued with a view to amending those standards as circumstances change. The proposed imposition of enhanced crashworthiness requirements for cab cars and MU locomotives in Tier I passenger trains, and the specific recognition that this equipment will be operated cab car forward in the push mode, demonstrate that FRA has imposed, and will continue to impose, the requirements that it deems necessary for the safe operation of cab cars and MU locomotives in all of the configurations in which they will be operated. FRA is thoroughly familiar, through the inspections it performs regularly, with the physical properties and operating characteristics of each passenger railroad. FRA has applied that knowledge in deciding to permit those railroads to operate cab cars and MU locomotives as the leading units of Tier I passenger trains, and FRA is not aware of any circumstances on any of those passenger railroads which would qualify under the statute as essentially local safety or security hazards affecting those operations.

Subpart C—Specific Requirements for Tier I Passenger Equipment

Section 238.205 Anti-climbing mechanism

FRA is proposing to amend paragraph (a) of this section to correct an error in the rule text. In the relevant part, this paragraph currently states that ''all passenger equipment * * * shall have at both the forward and rear ends an anti-climbing mechanism capable of resisting an upward or downward vertical force of 100,000 pounds without failure.'' However, FRA had intended that the words ''without failure'' actually read as ''without permanent deformation,'' as stated in the preamble accompanying the issuance of this paragraph. Specifically, FRA explained in the accompanying preamble that the anti-climbing mechanism must be capable of resisting an upward or downward vertical force of 100,000 pounds ''without permanent deformation.'' See 64 FR 25604; May 12, 1999. Use of the ''without permanent deformation'' criterion is consistent with North American industry practice, and FRA had not intended to relax that practice. Consequently, FRA is proposing to correct § 238.205(a) to expressly require that the anti-climbing mechanism be capable of resisting an upward or downward vertical force of 100,000 pounds without permanent deformation.

Section 238.211 Collision posts

FRA is proposing to adopt the provisions of paragraphs (a) through (d) of section 5.3.1.3.1, Cab-end collision posts, of APTA Standard SS–C&S–034–99, Rev. 1. FRA is also proposing to modify these provisions for purposes of their adoption as a Federal regulation.

This proposal would enhance current requirements for collision posts at the forward ends of cab cars and MU locomotives. In sum, paragraph (b) currently requires that each locomotive, including a cab car and an MU locomotive, ordered on or after September 8, 2000, or placed in service for the first time on or after September 9, 2002, have two collision posts at its forward end, each post capable of withstanding a 500,000-pound longitudinal force at the point even with the top of the underframe and a 200,000-pound longitudinal force exerted 30 inches above the joint of the post to the underframe. These requirements were based on AAR Standard S–580, and had been the industry practice for all locomotives built since August 1990. *See* 64 FR 25606. Subsequently, industry standards for locomotive crashworthiness have been enhanced, with APTA focusing on standards for passenger-occupied locomotives, i.e., cab cars and MU locomotives, and the AAR focusing on standards for freight locomotives. The AAR's efforts helped support development of the Locomotive Crashworthiness rulemaking, published as a final rule on June 28, 2006. *See* 71 FR 36887. That final rule specifically addresses the safety of freight locomotives and does not apply to passenger-occupied locomotives (i.e., cab cars and MU locomotives). Nevertheless, FRA believes that conceptual approaches taken in the

Locomotive Crashworthiness final rule are applicable to this rulemaking, as discussed below. To clearly delineate the relationship between the Locomotive Crashworthiness final rule and part 238, FRA proposes that a cross-reference be inserted in the introductory language of paragraph (b) to indicate that as the locomotive requirements for collision posts become effective for locomotives manufactured on or after January 1, 2009, those more stringent requirements will apply to conventional locomotives (though not to cab cars or MU locomotives).

FRA is proposing to correct paragraph (b)(2) so that the rule text is consistent with the clear intent of the provision. As explained in the preamble accompanying the issuance of this paragraph, paragraph (b)(2) provides for the use of an equivalent end structure in place of the two forward collision posts described in paragraph (b)—specifically, paragraphs (b)(1)(i) and (ii). *See* 64 FR 25606. However, the rule text makes express reference only to the collision posts in ''paragraph (b)(1)(i) of this section.'' This provision was not intended to be limited to the collision posts described in paragraph (b)(1)(i) alone, but instead to the collision posts described in paragraph (b)(1) as a whole—both paragraphs (b)(1)(i) and (ii). FRA is, therefore, proposing to correct this clear error in the rule text.

FRA is proposing to redesignate current paragraph (c) as paragraph (d) and add a new paragraph (c) in its place. Specifically, proposed paragraphs (c)(1)(i) and (ii) are similar to paragraphs (b)(1)(i) and (ii). One principal difference is that the proposed regulation would require that each collision post be able to support the specified loads for angles up to 15° from the longitudinal. In effect, this would require each post to support a significant lateral load, and is intended to reflect the uncertainty in the direction a load is imparted during an impact. The proposed standard is also intended to encourage the use of collision posts with closed (e.g., rectangular) cross sections, rather than with open (e.g., I-beam) cross sections. Beams with open cross sections tend to twist and bend across the weaker axis when overloaded, regardless of the direction of load. Beams with closed cross sections are less likely to twist when overloaded, and are more likely to sustain a higher load as they deform, absorbing more energy.

Proposed paragraph (c)(1)(iii) does not have a counterpart in paragraph (b). This paragraph would require that the collision post be able to support a 60,000-pound longitudinal load applied anywhere along its length, from its attachment to floor-level structure up to its attachment to roof-level structure. This proposed regulation is intended to provide a minimum level of collision post strength at any point along its full height-not only at its connection to the underframe or at 30 inches above that point. The proposed requirement must also be met for any angle within 15 degrees of the longitudinal axis.

Proposed paragraph (c)(2) would require that each collision post also be able to absorb a prescribed amount of energy without separation from its supporting structure. This proposed requirement is intended to provide a level of protection similar to the SOA design, as discussed in the Technical Background section of the preamble, above. A quasi-static test, such as the test conducted by Bombardier on the M7 design, may be used to show compliance, or the builder may utilize the dynamic test method.

Designs without flat forward ends include shaped-nosed designs such as those by Colorado Railcar and, as discussed above, the design being developed by Rotem for Metrolink. Because such designs place the engineer back from the extreme forward end of the vehicle, there is the potential for significantly increased protection for the engineer in collisions. In this regard, FRA is proposing to add paragraph (e) to require an equivalent structure to be present in front of occupied space but set back from the very end of the cab car or MU locomotive. Such structures may be part of the nose of the equipment or the CEM system, or both. Paragraph (e) would provide relief from utilization of a traditional end frame structure provided that an equivalent level of protection is afforded by the components of the CEM system. In the FRA CEM design tested in March 2006, the end frame structure was reinforced in order to support the loads introduced through the deformable anti-climber. Significantly more energy was absorbed in the deformation of the deformable anti-climber than the combined requirements outlined for both collision and corner posts while preserving all space for the locomotive engineer and passengers. In the design under development for Metrolink in southern California, an equivalent end frame structure is placed outboard of occupied space with crush elements between the very end of the nose and the equivalent end frame. For a grade crossing collision above the underframe of the cab car it is expected that perhaps an order of magnitude or larger of collision energy will be absorbed prior to any deformations into occupied space.

As noted, the APTA Standard does recognize the need to address shaped-nosed designs and CEM designs. Specifically, the Standard provides that cab end collision posts and corner posts (and their supporting structure) on MU locomotives and cab cars without flat ends, or on equipment utilizing crash energy management designs, meet the ''severe deformation'' requirements, but that compliance with the requirements be demonstrated either through analysis or testing as agreed to by the vehicle builder and purchaser. See paragraph (e) in both sections 5.3.1.3.1, Cab-end collision posts, and 5.3.2.3.1, Cab end corner posts, of APTA Standard SS–C&S–034–99, Rev. 1. While FRA supports applying the ''severe deformation'' requirements to such designs, FRA does not believe it viable as a Federal regulation to have the application of these requirements essentially depend on an agreement between the vehicle builder and the purchaser of the vehicle-without the involvement of the Federal government or public input. In particular, since the ''severe deformation'' requirements were developed from research on typical flat-end cab cars and MU locomotives, FRA believes that there may be too much uncertainty for applying such requirements to other designs and that the industry would benefit from the inclusion of a more specific standard.

Within the Task Force, FRA proposed that a dynamic test standard be added to address the issue. However, as noted above, the Task Force could not reach consensus on a recommendation for such a dynamic standard. Concern was raised about the validity of any dynamic test standard chosen and whether such a standard could be used for valid comparisons with a quasi-static test standard. This concern included the need to first conduct full-scale testing on an actual prototype for a production design. Further, APTA was concerned that its member railroads might feel compelled to conduct both quasi-static and dynamic testing to demonstrate compliance, even if the regulations were expressly written to state that compliance with only one test standard would be required. FRA wishes to make clear that nothing in this proposal would require that both types of qualification procedures be used. Either may be clearly adequate for the purpose, depending on the technical challenge presented; and conducting two analyses or types of tests would clearly be excessive and wasteful. Again, FRA proposes two alternative methods in order to provide maximum flexibility,

recognizing that other-than-flat-nosed cars will be offered in the marketplace and further recognizing that equipment utilizing crush zones may also present difficulties should the quasi-static test be the only approach considered.

Concern was also raised as to the safety of conducting full-scale, dynamic testing. The technical tradeoffs between quasi-static and dynamic test standards are discussed in the Technical Background section of the preamble, above. FRA notes that there are safety concerns associated with both quasi-static and dynamic testing, and in a quasi-static test particular care must be taken due to the potential for the sudden release of stored energy should there be material failure. Proper planning and execution of each test are required. (By noting that caution must be exercised in planning and executing the tests, FRA does not intend in any way to oust the jurisdiction of the Occupational Safety and Health Administration of the U.S. Department of Labor with regard to the safety of employees performing the tests.)

FRA believes that dynamic test standards have been sufficiently validated and that dynamic testing should be included as an option for demonstrating compliance with the rule. For this reason, FRA is proposing that paragraph (c)(2) include an option for the dynamic testing of cab cars and MU locomotives. Although FRA expects that this method will be applied to designs with shaped-nose designs or with CEM designs, or both, it may also be used for a conventional flat-nosed design; and the quasi-static method may be applied to shaped-nose or CEM designs.

FRA recognizes that questions may arise in applying these methods in situations not clearly anticipated today. FRA requests comment on whether the final rule should include either an option or requirement that the test methodology be submitted for FRA review prior to the conduct of destructive testing. FRA also requests comment on whether and under what circumstances analysis and scale model or fixture testing might be accepted as satisfying the dynamic standard.

The dynamic standard itself is a performance standard involving impact with a proxy object. The proxy object must have a cylindrical shape, diameter of 48 inches, length of 36 inches, and minimum weight of 10,000 pounds. The longitudinal axis of the proxy object must be offset by 19 inches from the longitudinal axis of the cab car or MU locomotive, which must be ballasted to weigh a minimum of 100,000 pounds. At impact, the longitudinal axis of the proxy object must be 30 inches above the top of the finished floor. The cab car or MU locomotive and its end structure must withstand a 21 mph impact with the proxy object resulting in no more than 10 inches of intrusion longitudinally into the occupied area of the vehicle, and without separation of the attachments of any structural members. FRA is including a graphical description of this collision scenario as Figure 1 to subpart C.

FRA notes that in the Locomotive Crashworthiness final rule, the front-end structure requirements are principally stated in the form of performance criteria for given collision scenarios. *See* Appendix E to part 229; 71 FR 36915. In fact, the performance criteria in Appendix E to part 229 involve dynamic loading conditions stated in a way similar to what FRA is proposing here as the example to demonstrate compliance. In the Locomotive Crashworthiness final rule, FRA adopted performance criteria, rather than more prescriptive design standards, to allow for greater flexibility in the design of locomotives and better encourage innovation in locomotive designs. *See* 71 FR 36895–36898. Of course, the requirements proposed in paragraph (c)(2)(i) are a form of performance criteria. The distinction is that the performance criteria relate to quasi-static loading conditions—instead of dynamic loading conditions, which more approximate actual collision scenarios.

FRA also notes that recently adopted European standards, prEN 15227 FCD *Crashworthiness Requirements for Railway Vehicle Bodies,* include four collision scenarios. Collision Scenario 3 of the European standard involves a ''train unit front end impact with a heavy obstacle (e.g. lorry on road crossing).'' Commuter and intercity trains are required to be able to sustain an impact with a deformable object weighing 33 kips (15,000 kg) at 68 mph (110 kph). Calibration tests on components and numerical simulations of the scenario are recommended for showing compliance. Key differences between the European standard and the dynamic testing collision scenarios FRA is proposing to apply to both collision posts and corner posts, below, include the amount of energy involved and the character of the object. Assuming that the mass of the train is more than about 25 times greater than the mass of the object (which roughly corresponds to the mass of a commuter train made up of a cab car, four coaches, and a locomotive, or made up of six MU locomotives) then the total energy dissipated in a prEN 15227 Scenario 3-impact is 5.0 million foot-pounds. The total energy absorbed in the collision scenarios included in this NPRM are 135,000 foot-pounds for the collision post and 120,000 foot-pounds for the corner post. However, in the European standard, the impacted object is deformable and potentially absorbs a significant amount of the available energy; in the collision scenarios included in the NPRM, the impacted object is rigid and all of the energy is absorbed by the cab car or MU locomotive.

FRA invites comment on the proposal to provide for dynamic testing to demonstrate compliance by cab cars and MU locomotives. Specifically, FRA invites comment on the dynamic testing collision scenario included in the proposed rule for collision posts, and invites comment suggesting any alternative collision scenario or way to address such cab cars and MU locomotives.

Section 238.213 Corner posts

FRA is proposing to adopt the provisions of paragraph (a) through (d) of Section 5.3.2.3.1, Cab end corner posts, of APTA Standard SS–C&S–034–99 Rev. 1, and Section 5.3.2.3.3, Cab end-non-operator side of cab-alternate requirements. FRA is also proposing to modify these provisions for purposes of their adoption as a Federal regulation and to specify standards for a cab car or MU locomotive with a stairwell located on the side of the equipment opposite from where the locomotive engineer is situated. Together with the proposal for collision posts, this action would increase the strength of the front-end structure of cab cars and MU locomotives up to what the main structure can support, and also require explicit consideration of the behavior of the front-end structures when overloaded.

Overall, FRA is proposing to revise this section in its entirety by redesignating current paragraph (b) as paragraph (a)(2), making conforming changes to paragraph (a), and adding new paragraphs (b), (c), and (d).

Proposed paragraph (b) is intended to augment the current requirements of paragraph (a) for cab cars and MU locomotives ordered on or after October 1, 2009, or placed in service for the first time on or after October 2, 2011. Proposed paragraph (b) would require higher loads at the specified locations than its counterpart in paragraph (a).

Paragraph (b)(2) addresses alternative methods of demonstrating that the corner posts absorb energy while deforming. Proposed paragraph (b)(2)(i) sets forth quasi-static test requirements.

The corner post would have to be able to absorb a prescribed amount of energy without separation from its supporting structure. This proposed requirement is intended to provide a level of protection similar to the SOA design, as described in the Technical Background section of the preamble, above. A quasi-static test, similar to the test conducted by Bombardier on the M7, may be used to demonstrate compliance.

Proposed paragraph (b)(2)(ii) would provide for alternative dynamic qualification. The end structure would need to be capable of withstanding a frontal impact with a proxy object that is intended to approximate lading carried by a highway vehicle under the following conditions. The proxy object must have a cylindrical shape, diameter of 48 inches, length of 36 inches, and minimum weight of 10,000 pounds. The longitudinal axis of the proxy object must be aligned with the outboard edge of the side of the cab car or MU locomotive, which must be ballasted to weigh a minimum of 100,000 pounds. At impact, the longitudinal axis of the proxy object must be 30 inches above the top of the finished floor. The cab car or MU locomotive and its end structure must withstand a 20 mph impact with the proxy object resulting in no more than 10 inches of intrusion longitudinally into the occupied area of the cab car or MU locomotive, and without separation of the attachments of any structural members. FRA is including a graphical description of this collision scenario as Figure 2 to subpart C.

Paragraph (c) prescribes the corner post standards for cab cars and MU locomotives ordered on or after October 1, 2009, or placed in service for the first time on or after October 2, 2011, utilizing low-level passenger boarding on the side of the equipment opposite from where the locomotive engineer is seated. In this arrangement the non-operating side of the vehicle is protected by two corner posts (an end corner post and an internal adjacent body corner post) that are situated in front of occupied space and provide protection for the occupied space; the proposed rule allows for the combined contribution of both sets of corner posts to provide an equivalent level of protection to that required for corner posts in other cab car configurations.

Paragraph (c) would require that the corner post load requirements of paragraph (b) be met for the corner post on the operating side of the cab. The requirements for the two corner posts on the opposite side of the operator control stand are described in paragraphs (c)(1) and (2). The structural requirements for the end corner post are described in paragraph s (c)(1)(i) through (vii). The longitudinal load requirements for the end corner post as set forth in paragraph (c)(1) are as follows: (1)(i) is a 150,000-pound shear load applied at the base of the corner post with its connection with the underframe where the load must not exceed the shear strength of the post; (1)(ii) is a 30,000-pound bending load applied 18 inches above the top of underframe and no permanent deformation can occur; (1)(iii) is a 30,000-pound shear load applied at the attachment point with the roof structure, again without permanent deformations; and (1)(iv) is a 20,000-pound bending load applied anywhere between the underframe connection up to the roof structure connection without permanent deformation. The transverse load requirements for the end corner post are described in paragraph (c)(1) as follows: (1)(v) is a 300,000-pound shear load applied at a point even with the top of the underframe without exceeding the shear strength of the post or the carbody supporting structure; (1)(vi) is a 100,000-pound bending load applied 18 inches above the top of underframe and no permanent deformation can occur; and (1)(vii) is a 45,000-pound shear load at the connection between the corner post and the roof structure without deforming the post or the supporting structure. The higher magnitude loads applied in the longitudinal direction will result in a corner post that is wider than it is deep.

The structural load requirements for the body corner post are described in paragraphs (2)(i) through (vi). The longitudinal load requirements are as follows: (2)(i) is a 300,000-pound shear load applied at the base of the body corner post with its connection with the underframe where the load must not exceed the shear strength of the post; (2)(ii) is a 100,000-pound bending load applied 18 inches above the top of underframe and no permanent deformation can occur; (2)(iii) is a 45,000-pound bending load applied anywhere between the underframe connection up to the roof structure connection without permanent deformation. The transverse load requirements for the body corner post are described in paragraph (2) are as follows: (2)(iv) is a 100,000-pound shear load applied at a point even with the top of the underframe without exceeding the shear strength of the post or the carbody supporting structure; (2)(v) is a 30,000-pound bending load applied 18 inches above the top of underframe and no permanent deformation can occur; and (2)(vi) is a 20,000-pound shear load applied at the connection between the body corner post and the roof structure without deforming the post or the supporting structure. The higher magnitude loads applied in the transverse direction will result in a corner post that is deeper than it is wide.

FRA is also proposing that the combination of the corner post and the adjacent body corner post be capable of absorbing collision energy prior to or during structural deformation, as demonstrated by either a quasi static test or alternative dynamic qualification similar to the provisions set out for qualification under paragraph (b).

FRA notes that it is proposing different speeds and different points of contact for the dynamic testing alternatives given for collision post equivalents and corner post equivalents. The collision post equivalents are to be tested at 21 mph, and the corner post equivalents at 20 mph—a difference of about 10% in total energy involved. As the dynamic testing alternatives are intended to provide an equivalent level of safety, the higher speed for dynamically testing the collision posts reflects the more stringent quasi-static testing requirements for collision posts. The collision posts have more available space and a stronger support structure; hence, they can absorb more energy than the corner posts. Nevertheless, the proposed requirements for corner posts would more than double the amount of energy required for the posts to fail, when compared to current FRA requirements. Together, the proposed requirements for collision posts and corner posts would significantly enhance the performance of the posts in protecting occupants of cab cars and MU locomotives.

As noted above, FRA invites comment on the proposal to provide for dynamic testing to demonstrate compliance by cab cars and MU locomotives. Specifically, FRA invites comment on the dynamic testing collision scenario included in the proposed rule for corner posts, and invites comment suggesting any alternative collision scenario or way to address possible future designs. Moreover, FRA invites comment whether the final rule should provide for all cab cars and MU locomotives to be tested dynamically to demonstrate compliance—whether or not they have a shaped-nosed design or a CEM design—and, if so, whether the collision scenario included in the proposed rule is appropriate or whether another collision scenario would be.

Paragraph (d) would provide relief from utilization of a traditional end frame structure provided that an

equivalent level of protection is afforded by the components of the CEM system. In the FRA CEM design tested in March 2006, the end frame structure was reinforced in order to support the loads introduced through the deformable anti-climber. Significantly more energy was absorbed in the deformation of the deformable anti-climber than the combined requirements outlined for both collision and corner posts while preserving all space for the locomotive engineer and passengers. In the design under development for Metrolink in southern California, an equivalent end frame structure is placed outboard of occupied space with crush elements between the very end of the nose and the equivalent end frame. For a grade crossing collision above the underframe of the cab car it is expected that perhaps an order of magnitude or larger of collision energy will be absorbed prior to any deformations into occupied space.

Appendix A to Part 238—Schedule of Civil Penalties

Appendix A to part 238 contains a schedule of civil penalties for use in connection with this part. FRA may revise the schedule of civil penalties in issuing the final rule to reflect revisions made to part 238. Because such penalty schedules are statements of agency policy, notice and comment are not required prior to their issuance. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, commenters are invited to submit suggestions to FRA describing the types of actions or omissions for each proposed regulatory section that would subject a person to the assessment of a civil penalty. Commenters are also invited to recommend what penalties may be appropriate, based upon the relative seriousness of each type of violation.

FRA notes that in December 2006 it published proposed statements of agency policy that would amend the 25 schedules of civil penalties issued as appendixes to FRA's safety regulations, including part 238. *See* 71 FR 70589; Dec. 5, 2006. The proposed revisions are intended to reflect more accurately the safety risks associated with violations of the rail safety laws and regulations, as well as to make sure that the civil penalty amounts are consistent across all safety regulations. Although the schedules are statements of agency policy, and FRA has authority to issue the revisions without having to follow the notice and comment procedures of the Administrative Procedure Act, FRA has provided members and representatives of the general public an opportunity to comment on the proposed revisions before amending them. FRA is currently evaluating all of the comments received in preparing final statements of agency policy, and the schedule of civil penalties to part 238 may be revised as a result, independent of this rulemaking proceeding.

V. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures, and it has been determined not to be significant under either Executive Order 12866 or DOT policies and procedures (44 FR 11034; Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of this proposed rule. Document inspection and copying facilities are available at the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590. Access to the docket may also be obtained electronically through the Web site for the DOT Docket Management System at *http://dms.dot.gov.* Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590; please refer to Docket No. FRA–2006–25268. FRA invites comments on the regulatory evaluation.

The regulatory evaluation explains that the proposed requirements are based on industry standards, which every affected cab car or MU locomotive from currently producing manufacturers would now meet. Consequently, the proposed requirements are not expected to affect any units in production by current manufacturers, and are, therefore, estimated to have zero costs and benefits for such units. The proposed requirements would affect cab cars and MU locomotives from other potential manufacturers if those units were of a design which would not meet the proposed requirements. However, it is highly speculative whether any non-conforming cab car or MU locomotive would ever be produced, even in the absence of this proposal. Further, as discussed in detail above, States are preempted from imposing by regulation other, potentially conflicting, or more burdensome requirements.

Were any cab cars or MU locomotives to be affected by this proposal, the estimated benefits would be about $16,000 per cab car or MU locomotive, discounted at 7% over 20 years, and the estimated costs would be only about $2,000 per cab car or MU locomotive, also discounted at 7% over 20 years. Therefore, FRA estimates that the net benefit, discounted at 7% over 20 years, would be about $14,000 per such cab car or MU locomotive. However, because FRA believes that no units will be affected, FRA estimates that the present value of the total 20-year costs which the industry would be expected to incur to comply with the requirements proposed in this rule is zero, as is the anticipated benefits.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of proposed and final rules to assess their impact on small entities. FRA has prepared and placed in the docket an Analysis of Impact on Small Entities (AISE) that assesses the small entity impact of this proposal. Document inspection and copying facilities are available at the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590. Docket material is also available for inspection on the Internet at *http://dms.dot.gov.* Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590; please refer to Docket No. FRA–2006–25268.

The AISE developed in connection with this NPRM concludes that this proposed rule would not have a significant economic impact on a substantial number of small entities. The principal entities impacted by the rule would be governmental jurisdictions or transit authorities—none of which is small for purposes of the United States Small Business Administration (*i.e.*, no entity serves a locality with a population less than 50,000). These entities also receive Federal transportation funds. Although these entities are not small, the level of costs incurred by each entity should generally vary in proportion to either the size of the entity, or the extent to which the entity purchases newly manufactured passenger equipment, or both. Tourist, scenic, excursion, and historic passenger railroad operations would be exempt from the rule, and, therefore, these smaller operations would not incur any costs.

The rule would impact passenger car manufacturers. In general, these entities are principally large international corporations that would not be considered small entities. However, it is possible that a smaller entity, such as a small domestic manufacturer of rail cars, could be impacted if the requirements of the final rule do not provide sufficient flexibility for shaped-nosed MU locomotives and cab cars of the type it manufactures.

Having made these determinations, FRA certifies that this proposed rule is not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act or Executive Order 13272.

C. Paperwork Reduction Act

FRA has analyzed the proposed rule in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) to determine whether it would result in any new or additional information collection requirements. FRA has determined that no new or additional information collection requirements would result from the rule as proposed. FRA invites comment on this determination and whether the proposed rule would in fact result in any new or additional information collection requirements. Should any new or additional information collection requirements result from this rulemaking, FRA intends to obtain current Office of Management and Budget (OMB) control numbers for any such collection requirement prior to the effective date of a final rule. FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required.

D. Federalism Implications

FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132, issued on August 4, 1999, which directs Federal agencies to exercise great care in establishing policies that have federalism implications. *See* 64 FR 43255. This proposed rule 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 various levels of government.

FRA does note that it is clarifying the preemptive effect of this proposed rule and the underlying regulations it is proposing to amend. See the discussion of § 238.13, Preemptive effect, above. In particular, FRA believes that it has preempted any State law, regulation, or order, including State common law, concerning the operation of a cab car or MU locomotive as the leading unit of a passenger train. FRA has taken into account the federalism principles and criteria contained in Executive Order 13132 in making this determination.

One of the fundamental federalism principles, as stated in Section 2(a) of Executive Order 13132, is that ''[f]ederalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people.'' Congress expressed its intent that there be national uniformity of regulation concerning railroad safety matters when it issued 49 U.S.C. 20106, which provides that all regulations prescribed by the Secretary with respect to railroad safety matters and the Secretary of Homeland Security with respect to railroad security matters preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. This intent was expressed even more specifically in 49 U.S.C. 20133, which mandated that the Secretary of Transportation prescribe ''regulations establishing minimum standards for the safety of cars used by railroad carriers to transport passengers'' and consider such matters as ''the crashworthiness of the cars'' before prescribing the regulations. This proposed rule is intended to add to and enhance these regulations, originally issued on May 12, 1999, pursuant to 49 U.S.C. 20133.

Further, federalism concerns have been considered in the development of this NPRM both internally and through consultation within the RSAC forum, as described in Section II of this preamble, above. The full RSAC, which reached consensus on the proposal (with the exception discussed above concerning cab cars and MU locomotives without flat-ends or with CEM designs, or both) and then recommended it to FRA, has as permanent voting members two organizations representing State and local interests: AASHTO and ASRSM. As such, these State organizations concurred with the proposed requirements (again, with the exception noted above). The RSAC regularly provides recommendations to the FRA Administrator for solutions to regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the Federalism implications of this rulemaking from these representatives or from any other representative on the Committee.

For the foregoing reasons, FRA believes that this proposed rule is in accordance with the principles and criteria contained in Executive Order 13132.

E. Environmental Impact

FRA has evaluated this proposed regulation in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this proposed regulation is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28547, May 26, 1999. In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this proposed regulation is not a major Federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in 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)[currently $120,700,000] in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect

on State, local, and tribal governments and the private sector. The proposed rule would not result in the expenditure, in the aggregate, of $120,700,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

H. Trade Impact

The Trade Agreements Act of 1979 (Pub. L. No. 96–39, 19 U.S.C. 2501 *et seq.*) prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

FRA has assessed the potential effect of this rulemaking on foreign commerce and believes that the proposed requirements are consistent with the Trade Agreements Act. The requirements proposed are safety standards, which, as noted, are not considered unnecessary obstacles to trade. Moreover, FRA has sought, to the extent practicable, to propose the requirements in terms of the performance desired, rather than in more narrow terms restricted to a particular design, so as not to limit alternative, compliant designs by any manufacturer—foreign or domestic.

For related discussion on the international effects of this part, please see the preamble to the May 12, 1999 Passenger Equipment Safety Standards final rule on the topic of ''United States international treaty obligations,'' 64 FR 25545.

I. Privacy Act

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov*.

List of Subjects in 49 CFR Part 238

Passenger equipment, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 238 of chapter II, subtitle B of Title 49, Code of Federal Regulations, as follows:

PART 238—[AMENDED]

1. The authority citation for part 238 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20133, 20141, 20302–20303, 20306, 20701–20702, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

Subpart C—Specific Requirements for Tier I Passenger Equipment

2. Section 238.13 is revised to read as follows:

§ 238.13 Preemptive effect.

Under 49 U.S.C. 20106, issuance of these regulations preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation or order that is necessary to eliminate or reduce an essentially local safety or security hazard; that is not incompatible with a law, regulation, or order of the United States Government; and that does not unreasonably burden interstate commerce.

3. Section 238.205 is amended by revising paragraph (a) to read:

§ 238.205 Anti-climbing mechanism.

Except as provided in paragraph (b) of this section, all passenger equipment placed in service for the first time on or after September 8, 2000 shall have at both the forward and rear ends an anti-climbing mechanism capable of resisting an upward or downward vertical force of 100,000 pounds without permanent deformation. When coupled together in any combination to join two vehicles, AAR Type H and Type F tight-lock couplers satisfy this requirement.

* * * * *

4. Section 238.211 is amended by revising the introductory text of paragraph (a), the introductory text of paragraph (b) and paragraph (b)(2), redesignating paragraph (c) as paragraph (d) and revising it, and by adding new paragraphs (c) and (e) to read as follows:

§ 238.211 Collision posts.

(a) Except as further specified in this paragraph and paragraphs (b) through (d) of this section—

* * * * *

(b) Each locomotive, including a cab car and an MU locomotive, ordered on or after September 8, 2000, or placed in service for the first time on or after September 9, 2002 (except a conventional locomotive manufactured on or after January 1, 2009, which shall be subject to the requirements of subpart D of part 229 of this chapter), shall have at its forward end, in lieu of the structural protection described in paragraph (a) of this section either:

(1) * * *

(2) An equivalent end structure that can withstand the sum of the forces that each collision post in paragraph (b)(1) of this section is required to withstand.

(c) Each cab car and MU locomotive ordered on or after October 1, 2009, or placed in service for the first time on or after October 2, 2011, shall have at its forward end, in lieu of the structural protection described in paragraphs (a) and (b) of this section, two forward collision posts, located at approximately the one-third points laterally, meeting the following requirements:

(1) Each collision post, with the supporting car body structure, shall be capable of withstanding the following loads individually applied at any angle within 15 degrees of the longitudinal axis:

(i) A 500,000-pound longitudinal force applied at the connection to the top of the underframe, without exceeding the ultimate strength of the post or supporting car body structure;

(ii) A 200,000-pound longitudinal force applied 30 inches above the connection of the post to the underframe, without exceeding the ultimate strength of the post or supporting car body structure; and

(iii) A 60,000-pound longitudinal force applied at any height along the post above the top of the underframe, without permanent deformation of the post or supporting car body structure; and

(2) Each collision post shall also be capable of absorbing collision energy prior to or during structural deformation, as demonstrated by one of the following methods:

(i) *Quasi-static method.* Each collision post shall be demonstrated to absorb a minimum of 135,000 ft-lbs (0.18 MJ) of energy when loaded longitudinally at a height of 30 inches above the connection of the post to the underframe, while not permanently deflecting more than 10 inches longitudinally. There shall be no complete separation of the post from its connections to the supporting structure; or

(ii) *Dynamic method.* The front end structure shall be demonstrated to be capable of withstanding a frontal impact with a proxy object that is intended to approximate lading carried by a highway vehicle under the following conditions:

(A) The proxy object shall have a cylindrical shape, diameter of 48 inches, length of 36 inches, and minimum weight of 10,000 pounds. The longitudinal axis of the proxy object shall be offset by 19 inches from the longitudinal axis of the cab car or MU locomotive, which shall be ballasted to weigh a minimum of 100,000 pounds. At impact, the longitudinal axis of the proxy object shall be 30 inches above the top of the finished floor; and

(B) The cab car or MU locomotive and its end structure must withstand a 21 mph impact with the proxy object resulting in no more than 10 inches of intrusion longitudinally into the occupied area of the vehicle, and without separation of the attachments of any structural members. (A graphical description of the frontal impact is provided in Figure 1 to subpart C.)

(d) The end structure requirements of this section apply only to the ends of a semi-permanently coupled consist of articulated units, provided that:

(1) The railroad submits to the FRA Associate Administrator for Safety under the procedures specified in § 238.21 a documented engineering analysis establishing that the articulated connection is capable of preventing disengagement and telescoping to the same extent as equipment satisfying the anti-climbing and collision post requirements contained in this subpart; and

(2) FRA finds the analysis persuasive.

(e) In the case of a cab car or MU locomotive designed to provide the benefits of crash energy management, the end structure requirements of this section are satisfied if the requirements of this section are met with respect to the portion of the car or MU locomotive outboard of the areas occupied by crew members and passengers.

5. Section 238.213 is revised to read as follows:

§ 238.213 Corner posts.

(a) Except as further specified in paragraphs (b) and (c) of this section, each passenger car and MU locomotive shall have at each end of the car, placed ahead of the occupied volume, two full-height corner posts capable of resisting:

(1)(i) A horizontal load of 150,000 pounds at the point of attachment to the underframe, without failure;

(ii) A horizontal load of 20,000 pounds at the point of attachment to the roof structure, without failure; and

(iii) A horizontal load of 30,000 pounds applied 18 inches above the top of the floor, without permanent deformation.

(2) For purposes of this paragraph (a), the orientation of the applied horizontal loads shall range from longitudinal inward to transverse inward.

(b) Except as provided in paragraph (c) of this section, each cab car and MU locomotive ordered on or after October 1, 2009, or placed in service for the first time on or after October 2, 2011, shall have at its forward end, in lieu of the structural protection described in paragraph (a) of this section, two corner posts ahead of the occupied volume, meeting the following requirements:

(1) Each post, with the supporting car body structure, shall be capable of withstanding the following loads individually applied toward the inside of the vehicle at all angles in the range from longitudinal to lateral:

(i) A 300,000-pound longitudinal force at the point even with the top of the underframe, without exceeding the ultimate strength of the post or supporting car body structure;

(ii) A 100,000-pound longitudinal force exerted 18 inches above the joint of the post to the underframe, without permanent deformation of the post or supporting car body structure; and

(iii) A 45,000-pound longitudinal force applied at any height along the post above the top of the underframe, without permanent deformation of the post or supporting car body structure; and

(2) Each corner post shall also be capable of absorbing collision energy prior to or during structural deformation, as demonstrated by one of the following methods:

(i) *Quasi-static method.* Each corner post shall be demonstrated to be capable of absorbing a minimum of 120,000 ft-lbs (O.16 MJ) of energy when loaded longitudinally at a height of 30 inches above the connection of the post to the underframe, while not permanently deflecting more than 10 inches longitudinally. There shall be no complete separation of the post from its connections to the supporting structure; or

(ii) *Dynamic method.* The front end structure shall be demonstrated to be capable of withstanding frontal impact with a proxy object that is intended to approximate lading carried by a highway vehicle under the following conditions:

(A) The proxy object shall have a cylindrical shape, diameter of 48 inches, length of 36 inches, and minimum weight of 10,000 pounds. The longitudinal axis of the proxy object shall be aligned with the outboard edge of the side of the cab car or MU locomotive, which shall be ballasted to weigh a minimum of 100,000 pounds. At impact, the longitudinal axis of the proxy object shall be 30 inches above the top of the finished floor; and

(B) The cab car or MU locomotive and its end structure must withstand a 20 mph impact with the proxy object resulting in no more than 10 inches of intrusion longitudinally into the occupied area of the cab car or MU locomotive, and without separation of the attachments of any structural members. (A graphical description of the frontal impact is provided in Figure 2 to subpart C.)

(c) Each cab car and MU locomotive ordered on or after October 1, 2009, or placed in service for the first time on or after October 2, 2011, utilizing low-level passenger boarding on the non-operating side of the cab end shall meet the corner post requirements of paragraph (b) of this section for the corner post on the side of the cab containing the control stand, and the following structural requirements for the corner post and the adjacent body corner post on the opposite side of the cab from the control stand:

(1) The corner post on the opposite side of the cab from the control stand, with the supporting car body structure, shall be capable of withstanding the following horizontal loads individually applied toward the inside of the vehicle:

(i) A 150,000-pound longitudinal force at the point even with the top of

the underframe, without exceeding the ultimate strength of the post or supporting car body structure;

(ii) A 30,000-pound longitudinal force at a point 18 inches above the top of the underframe, without permanent deformation;

(iii) A 30,000-pound longitudinal force at the point of attachment to the roof structure, without permanent deformation;

(iv) A 20,000-pound longitudinal force anywhere between the top of the post at its connection to the roof structure, and the top of the underframe, without permanent deformation of the post or supporting structure;

(v) A 300,000-pound transverse force at a point even with the top of the underframe, without exceeding the ultimate strength of the post or supporting car body structure;

(vi) A 100,000-pound transverse force at a point 18 inches above the top of the underframe, without permanent deformation; and

(vii) A 45,000-pound transverse force anywhere between the top of the post at its connection to the roof structure, and the top of the underframe, without permanent deformation of the post or supporting structure.

(2) The body corner post on the opposite side of the cab from the control stand, with the supporting car body structure, shall be capable of withstanding the following horizontal loads individually applied toward the inside of the vehicle:

(i) A 300,000-pound longitudinal force at a point even with the top of the underframe, without exceeding the ultimate strength of the post or supporting car body structure;

(ii) A 100,000-pound longitudinal force at a point 18 inches above the top of the underframe, without permanent deformation;

(iii) A 45,000-pound longitudinal force anywhere between the top of the post at its connection to the roof structure, and the top of the underframe, without permanent deformation or supporting structure;

(iv) A 100,000-pound transverse force at a point even with the top of the underframe, without exceeding the ultimate strength of the post or supporting car body structure;

(v) A 30,000-pound transverse force at a point 18 inches above the top of the underframe, without permanent deformation; and

(vi) A 20,000-pound transverse force anywhere between the top of the post at its connection to the roof structure, and the top of the underframe, without deformation of the post or supporting structure, and

(3) The combination of the corner post and the adjacent body corner post shall also be capable of absorbing collision energy prior to or during structural deformation, as demonstrated by one of the following methods:

(i) *Quasi-static method.* The two posts in combination shall be demonstrated to be capable of absorbing a minimum of 120,000 ft-lbs (O.16 MJ) of energy when loaded longitudinally at a height of 30 inches above the connection of the posts to the underframe, while not permanently deflecting the body corner post than 10 inches longitudinally. There shall be no complete separation of the body corner post from its connections to the supporting structure; or

(ii) *Dynamic method.* The front end structure on the non-operating side of the cab shall be demonstrated to be capable of withstanding frontal impact with a proxy object that is intended to approximate lading carried by a highway vehicle under the following conditions:

(A) The proxy object shall have a cylindrical shape, diameter of 48 inches, length of 36 inches, and minimum weight of 10,000 pounds. The longitudinal axis of the proxy object shall be aligned with the outboard edge of the side of the cab car or MU locomotive, which shall be ballasted to weigh a minimum of 100,000 pounds. At impact, the longitudinal axis of the proxy object shall be 30 inches above the top of the finished floor; and

(B) The cab car or MU locomotive and its end structure on the non-operating side of the cab must withstand a 20 mph impact with the proxy object resulting in no more than 10 inches of intrusion longitudinally into the occupied area of the cab car or MU locomotive, and without separation of the attachments of the body corner post. (A graphical description of the frontal impact is provided in Figure 3 to subpart C.)

(d) In the case of a cab car or MU locomotive designed to provide the benefits of crash energy management, the end structure requirements of this section are satisfied if the requirements of this section are met with respect to the portion of the cab car or MU locomotive outboard of the areas occupied by crew members and passengers.

6. Add Appendix to Subpart C of Part 238, consisting of figures 1, 2, and 3, to read as follows:

Appendix to Subpart C of Part 238

BILLING CODE 4910–06–P

FIGURE 1 TO SUBPART C OF PART 238–

SCHEMATIC OF DYNAMIC COLLISION POST PERFORMANCE STANDARD

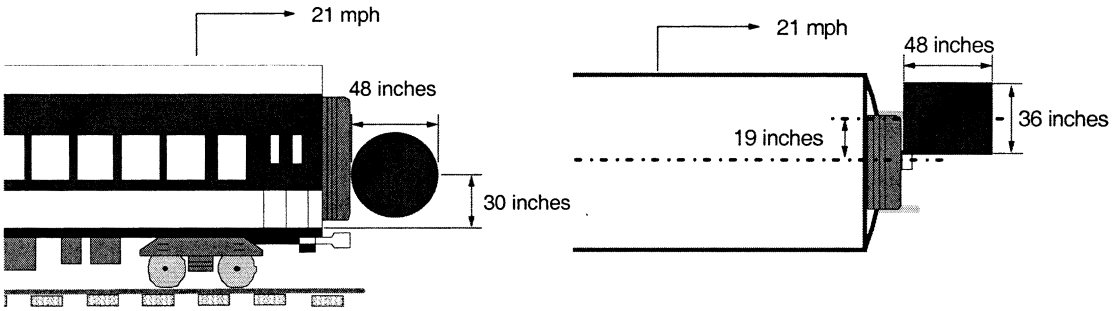


FIGURE 2 TO SUBPART C OF PART 238–

SCHEMATIC OF DYNAMIC CORNER POST PERFORMANCE STANDARD

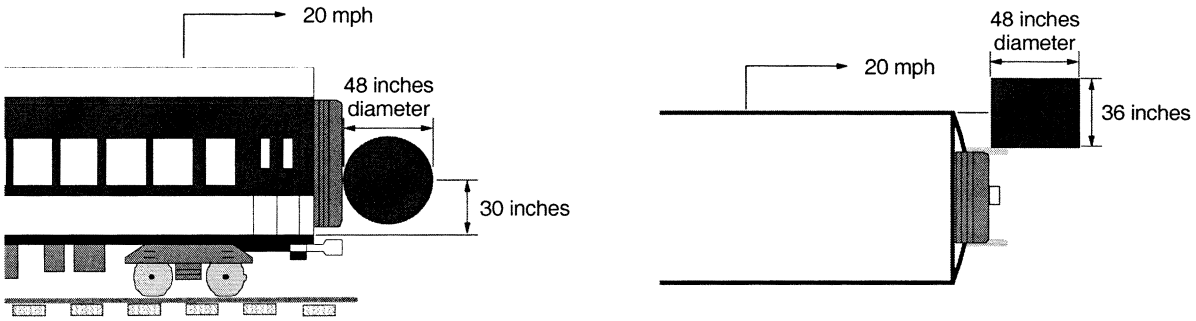
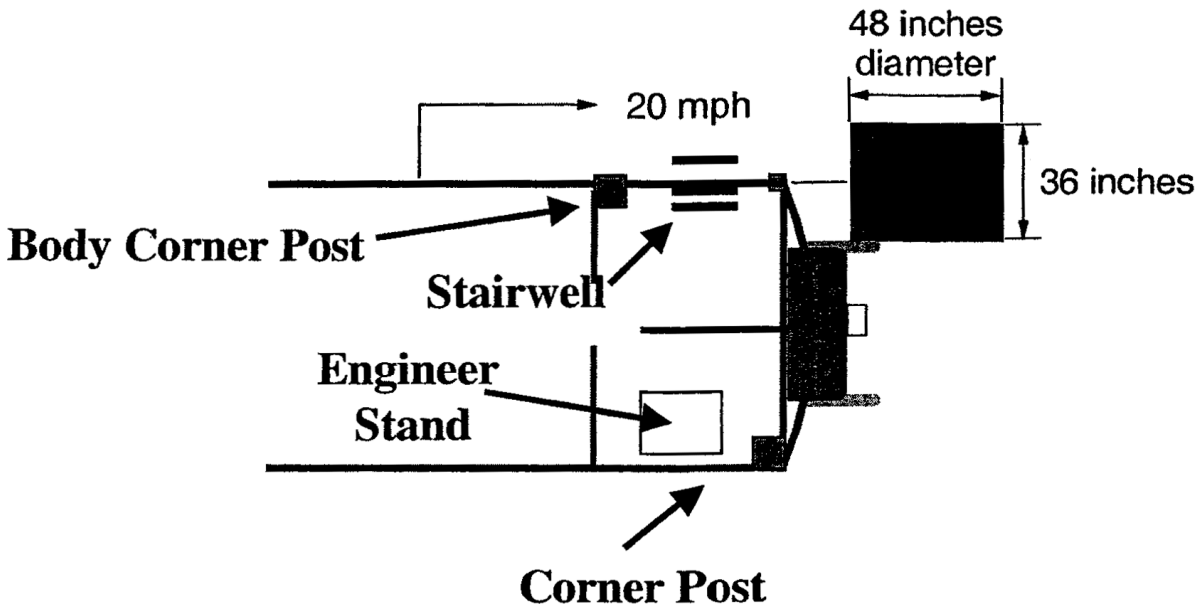


FIGURE 3 TO SUBPART C OF PART 238–

SCHEMATIC OF DYNAMIC CORNER POST PERFORMANCE STANDARD FOR CAB CARS AND MU LOCOMOTIVES UTILIZING LOW-LEVEL PASSENGER BOARDING ON THE NON-OPERATING SIDE OF THE CAB END



Issued in Washington, DC, on July 26, 2007.

Joseph H. Boardman,

Federal Railroad Administrator.

[FR Doc. 07–3736 Filed 7–31–07: 8:45 am]

BILLING CODE 4910–06–C

Notices

Federal Register
Vol. 72, No. 147
Wednesday, August 1, 2007

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

July 26, 2007.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Housing Service

Title: Notice of Funds Availability (NOFA) Inviting Applications for the Rural Community Development Initiative.

OMB Control Number: 0575–0180.

Summary of Collection: Congress created the Rural Community Development Initiative (RCDI) in fiscal year 2000 and funds was appropriated under the Rural Community Advancement Program. The intent of the RCDI grant program is to develop the capacity and ability of rural area recipients to undertake projects through a program of financial and technical assistance provided by qualified intermediary organizations. Intermediaries are required to provide matching funds in an amount equal to the RCDI grant. Eligible recipients are private, nonprofit community-based housing and community development organizations and low-income rural communities.

Need and Use of the Information: RHS will collect information to determine applicant/grantee eligibility, project feasibility, and to ensure that grantees operate on a sound basis and use grant funds for authorized purposes. Failure to collect this information could result in improper use of Federal funds.

Description of Respondents: Not-for profit institutions; State, Local or Tribal Government.

Number of Respondents: 1,055.

Frequency of Responses: Recordkeeping; Reporting: Quarterly; Annually; Third party disclosure.

Total burden hours: 3,408.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. E7–14824 Filed 7–31–07; 8:45 am]

BILLING CODE 3410–XT–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

Request for Approval of a New Information Collection; Request for Producer Service Center Information Management System (SCIMS) Record Change

AGENCY: Farm Service Agency, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intent of the Farm Service Agency (FSA) to request approval for the information collection to be used in support of documenting critical producer data changes (customer name, current mailing address and tax identification number) in SCIMS. The collection of critical producer data will be used to update existing producer record data and document when and who initiates and changes the record in SCIMS.

DATES: Comments on this notice must be received on or before October 1, 2007 to be assured consideration.

FOR FURTHER INFORMATION CONTACT: Mike Sienkiewicz, Program Specialist, USDA, Farm Service Agency, Production, Emergencies, and Compliance Division, 1400 Independence Avenue, SW., Stop 0517, Washington, DC 20250–0517; Telephone (202) 720–8959; Electronic mail: *mike.sienkiewicz@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Request for Producer Service Center Information Management System (SCIMS) Record Change.

OMB Control Number: 0560–NEW.

Type of Request: Approval of a New Information Collection.

Abstract: The information collection is necessary to effectively monitor critical producer data changes made in the SCIMS database. The necessity to monitor critical producer data changes in the SCIMS database is a direct result of the OMB Circular A–123 Remediation/Corrective Action Plan for County Office Operations. The FSA A–123 team was established and reviewed and documented key controls related to all material accounts. Included in this analysis was a review of the SCIMS database.

Estimate of Annual Respondent Burden: Public reporting burden for this collection of information is estimated to average .17 hours per response.

Respondents: FSA, NRCS, and RD customers currently residing in SCIMS database.

Estimated Number of Respondents: 45,000.

Estimated Number of Responses per Respondents: 1.15.

Estimated Total Annual Burden on Respondents: 8,798.

Comments are invited on the following: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. These comments should be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 and to Mike Sienkiewicz, Program Specialist, USDA, Farm Service Agency, Production, Emergencies, and Compliance Division, 1400 Independence Avenue, SW., STOP 0517, Washington, DC 20250–0517.

Comments will be summarized and included in the request for Office of Management and Budget approval of the information collection. All comments will also become a matter of public record.

Signed in Washington, DC on July 25, 2007.

Glen L. Keppy,

Acting Administrator, Farm Service Agency.

[FR Doc. E7–14816 Filed 7–31–07; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Comprehensive River Management Plan for the Black, Ontonagon, Presque Isle, Paint, Sturgeon and Yellow Dog National Wild and Scenic Rivers, Ottawa National Forest, Baraga, Gogebic, Houghton, Iron, Marquette and Ontonagon Counties, MI

AGENCY: Forest Service, USDA.

ACTION: Notice of availability.

SUMMARY: In accordance with section 3(d)(1) of the Wild and Scenic Rivers Act, the USDA Forest Service, announces the availability of the Ottawa National Forest Comprehensive River Management Plan. On July 13, 2007, Forest Supervisor, Susan J. Spear made a decision to adopt into the Forest Plan, the Comprehensive River Management Plan which required an amendment to the Ottawa National Forest Plan. This management plan outlines use levels, development levels, resource protection measures, and general management direction for the river corridor. This amendment is necessary to implement the Wild and Scenic Rivers Act which required the Forest Service to develop a management plan for the Black, Ontonagon, Presque Isle, Paint, Sturgeon and Yellow Dog Rivers. Interim direction was identified in the Forest Plan as Management Area 8.1. The environmental assessment documents the analysis of alternatives for managing the Black, Ontonagon, Presque Isle, Paint, Sturgeon and Yellow Dog Wild and Scenic Rivers in accordance with the Wild and Scenic Rivers Act. This decision is subject to appeal pursuant to Forest Service Regulations 36 CFR part 217. Appeals must be filed within 45 days from the date of publication in the newspaper of record the Ironwood Daily Globe, Ironwood, Michigan.

The environmental assessment is available for public review at the Ottawa National Forest Supervisor's Office in Ironwood, Michigan or on the Ottawa National Forest Web page at *http://www.fs.fed.us/r9/ottawa/recreation/wsr/index.htm.*

DATES: *Effective Date:* Implementation of this decision shall not occur for 7 days following the publication of the legal notice of the decision in the Ironwood Daily Globe, Ironwood, Michigan.

FOR FURTHER INFORMATION CONTACT: Information may be obtained by contacting Teresa Wagner or Karen Dunlap, Ottawa National Forest, E6248 U.S. Highway 2, Ironwood, Michigan, (906) 932–1330.

Dated: July 26, 2007.

Susan J. Spear,

Forest Supervisor.

[FR Doc. E7–14920 Filed 7–31–07; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Mendocino Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Mendocino County Resource Advisory Committee (RAC) will meet August 24, 2007 and September 14th and 28th in Willits, California. Agenda items to be covered include: (1) Approval of minutes, (2) Public Comment, (3) Extension of RAC (4) Discussion—items of interest (5) Discussion/approval of projects, (6) next items and meeting date.

DATES: The meetings will be held on August 24th, 2007 and September 14th and 28th, 2007 from 9 a.m. to 12 noon.

ADDRESSES: The meeting will be held at the Mendocino County Museum, located at 400 E. Commercial St., Willits, California.

FOR FURTHER INFORMATION CONTACT: Roberta Hurt, Committee Coordinator, USDA, Mendocino National Forest, Covelo Ranger District, 78150 Covelo CA 95428. (707) 983–8503; e-mail *rhurt@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff by August 15, September 10 and September 20, 2007. Public will have the opportunity to address the committee at the meeting.

Dated: July 23, 2007.

Lee Johnson,

Designated Federal Official.

[FR Doc. 07–3738 Filed 7–31–07; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

National Agricultural Statistics Service

Notice of Intent To Request Approval To Revise and Extend an Information Collection

AGENCY: National Agricultural Statistics Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of the National Agricultural Statistics Service (NASS) to request approval to revise and extend a currently approved information collection, the Milk and Milk Products Surveys. Revision to burden hours may be needed due to changes in the size of the target population, sampling design, and/or questionnaire length.

DATES: Comments on this notice must be received by October 1, 2007 to be assured of consideration.

ADDRESSES: You may submit comments, identified by docket number 0535–0020, by any of the following methods:

- *E-mail: gmcbride@nass.usda.gov.* Include docket number above in the subject line of the message.
- *Fax:* (202) 720–6396.

• *Mail:* Mail any paper, disk, or CD–ROM submissions to: Ginny McBride, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue, SW., Washington, DC 20250–2024.

• *Hand Delivery/Courier:* Hand deliver to: Ginny McBride, NASS Clearance Officer, U.S. Department of Agriculture, Room 5336 South Building, 1400 Independence Avenue, SW., Washington, DC 20250–2024.

FOR FURTHER INFORMATION CONTACT: Joseph T. Reilly, Associate Administrator, National Agricultural Statistics Service, U.S. Department of Agriculture, (202) 720–4333.

SUPPLEMENTARY INFORMATION:

Title: Milk and Milk Products Surveys.

OMB Control Number: 0535–0020.

Expiration Date of Approval: December 31, 2007.

Type of Request: Intent to Seek Approval to Revise and Extend an Information Collection.

Abstract: The primary objective of the National Agricultural Statistics Service is to prepare and issue State and national estimates of crop and livestock production. The Milk and Milk Products Surveys obtain basic agricultural statistics on milk production and manufactured dairy products from farmers and processing plants throughout the nation. Data are gathered for milk production, dairy products, evaporated and condensed milk, manufactured dry milk, and manufactured whey products. Milk production and manufactured dairy products statistics are used by the U.S. Department of Agriculture (USDA) to help administer federal programs and by the dairy industry in planning, pricing, and projecting supplies of milk and milk products.

Authority: Voluntary dairy information reporting is conducted under authority of 7 U.S.C. 2204(a). Individually identifiable data collected under this authority are governed by section 1770 of the Food Security Act of 1985 (7 U.S.C. 2276), which requires USDA to afford strict confidentiality to non-aggregated data provided by respondents. Mandatory dairy product information reporting is based on the Agricultural Marketing Act of 1946, as amended by the Dairy Market Enhancement Act of 2000 and the Farm Security and Rural Development Act of 2002 (U.S.C. 1637–1637b). This program requires each manufacturer to report to USDA the price, quantity, and moisture content of dairy products sold and each entity storing dairy products to report information on the quantity of dairy products stored. Any manufacturer that processes, markets, or stores less than 1,000,000 pounds of dairy products per year is exempt. USDA is required to maintain information, statistics, or documents obtained under these Acts in a manner that ensures that confidentiality is preserved regarding the identity of persons and proprietary business information, subject to verification by the Agricultural Marketing Service under Public Law No. 106–532.

This Notice is submitted in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, codified at 44 U.S.C. 3501, *et seq.*) and Office of Management and Budget regulations at 5 CFR part 1320 (60 FR 44978, August 29, 1995).

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 8 minutes per response. This average is based on the 8 different surveys in the information collection: 4 weekly, 2 monthly, 1 quarterly, and 1 annual. Total annual response is estimated to be 95,000 with an average annual frequency of 3.65 responses per respondent.

Respondents: Farms and businesses.

Estimated Number of Respondents: 26,000.

Estimated Total Annual Burden on Respondents: 12,800 hours. Copies of this information collection and related instructions can be obtained without charge from Ginny McBride, the Agency Clearance Officer, at (202) 720–5778.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice will become a matter of public record and be summarized in the request for OMB approval.

Signed at Washington, DC, July 18, 2007.

Joseph T. Reilly,

Associate Administrator.

[FR Doc. E7–14847 Filed 7–31–07; 8:45 am]

BILLING CODE 3410–20–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Correction: Compliance of National Marine Fisheries Service Permits With the Debt Collection Improvement Act of 1996

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

SUPPLEMENTARY INFORMATION: All NOAA National Marine Fisheries Service (NMFS) permit forms not already requiring Tax Identifying Numbers (Employer ID Number and/or Social Security Number) and Date of Incorporation and/or Date of Birth) will be revised to require this information, following procedures as laid out by the Paperwork Reduction Act. This notice applies to all NMFS permits information collections for which rulemaking is not needed in conjunction with such revisions. Proposed rules will be issued for all collections whose regulations require amendment for such revisions.

In addition to the notice published on *June 6, 2007,* this action applies to the following NOAA NMFS permit collections: OMB Control Numbers:

1. 0648–0240, Application to Shuck Surf Clams/Ocean Quahogs at Sea.

2. 0648–0345, Southeast Region Bycatch Reduction Device Certification Family of Forms.

The sentence following the original list should now read ''All but five of these seventeen permit collections currently require some or most of this information.''

DATES: The original deadline for public comment remains the same (August 6, 2007).

ADDRESS: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and

Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov*).

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of these information collections; they also will become a matter of public record.

Dated: July 26, 2007.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. E7–14846 Filed 7–31–07; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XB70

Small Takes of Marine Mammals Incidental to Specified Activities; Low-Energy Marine Seismic Survey in the Northeast Pacific Ocean, September 2007

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

ACTION: Notice; proposed incidental take authorization; request for comments.

SUMMARY: NMFS has received an application from Scripps Institute of Oceanography (SIO) for an Incidental Harassment Authorization (IHA) to take marine mammals incidental to conducting a low-energy marine seismic survey in the northeastern Pacific Ocean during September, 2007. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to SIO to incidentally take, by Level B harassment only, several species of marine mammals during the aforementioned activity.

DATES: Comments and information must be received no later than August 31, 2007.

ADDRESSES: Comments on the application should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *PR1.0648XB70@noaa.gov*. NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10–megabyte file size.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*.

Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Candace Nachman or Jolie Harrison, Office of Protected Resources, NMFS, (301) 713–2289.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as:

> any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45–day time limit for NMFS review of an application followed by a 30–day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either approve or deny the authorization.

Summary of Request

On May 4, 2007, NMFS received an application from SIO for the taking, by Level B harassment only, of 32 species of marine mammals incidental to conducting, with research funding from the National Science Foundation (NSF), an ocean-bottom seismograph (OBS) deployment and a magnetic, bathymetric, and seismic survey program off the Oregon coast in the northeastern Pacific Ocean during September, 2007. The purpose of the research program is to record microearthquakes in the forearc to determine whether seismicity on the plate boundary is characteristic of a locked or a freely slipping fault plane. OBSs will be deployed and left in place for a year, and a seismic survey will be used to locate the instruments accurately and precisely on the seafloor and to characterize the shallow sediment structure around the instrument. Seismometers measure movement in the Earth's crust. About 90 percent of all natural earthquakes occur under water, where great pressure and cold make measurements difficult. The OBS was developed for this task. Scientists use seismometer data to calculate the energy released by earthquakes. Also included in the research is the use of a magnetometer and sub-bottom profiler.

Description of the Activity

The seismic surveys will involve one vessel, the R/V *Wecoma* (*Wecoma*),

which is scheduled to depart from Newport, Oregon on September 5, 2007 and return on September 11, 2007. The exact dates of the activities may vary by a few days because of weather conditions, repositioning, OBS and streamer operations and adjustments, GI-gun deployment, or the need to repeat some lines if data quality is substandard. The seismic surveys will take place off the Oregon coast in the northeastern Pacific Ocean. The overall area within which the seismic surveys will occur is located between approximately 44° and 45° N. and 124.5° and 126° W. (Figure 1 in the application). The surveys will occur approximately 25–110 km (15.5–68.4 mi) offshore from Oregon in water depths between approximately 110 and 3,050 m (361 and 10,007 ft), entirely within the Exclusive Economic Zone of the U.S.

The *Wecoma* will deploy a single low-energy Generator-Injector (GI) airgun as an energy source (with a discharge volume of 45 in^3), 16 OBSs that will remain in place for a year, and a 300 m-long (984 ft-long), 16–channel, towed hydrophone streamer. The program will consist of approximately 21 km (13 mi) of surveys over each of the 16 OBSs. The GI gun will be operated on a small grid for approximately 2 hours at each of 16 OBS sites over an approximately 7–day period during September, 2007. There will be additional seismic operations associated with equipment testing, start-up, and repeat coverage of any areas where initial data quality is sub-standard. The OBSs are acoustically passive and do not emit any sounds into the ocean.

In addition to the operations of the GI gun, a 3.5–kHz sub-bottom profiler, a Knudsen 320BR sub-bottom profiler, and a magnetometer may be run on the transit between OBS locations.

Vessel Specifications

The *Wecoma* has a length of 56.4 m (185 ft), a beam of 10.1 m (33.1 ft), and a maximum draft of 5.6 m (18.4 ft). The ship is powered by a single 3,000–hp EMD diesel engine driving a single, controllable-pitch propeller through a clutch and reduction gear, and an electric, 350–hp azimuthing bow thruster. An operation speed of 11.1 km/h (6 knots) is used during seismic acquisition. When not towing seismic survey gear, the *Wecoma* cruises at 22.2 km/h (12 knots) and has a maximum speed of 26 km/h (14 knots). It has a normal operating range of approximately 13,300 km (8,264 mi).

Acoustic Source Specifications

Seismic Airguns

The vessel *Wecoma* will tow a GI gun and an 300 m-long (984–ft) streamer containing hydrophones along predetermined lines. Seismic pulses will be emitted at intervals of 10 s, which corresponds to a shot interval of approximately 31 m (102 ft) at a speed of 6 knots (11.1 km/h). The generator chamber of the GI gun, the one responsible for introducing the sound pulse into the ocean, is 45 in^3. The larger (105 in^3) injector chamber injects air into the previously-generated bubble to maintain its shape and does not introduce more sound into the water. The 45 in^3 GI gun will be towed 21 m (69 ft) behind the *Wecoma*, at a depth of 4 m (13 ft). The dominant frequency components are 0–188 Hz.

The sound pressure field of the GI gun variation at a tow depth of 2.5 m (8.2 ft) has been modeled by the Lamont-Doherty Earth Observatory (L-DEO) in relation to distance and direction from the airgun. This source, which is directed downward, was found to have an output (0–peak) of 225.3 dB re 1 μPa m.

The rms (root mean square) received levels that are used as impact criteria for marine mammals are not directly comparable to the peak or peak to peak values normally used to characterize source levels of airgun arrays. The measurement units used to describe airgun sources, peak or peak-to-peak decibels, are always higher than the rms decibels referred to in biological literature. A measured received level of 160 dB rms in the far field would typically correspond to a peak measurement of approximately 170 to 172 dB, and to a peak-to-peak measurement of approximately 176 to 178 dB, as measured for the same pulse received at the same location (Greene 1997; McCauley *et al.*, 1998, 2000). The precise difference between rms and peak or peak-to-peak values depends on the frequency content and duration of the pulse, among other factors. However, the rms level is always lower than the peak or peak-to-peak level for an airgun-type source.

Sub-bottom Profiler

The *Wecoma* will utilize the Knudsen Engineering Model 320BR sub-bottom profiler, which is a dual-frequency transceiver designed to operate at 3.5 and/or 12 kHz. It is used to provide data about the sedimentary features that occur below the sea floor. The energy from the sub-bottom profiler is directed downward (in an 80–degree cone) via a 12–kHz transducer (EDO 323B) or a 3.5–kHz array of 16 ORE 137D transducers in a 4 x 4 arrangement. The maximum power output of the 320BR is 10 kilowatts for the 3.5–kHz section and 2 kilowatts for the 12–kHz section.

The pulse length for the 3.5 kHz section of the 320BR is 0.8–24 ms, controlled by the system operator in regards to water depth and reflectivity of the bottom sediments, and will usually be 12 or 24 ms in this survey. The system produces one sound pulse and then waits for its return before transmitting again. Thus, the pulse interval is directly dependent upon water depth, and in this survey is 4.5–8 sec. Using the Sonar Equations and assuming 100 percent efficiency in the system (impractical in real world applications), the source level for the 320BR is calculated to be 211 dB re 1 mPa-m. In practice, the system is rarely operated above 80 percent power level.

Safety Radii

NMFS has determined that for acoustic effects, using acoustic thresholds in combination with corresponding safety radii is the most effective way to consistently apply measures to avoid or minimize the impacts of an action, and to quantitatively estimate the effects of an action. Thresholds are used in two ways: (1) to establish a mitigation shut-down or power down zone, i.e., if an animal enters an area calculated to be ensonified above the level of an established threshold, a sound source is powered down or shut down; and (2) to calculate take, in that a model may be used to calculate the area around the sound source that will be ensonified to that level or above, then, based on the estimated density of animals and the distance that the sound source moves, NMFS can estimate the number of marine mammals that may be ''taken''. NMFS believes that to avoid permanent physiological damage (Level A Harassment), cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding, respectively, 180 and 190 dB re 1 μPa (rms). NMFS also assumes that cetaceans or pinnipeds exposed to levels exceeding 160 dB re 1 μPa (rms) may experience Level B Harassment.

Received sound levels have been modeled by L-DEO for a number of airgun configurations, including one 45–in^3 GI gun, in relation to distance and direction from the airgun(s). The model does not allow for bottom interactions and is most directly applicable to deep water. Based on the modeling, estimates of the maximum distances from the GI gun where sound levels of 190, 180, and 160 dB re 1 μPa

(rms) are predicted to be received in deep (>1000–m, 3280–ft) water are 8, 23, and 220 m (26.2, 75.5, and 721.8 ft), respectively and 12, 35, and 330 m (39.4, 115, and 1,082.7 ft), respectively for intermediate water depths (100–1000m, 328–3,280 ft). Because the model results are for a 2.5–m (8.2–ft) tow depth, the above distances slightly underestimate the distances for the 45–in^3 GI gun towed at 4–m (13–ft) depth.

Empirical data concerning the 180- and 160- dB distances have been acquired based on measurements during the acoustic verification study conducted by L-DEO in the northern Gulf of Mexico from 27 May to 3 June 2003 (Tolstoy *et al.*, 2004). Although the results are limited, the data showed that radii around the airguns where the received level would be 180 dB re 1 mPa (rms) vary with water depth. Similar depth-related variation is likely in the 190–dB distances applicable to pinnipeds. Correction factors were developed for water depths 100–1,000 m (328–3,280 ft) and <100 m (328 ft). The proposed survey will occur in depths 110–3,050 m (361–10,007 ft), so the correction factors for the latter are not relevant here.

The empirical data indicate that, for deep water (>1,000 m, 3,280 ft), the L-DEO model tends to overestimate the received sound levels at a given distance (Tolstoy *et al.*, 2004). However, to be precautionary pending acquisition of additional empirical data, it is proposed that safety radii during airgun operations in deep water will be the values predicted by L-DEO's model (above). Therefore, the assumed 180- and 190–dB radii are 23 m and 8 m (75.5 and 26.2 ft), respectively.

Empirical measurements were not conducted for intermediate depths (100–1,000 m, 328–3,280 ft). On the expectation that results will be intermediate between those from shallow and deep water, a 1.5x correction factor is applied to the estimates provided by the model for deep water situations. This is the same factor that was applied to the model estimates during L-DEO cruises in 2003. The assumed 180- and 190–dB radii in intermediate-depth water are 35 m and 12 m (115 and 39.4 ft), respectively.

The airgun will be shut down immediately when cetaceans or pinnipeds are detected within or about to enter the appropriate 180–dB (rms) or 190–dB (rms) radius, respectively.

Description of Marine Mammals in the Activity Area

Thirty-two marine mammal species, including 19 odontocete (dolphins and small and large toothed whales) species, seven mysticete (baleen whales) species, five pinniped species, and the sea otter, may occur or have been documented to occur in the marine waters off Oregon and Washington, excluding extralimital sightings or strandings (Table 1 here). Six of the species that may occur in the project area are listed under the U.S. Endangered Species Act (ESA) as Endangered, including sperm, humpback, blue, fin, sei, and North Pacific right whales. One other species listed as Threatened may occur in the project area: the Steller sea lion.

Gray whales and sea otters (which is under the jurisdiction of the U.S. Fish and Wildlife Service) are not expected in the project area because their occurrence off Oregon is limited to very shallow, coastal waters. The California sea lion, Steller sea lion, and harbor seal are also mainly coastal and would be rare at most at the OBS locations. Information on habitat and abundance of the species that may occur in the study area are given in Table 1 below. Vagrant ringed seals, hooded seals, and ribbon seals have been sighted or stranded on the coast of California (see Mead, 1981; Reeves *et al.*, 2002) and presumably passed through Oregon waters. A vagrant beluga was seen off the coast of Washington (Reeves *et al.*, 2002).

The six species of marine mammals expected to be most common in the deep pelagic or slope waters of the project area, where most of the survey sites are located, include the Pacific white-sided dolphin, northern right whale dolphin, Risso's dolphin, short-beaked common dolphin, Dall's porpoise, and northern fur seal (Green *et al.*, 1992, 1993; Buchanan *et al.*, 2001; Barlow, 2003; Carretta *et al.*, 2006).

The sperm, pygmy sperm, mesoplodont species, Baird's beaked, and Cuvier's beaked whales and the northern elephant seal are considered pelagic species but are generally uncommon in the waters near the survey area.

Additional information regarding the distribution of these species expected to be found in the project area and how the estimated densities were calculated may be found in SIO's application.

Species	Habitat	Abundance[1]	Rqstd Take
Mysticetes			
North Pacific right whale (Eubalaena japonica) *	Inshore, occasionally offshore	N.A.[2]	0
Humpback whale (Megaptera novaeangliae) *	Mainly nearshore waters and banks	1391	0
Minke whale (Balaenoptera acutorostrata)	Pelagic and coastal	1015	0
Sei whale (Balaenoptera borealis) *	Primarily offshore, pelagic	56	0
Fin whale (Balaenoptera physalus) *	Continental slope, mostly pelagic	3279	0
Blue whale (Balaenoptera musculus) *	Pelagic and coastal	1744	0
Odontocetes			
Sperm whale (Physeter macrocephalus) *	Usually pelagic and deep seas	1233	0
Pygmy sperm whale (Kogia breviceps)	Deep waters off the shelf	247	1
Dwarf sperm whale (Kogia sima)	Deep waters off the shelf	N.A.	0
Cuvier's beaked whale (Ziphius cavirostris)	Pelagic	1884	0
Baird's beaked whale (Berardius bairdii)	Pelagic	228	0

Species	Habitat	Abundance[1]	Rqstd Take
Blainville's beaked whale (Mesoplodon densirostris)	Slope, offshore	1247[3]	0
Hubb's beaked whale (Mesoplodon carlhubbsi)	Slope, offshore	1247[3]	0
Stejneger's beaked whale (Mesoplodon stejnegeri)	Slope, offshore	1247[3]	0
Offshore bottlenose dolphin (Tursiops truncatus)	Offshore, slope	5,065	0
Striped dolphin (Stenella coeruleoalba)	Off continental shelf	13,934	0
Short-beaked common dolphin (Delphinus delphis)	Shelf and pelagic, seamounts	449,846	4
Pacific white-sided dolphin (Lagenorhynchus obliquidens)	Offshore, slope	59,274	6
Northern right whale dolphin (Lissodelphis borealis)	Slope, offshore waters	20,362	5
Risso's dolphin (Grampus griseus)	Shelf, slope, seamounts	16,066	3
False killer whale (Pseudorca crassidens)	Pelagic, occasionally inshore	N.A.	0
Killer whale (Orcinus orca)	Widely distributed	466 (Offshore)	0
Short-finned pilot whale (Globicephala macrorhynchus)	Mostly pelagic, high-relief topography	304	0
Harbor porpoise (Phocoena phocoena)	Coastal and inland waters	39,586 (OR/WA)	0
Dall's porpoise (Phocoenoides dalli)	Shelf, slope, offshore	99,517	39
Pinnipeds			
Northern fur seal (Callorhinus ursinus)	Pelagic, offshore	688,028[2]	3
California sea lion (Zalophus californianus californianus)	Coastal, shelf	237,000-244,000	0
Steller sea lion (Eumetopias jubatus) *	Coastal, shelf	44,996[2] Eastern U.S.	0
Harbor seal (Phoca vitulina richardsi)	Coastal	24,732 (OR/WA)	1
Northern elephant seal (Mirounga angustirostris)	Coastal, pelagic when migrating	101,000 (CA)	0

Table 1. Species expected to be encountered (and potentially harassed) during SIO's Pacific Ocean cruise.
N.A. - Data not available or species status was not assessed.
* Species are listed as threatened or endangered under the Endangered Species Act.

Potential Effects on Marine Mammals

Potential Effects of Airguns

The effects of sounds from airguns might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, and temporary or permanent hearing impairment or non-auditory physical or physiological effects (Richardson *et al.*, 1995; Gordon *et al.*, 2004). Given the small size of the GI gun planned for the present project, effects are anticipated to be considerably less than would be the case with a large array of airguns. It is very unlikely that there would be any cases of temporary or, especially, permanent hearing impairment or any significant non-auditory physical or physiological effects. Also, behavioral disturbance is expected to be limited to relatively short distances.

Tolerance

Numerous studies have shown that pulsed sounds from airguns are often readily detectable in the water at distances of many kilometers. For a summary of the characteristics of airgun pulses, see Appendix A of SIO's application. However, it should be noted that most of the measurements of airgun sounds that have been reported concerned sounds from larger arrays of airguns, whose sounds would be detectable considerably farther away than the GI gun planned for use in the present project.

Numerous other studies have shown that marine mammals at distances more than a few kilometers from operating seismic vessels often show no apparent response (see Appendix A (e) of SIO's application). That is often true even in cases when the pulsed sounds appear to be readily audible to the animals based on measured received levels and the hearing sensitivity of that mammal group. Although various baleen whales, toothed whales, and (less frequently) pinnipeds have been shown to react behaviorally to airgun pulses under some conditions, at other times mammals of all three types have shown no overt reactions. In general, pinnipeds and small odontocetes seem to be more tolerant of exposure to airgun pulses than are baleen whales. Given the relatively small and low-energy airgun source planned for use in this project, NMFS expects mammals (and sea turtles) to tolerate being closer to this source than for a larger airgun source typical of most seismic surveys.

Masking

Obscuring of sounds of interest by interfering sounds, generally at similar frequencies, is known as masking. Masking effects of pulsed sounds (even from large arrays of airguns) on marine mammal calls and other natural sounds are expected to be limited, although there are very few specific data on this matter. Some whales are known to continue calling in the presence of

seismic pulses. Their calls can be heard between the seismic pulses (e.g., Richardson *et al.*, 1986; McDonald *et al.*, 1995; Greene *et al.*, 1999; Nieukirk *et al.*, 2004; Smultea *et al.*, 2004). Although there has been one report that sperm whales cease calling when exposed to pulses from a very distant seismic ship (Bowles *et al.*, 1994), a recent study reports that sperm whales off northern Norway continued calling in the presence of seismic pulses (Madsen *et al.*, 2002c). Similar reactions have also been shown during recent work in the Gulf of Mexico (Tyack *et al.*, 2003; Smultea *et al.*, 2004). Given the small source planned for use here, there is even less potential for masking of baleen or sperm whale calls during the present study than in most seismic surveys. Masking effects of seismic pulses are expected to be negligible in the case of the smaller odontocete cetaceans, given the intermittent nature of seismic pulses and the relatively low source level of the airgun to be used here. Dolphins and porpoises are commonly heard calling while airguns are operating (Gordon *et al.*, 2004; Smultea *et al.*, 2004; Holst *et al.*, 2005a,b). Also, the sounds important to small odontocetes are predominantly at much higher frequencies than are airgun sounds. Masking effects, in general, are discussed further in Appendix A (d) of SIO's application.

Disturbance Reactions

Disturbance includes a variety of effects, including subtle changes in behavior, more conspicuous changes in activities, and displacement. Reactions to sound, if any, depend on species, state of maturity, experience, current activity, reproductive state, time of day, and many other factors. If a marine mammal responds to an underwater sound by changing its behavior or moving a small distance, the response may or may not rise to the level of harassment, let alone affect the stock or the species as a whole. Alternatively, if a sound source displaces marine mammals from an important feeding or breeding area, effects on the stock or species could potentially be more than negligible. Given the many uncertainties in predicting the quantity and types of impacts of noise on marine mammals, it is common practice to estimate how many mammals are likely to be present within a particular distance of industrial activities, or exposed to a particular level of industrial sound. This practice potentially overestimates the numbers of marine mammals that are affected in some biologically-important manner.

The sound criteria used to estimate how many marine mammals might be disturbed to some biologically-important degree by a seismic program are based on behavioral observations during studies of several species. However, information is lacking for many species. Detailed studies have been done on humpback, gray, and bowhead whales and ringed seals. Less detailed data are available for some other species of baleen whales, sperm whales, small toothed whales, and sea otters. Most of those studies have focused on the impacts resulting from the use of much larger airgun sources than those planned for use in the present project. Thus, effects are expected to be limited to considerably smaller distances and shorter periods of exposure in the present project than in most of the previous work concerning marine mammal reactions to airguns.

Baleen Whales – Baleen whales generally tend to avoid operating airguns, but avoidance radii are quite variable. Whales are often reported to show no overt reactions to pulses from large arrays of airguns at distances beyond a few kilometers, even though the airgun pulses remain well above ambient noise levels out to much longer distances. However, as reviewed in Appendix A (e) of SIO's application, baleen whales exposed to strong noise pulses from airguns often react by deviating from their normal migration route and/or interrupting their feeding activities and moving away from the sound source. In the case of the migrating gray and bowhead whales, the observed changes in behavior appeared to be of little or no biological consequence to the animals. They simply avoided the sound source by displacing their migration route to varying degrees, but within the natural boundaries of the migration corridors.

Studies of gray, bowhead, and humpback whales have determined that received levels of pulses in the 160–170 dB re 1 μPa rms range seem to cause obvious avoidance behavior in a substantial fraction of the animals exposed. In many areas, seismic pulses from large arrays of airguns diminish to those levels at distances ranging from 4.5–14.5 km (2.8–9 mi) from the source. A substantial proportion of the baleen whales within those distances may show avoidance or other strong disturbance reactions to the airgun array. Subtle behavioral changes sometimes become evident at somewhat lower received levels, and recent studies, reviewed in Appendix A (e) of SIO's application, have shown that some species of baleen whales, notably bowheads and humpbacks, at times show strong avoidance at received levels lower than 160–170 dB re 1 μPa rms. Reaction distances would be considerably smaller during the present project, in which the 160–dB radius is predicted to be approximately 0.22 or 0.33 km (0.14 or 0.21 mi), as compared with several kilometers when a large array of airguns is operating.

McCauley *et al.* (1998, 2000) studied the responses of humpback whales off Western Australia to a full-scale seismic survey with a 16–airgun, 2,678–in^3 array, and to a single 20–in^3 airgun with a source level of 227 dB re 1 μPa m. McCauley *et al.* (1998) documented that avoidance reactions began at 5–8 km (3.1–5 mi) from the array, and that those reactions kept most pods approximately 3–4 km (1.9–2.5 mi) from the operating seismic boat. McCauley *et al.* (2000) noted localized displacement during migration of 4–5 km (2.5–3.1 mi) by traveling pods and 7–12 km (4.3–7.5 mi) by cow-calf pairs. Avoidance distances with respect to the single airgun were smaller but consistent with the results from the full array in terms of received sound levels. Mean avoidance distance from the airgun corresponded to a received sound level of 140 dB re 1 μPa (rms); that was the level at which humpbacks started to show avoidance reactions to an approaching airgun. The standoff range, i.e., the closest point of approach of the whales to the airgun, corresponded to a received level of 143 dB re 1 μPa (rms). The initial avoidance response generally occurred at distances of 5–8 km (3.1–5 mi) from the airgun array and 2 km (1.2 mi) from the single airgun. However, some individual humpback whales, especially males, approached within distances of 100–400 m (328–1,312 ft), where the maximum received level was 179 dB re 1 μPa (rms).

Humpback whales summering in southeast Alaska did not exhibit persistent avoidance when exposed to seismic pulses from a 1.64–L (100 in^3) airgun (Malme *et al.*, 1985). Some humpbacks seemed ''startled'' at received levels of 150–169 dB re 1 μPa on an approximate rms basis. Malme *et al.* (1985) concluded that there was no clear evidence of avoidance, despite the possibility of subtle effects, at received levels up to 172 re 1 μPa (approximately rms). Additional effects from seismic surveys to wintering humpback whales off Brazil can be found in Appendix A (e) of SIO's application.

Results from bowhead whales show that responsiveness of baleen whales to seismic surveys can be quite variable depending on the activity (migrating vs. feeding) of the whales. Bowhead whales migrating west across the Alaskan Beaufort Sea in autumn, in particular, are unusually responsive, with

substantial avoidance occurring out to distances of 20 30 km (12.4–18.6 mi) from a medium-sized airgun source, where received sound levels were on the order of 130 dB re 1 μPa (rms) (Miller *et al.*, 1999; Richardson *et al.*, 1999). However, more recent research on bowhead whales (Miller *et al.*, 2005a) corroborates earlier evidence that, during the summer feeding season, bowheads are not as sensitive to seismic sources. In summer, bowheads typically begin to show avoidance reactions at a received level of about 160 170 dB re 1 μPa (rms) (Richardson *et al.*, 1986; Ljungblad *et al.*, 1988; Miller *et al.*, 1999). There are not data on reactions of wintering bowhead whales to seismic surveys. See Appendix A (e) of SIO's application for more information regarding bowhead whale reactions to airguns.

Malme *et al.* (1986, 1988) studied the responses of feeding Eastern Pacific gray whales to pulses from a single 100 in^3 airgun off St. Lawrence Island in the northern Bering Sea. Malme *et al.* (1986, 1988) estimated, based on small sample sizes, that 50 percent of feeding gray whales ceased feeding at an average received pressure level of 173 dB re 1 μPa on an (approximate) rms basis, and that 10 percent of feeding whales interrupted feeding at received levels of 163 dB. Those findings were generally consistent with the results of experiments conducted on larger numbers of gray whales that were migrating along the California coast and on observations of Western Pacific gray whales feeding off Sakhalin Island, Russia (Johnson, 2002).

We are not aware of any information on reactions of Bryde's whales to seismic surveys. However, other species of *Balaenoptera* (blue, sei, fin, and minke whales) have occasionally been reported in areas ensonified by airgun pulses. Sightings by observers on seismic vessels off the U.K. from 1997 to 2000 suggest that, at times of good sightability, numbers of rorquals seen are similar when airguns are shooting and not shooting (Stone, 2003). Although individual species did not show any significant displacement in relation to seismic activity, all baleen whales combined were found to remain significantly further from the airguns during shooting compared with periods without shooting (Stone, 2003; Stone and Tasker, 2006). In a study off Nova Scotia, Moulton and Miller (in press) found only a little or no difference in sighting rates and initial sighting distances of balaenopterid whales when airguns were operating vs. silent. However, there were indications that these whales were more likely to be moving away when seen during airgun operations.

Data on short-term reactions (or lack of reactions) of cetaceans to impulsive noises do not necessarily provide information about long-term effects. It is not known whether impulsive noises affect reproductive rate or distribution and habitat use in subsequent days or years. However, gray whales continued to migrate annually along the west coast of North America despite intermittent seismic exploration and much ship traffic in that area for decades (Appendix A in Malme *et al.*, 1984). Bowhead whales continued to travel to the eastern Beaufort Sea each summer despite seismic exploration in their summer and autumn range for many years (Richardson *et al.*, 1987). In any event, the brief exposures to sound pulses from the present small airgun source are highly unlikely to result in prolonged effects.

Toothed Whales – Little systematic information is available about reactions of toothed whales to noise pulses. Few studies similar to the more extensive baleen whale/seismic pulse work summarized above have been reported for toothed whales. However, a systematic study on sperm whales has been done (Jochens and Biggs, 2003; Tyack *et al.*, 2003; Miller *et al.*, 2006), and there is an increasing amount of information about responses of various odontocetes to seismic surveys based on monitoring studies (Stone, 2003; Smultea *et al.*, 2004; Bain and Williams, 2006; Holst *et al.*, 2006; Stone and Tasker, 2006; Moulton and Miller, in press).

Seismic operators sometimes see dolphins and other small toothed whales near operating airgun arrays, but in general there seems to be a tendency for most delphinids to show some limited avoidance of seismic vessels operating large airgun systems. However, some dolphins seem to be attracted to the seismic vessel and floats, and some ride the bow wave of the seismic vessel even when large arrays of airguns are firing. Nonetheless, there have been indications that small toothed whales sometimes tend to head away, or to maintain a somewhat greater distance from the vessel, when a large array of airguns is operating than when it is silent (Goold, 1996; Calambokidis and Osmek, 1998; Stone, 2003). In most cases, the avoidance radii for delphinids appear to be small, on the order of 1 km (0.62 mi) or less.

The beluga may be a species that (at least at times) shows long-distance avoidance of seismic vessels. Aerial surveys during seismic operations in the southeastern Beaufort Sea recorded much lower sighting rates of beluga whales within 10–20 km (6.2–12.4 mi) of an active seismic vessel. These results were consistent with the low number of beluga sightings reported by observers aboard the seismic vessel, suggesting that some belugas might be avoiding the seismic operations at distances of 10–20 km (6.2–12.4 mi) (Miller *et al.*, 2005a). Similarly, captive bottlenose dolphins and beluga whales exhibit changes in behavior when exposed to strong pulsed sounds similar in duration to those typically used in seismic surveys (Finneran *et al.*, 2000, 2002, 2005; Finneran and Schlundt, 2004). However, the animals tolerated high received levels of sound (pk-pk level >200 dB re 1 μPa) before exhibiting aversive behaviors.

Results for porpoises depend on species. Dall's porpoises seem relatively tolerant of airgun operations (MacLean and Koski, 2005; Bain and Williams, 2006), whereas the limited available data suggest that harbor porpoises show stronger avoidance (Stone, 2003; Bain and Williams, 2006). This apparent difference in responsiveness of these two porpoise species is consistent with their relative responsiveness to boat traffic in general (Richardson *et al.*, 1995).

Most studies of sperm whales exposed to airgun sounds indicate that this species shows considerable tolerance of airgun pulses. In most cases, the whales do not show strong avoidance, and they continue to call (see Appendix A (e) of SIO's application for review). However, controlled exposure experiments in the Gulf of Mexico indicate that foraging effort is apparently somewhat reduced upon exposure to airgun pulses from a seismic vessel operating in the area, and there may be a delay in diving to foraging depth.

There are no specific data on the behavioral reactions of beaked whales to seismic surveys. Most beaked whales tend to avoid approaching vessels of other types (Wursig *et al.*, 1998). They may also dive for an extended period when approached by a vessel (Kasuya, 1986). It is likely that these beaked whales would normally show strong avoidance of an approaching seismic vessel, but this has not been documented explicitly.Odontocete reactions to large arrays of airguns are variable and, at least for delphinids and some porpoises, seem to be confined to a smaller radius than has been observed for mysticetes (see Appendix A of SIO's application for more information). Behavioral reactions of odontocetes to the small GI-gun source to be used here are expected to be very localized, probably to distances <0.4 km (0.25 mi).

Pinnipeds – Pinnipeds are not likely to show a strong avoidance reaction to the GI gun that will be used. Visual monitoring from seismic vessels, usually employing larger sources, has shown only slight (if any) avoidance of airguns by pinnipeds, and only slight (if any) changes in behavior (see Appendix A (e) of SIO's application). Ringed seals frequently do not avoid the area within a few hundred meters of operating airgun arrays (Harris *et al.*, 2001; Moulton and Lawson, 2002; Miller *et al.*, 2005a). However, initial telemetry work suggests that avoidance and other behavioral reactions by two other species of seals to small airgun sources may at times be stronger than evident to date from visual studies of pinniped reactions to airguns (Thompson *et al.*, 1998). Even if reactions of any pinnipeds that might be encountered in the present study area are as strong as those evident in the telemetry study, reactions are expected to be confined to relatively small distances and durations, with no long-term effects on pinniped individuals or populations.

Additional details on the behavioral reactions (or the lack thereof) by all types of marine mammals to seismic vessels can be found in Appendix A (e) of SIO's application.

Hearing Impairment and Other Physical Effects

Temporary or permanent hearing impairment is a possibility when marine mammals are exposed to very strong sounds, but there has been no specific documentation of this for marine mammals exposed to sequences of airgun pulses. Current NMFS policy regarding exposure of marine mammals to high-level sounds is that cetaceans and pinnipeds should not be exposed to impulsive sounds of 180 and 190 dB re 1 μPa (rms), respectively. Those criteria have been used in defining the safety (shut-down) radii planned for the proposed seismic survey. The precautionary nature of these criteria is discussed in Appendix A (f) of SIO's application, including the fact that the minimum sound level necessary to cause permanent hearing impairment is higher, by a variable and generally unknown amount, than the level that induces barely-detectable temporary threshold shift (TTS) (which NMFS' criteria are based on) and the level associated with the onset of TTS is often considered to be a level below which there is no danger of permanent damage. NMFS is presently developing new noise exposure criteria for marine mammals that take account of the now-available scientific data on TTS, the expected offset between the TTS and permanent threshold shift (PTS) thresholds, differences in the acoustic frequencies to which different marine mammal groups are sensitive, and other relevant factors.

Because of the small size of the airgun source in this project (one 45–in3 GI gun), alongwith the planned monitoring and mitigation measures, there is little likelihood that any marine mammals will be exposed to sounds sufficiently strong to cause hearing impairment. Several aspects of the planned monitoring and mitigation measures for this project are designed to detect marine mammals occurring near the GI gun (and sub-bottom profiler), and to avoid exposing them to sound pulses that might, at least in theory, cause hearing impairment. In addition, many cetaceans are likely to show some avoidance of the area with high received levels of airgun sound (see above). In those cases, the avoidance responses of the animals themselves will reduce or (most likely) avoid any possibility of hearing impairment.

Non-auditory physical effects may also occur in marine mammals exposed to strong underwater pulsed sound. Possible types of non-auditory physiological effects or injuries that theoretically might occur in mammals close to a strong sound source include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage. It is possible that some marine mammal species (i.e., beaked whales) may be especially susceptible to injury and/or stranding when exposed to strong pulsed sounds. However, as discussed below, there is no definitive evidence that any of these effects occur even for marine mammals in close proximity to large arrays of airguns. It is especially unlikely that any effects of these types would occur during the present project given the small size of the source, the brief duration of exposure of any given mammal, and the planned monitoring and mitigation measures (see below). The following subsections discuss in somewhat more detail the possibilities of TTS, PTS, and non-auditory physical effects.

Temporary Threshold Shift (TTS) – TTS is the mildest form of hearing impairment that can occur during exposure to a strong sound (Kryter 1985). While experiencing TTS, the hearing threshold rises and a sound must be stronger in order to be heard. TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS threshold, hearing sensitivity recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals, and none of the published data concern TTS elicited by exposure to multiple pulses of sound.

For toothed whales exposed to single short pulses, the TTS threshold appears to be, to a first approximation, a function of the energy content of the pulse (Finneran *et al.*, 2002, 2005). Given the available data, the received level of a single seismic pulse (with no frequency weighting) might need to be approximately 186 dB re 1 $\mu Pa^2.s$ (i.e., 186 dB SEL or approximately 221–226 dB pk-pk) in order to produce brief, mild TTS. Exposure to several strong seismic pulses that each have received levels near 175–180 dB SEL might result in slight TTS in a small odontocete, assuming the TTS threshold is (to a first approximation) a function of the total received pulse energy. The distance from the *Wecoma*'s GI gun at which the received energy level (per pulse) would be expected to be ≥175–180 dB SEL are the distances shown in the 190 dB re 1 μPa (rms) column in Table 1 of SIO's application (given that the rms level is approximately 10–15 dB higher than the SEL value for the same pulse). Seismic pulses with received energy levels ≥175–180 dB SEL (190 dB re 1 μPa (rms)) are expected to be restricted to radii no more than 23–35 m (75.5–115 ft) around the GI gun. The specific radius depends on the depth of the water. For an odontocete closer to the surface, the maximum radius with ≥175–180 dB SEL or ≥190 dB re 1 μPa (rms) would be smaller. Such levels would be limited to distances within a few meters of the small GI gun source to be used in this project.

For baleen whales, direct or indirect data do not exist on levels or properties of sound thatare required to induce TTS. The frequencies to which baleen whales are most sensitive are lower than those to which odontocetes are most sensitive, and natural background noise levels at those low frequencies tend to be higher. As a result, auditory thresholds of baleen whales within their frequency band of best hearing are believed to be higher (less sensitive) than are those of odontocetes at their best frequencies (Clark and Ellison, 2004). From this, it is suspected that received levels causing TTS onset may also be higher in baleen whales. In any event, no cases of TTS are expected given three considerations: (1) the low abundance of baleen whales expected in the planned study areas; (2) the strong likelihood that baleen whales would avoid the approaching airguns (or vessel) before being exposed to levels high enough for there to be any

possibility of TTS; and (3) the mitigation measures that are planned.

In pinnipeds, TTS thresholds associated with exposure to brief pulses (single or multiple) of underwater sound have not been measured. Initial evidence from prolonged exposures suggested that some pinnipeds may incur TTS at somewhat lower received levels than do small odontocetes exposed for similar durations (Kastak *et al.*, 1999, 2005; Ketten *et al.*, 2001; cf. Au *et al.*, 2000). However, more recent indications are that TTS onset in the most sensitive pinniped species studied (harbor seal) may occur at a similar sound exposure level as in odontocetes (Kastak *et al.*, 2004).

To avoid injury, NMFS has determined that cetaceans and pinnipeds should not be exposed to pulsed underwater noise at received levels exceeding, respectively, 180 and 190 dB re 1 µPa (rms). Those sound levels were not considered to be the levels above which TTS might occur. Rather, they were the received levels above which, in the view of a panel of bioacoustics specialists convened by NMFS before TTS measurements for marine mammals started to become available, one could not be certain that there would be no injurious effects, auditory or otherwise, to marine mammals. As summarized above, data that are now available imply that TTS is unlikely to occur unless odontocetes (and probably mysticetes as well) are exposed to airgun pulses strong than 180 dB re 1 µPa (rms).

Permanent Threshold Shift (PTS) – When PTS occurs, there is physical damage to the sound receptors in the ear. In some cases, there can be total or partial deafness, while in other cases, the animal has an impaired ability to hear sounds in specific frequency ranges.

There is no specific evidence that exposure to pulses of airgun sound can cause PTS in any marine mammal, even with large arrays of airguns. However, given the possibility that mammals close to an airgun array might incur TTS, there has been further speculation about the possibility that some individuals occurring very close to airguns might incur PTS. Single or occasional occurrences of mild TTS are not indicative of permanent auditory damage in terrestrial mammals. Relationships between TTS and PTS thresholds have not been studied in marine mammals, but are assumed to be similar to those in humans and other terrestrial mammals. PTS might occur at a received sound level at least several decibels above that inducing mild TTS if the animal were exposed to strong sound pulses with rapid rise time (see Appendix A (f) of SIO's application). The specific difference between the PTS and TTS thresholds has not been measured for marine mammals exposed to any sound type. However, based on data from terrestrial mammals, a precautionary assumption is that the PTS threshold for impulse sounds (such as airgun pulses as received close to the source) is at least 6 dB higher than the TTS threshold on a peak-pressure basis and probably more than 6 dB.

In the present project employing a single 45–in^3 GI gun, marine mammals are highly unlikely to be exposed to received levels of seismic pulses strong enough to cause TTS, as they would probably need to be within a few meters of the GI gun for that to occur. Given the higher level of sound necessary to cause PTS, it is even less likely that PTS could occur. In fact, even the levels immediately adjacent to the GI gun may not be sufficient to induce PTS, especially since a mammal would not be exposed to more than one strong pulse unless it swam immediately alongside the GI gun for a period longer than the inter-pulse interval. Baleen whales generally avoid the immediate area around operating seismic vessels, as do some other marine mammals. The planned monitoring and mitigation measures, including visual monitoring and shut downs of the GI gun when mammals are seen within the ''safety radii'', will minimize the already-minimal probability of exposure of marine mammals to sounds strong enough to induce PTS.

Non-auditory Physiological Effects – Non-auditory physiological effects or injuries that theoretically might occur in marine mammals exposed to strong underwater sound include stress, neurological effects, bubble formation, resonance effects, and other types of organ or tissue damage. However, studies examining such effects are limited. If any such effects do occur, they would probably be limited to unusual situations when animals might be exposed at close range for unusually long periods. It is doubtful that any single marine mammal would be exposed to strong seismic sounds for time periods long enough to induce physiological stress.

Until recently, it was assumed that diving marine mammals are not subject to the bends or air embolism. This possibility was first explored at a workshop (Gentry [ed.], 2002) held to discuss whether the stranding of beaked whales in the Bahamas in 2000 (Balcomb and Claridge, 2001; NOAA and USN, 2001) might have been related to bubble formation in tissues caused by exposure to noise from naval sonar. However, this link could not be confirmed. Jepson *et al.* (2003) first suggested a possible link between mid-frequency sonar activity and acute chronic tissue damage that results from the formation *in vivo* of gas bubbles, based on the beaked whale stranding in the Canary Islands in 2002 during naval exercises. Fernandez *et al.* (2005a) showed those beaked whales did indeed have gas bubble-associated lesions, as well as fat embolisms. Fernandez *et al.* (2005b) also found evidence of fat embolism in three beaked whales that stranded 100 km (62 mi) north of the Canaries in 2004 during naval exercises. Examinations of several other stranded species have also revealed evidence of gas and fat embolisms (Arbelo *et al.*, 2005; Jepson *et al.*, 2005a; Mendez *et al.*, 2005). Most of the afflicted species were deep divers. There is speculation that gas and fat embolisms may occur if cetaceans ascend unusually quickly when exposed to aversive sounds, or if sound in the environment causes the destablization of existing bubble nuclei (Potter, 2004; Arbelo *et al.*, 2005; Fernandez *et al.* 2005a; Jepson *et al.*, 2005b; Cox *et al.*, 2006). Even if gas and fat embolisms can occur during exposure to mid-frequency sonar, there is no evidence that that type of effect occurs in response to airgun sounds.

In general, little is known about the potential for seismic survey sounds to cause auditory impairment or other physical effects in marine mammals. Available data suggest that such effects, if they occur at all, would be limited to short distances and probably to projects involving large arrays of airguns. However, the available data do not allow for meaningful quantitative predictions of the numbers (if any) of marine mammals that might be affected in those ways. Marine mammals that show behavioral avoidance of seismic vessels, including most baleen whales, some odontocetes, and some pinnipeds, are especially unlikely to incur auditory impairment or other physical effects. Also, the planned mitigation measures, including shut downs of the GI gun, will reduce any such effects that might otherwise occur.

Strandings and Mortality

Marine mammals close to underwater detonations of high explosives can be killed or severely injured, and their auditory organs are especially susceptible to injury (Ketten *et al.*, 1993; Ketten 1995). Airgun pulses are less energetic and have slower rise times, and there is no proof that they can cause serious injury, death, or stranding even in the case of large airgun arrays.

However, the association of mass strandings of beaked whales with naval exercises and, in one case, an L-DEO seismic survey, has raised the possibility that beaked whales exposed to strong pulsed sounds may be especially susceptible to injury and/or behavioral reactions that can lead to stranding. Appendix A (g) of SIO's application provides additional details.

Seismic pulses and mid-frequency sonar pulses are quite different. Sounds produced by airgun arrays are broadband with most of the energy below 1 kHz. Typical military mid-frequency sonars operate at frequencies of 2–10 kHz, generally with a relatively narrow bandwidth at any one time. Thus, it is not appropriate to assume that there is a direct connection between the effects of military sonar and seismic surveys on marine mammals. However, evidence that sonar pulses can, in special circumstances, lead to physical damage and mortality (Balcomb and Claridge, 2001; NOAA and USN, 2001; Jepson *et al.*, 2003; Fernandez *et al.*, 2004, 2005a; Cox *et al.*, 2006), even if only indirectly, suggests that caution is warranted when dealing with exposure of marine mammals to any high-intensity pulsed sound.

There is no conclusive evidence of cetacean strandings as a result of exposure to seismic surveys. Speculation concerning a possible link between seismic surveys and strandings of humpback whales in Brazil (Engel *et al.*, 2004) was not well founded based on available data (IAGC, 2004; IWC, 2006). In September 2002, there was a stranding of two Cuvier's beaked whales in the Gulf of California, Mexico, when the L-DEO vessel *Maurice Ewing* was operating a 20–gun, 8,490–in^3 array in the general area. The link between the stranding and the seismic survey was inconclusive and not based on any physical evidence (Hogarth, 2002; Yoder, 2002). Nonetheless, the preceding example plus the incidents involving beaked whale strandings near naval exercises suggests a need for caution in conducting seismic surveys in areas occupied by beaked whales. No injuries of beaked whales are anticipated during the proposed study because of the proposed monitoring and mitigation measures.

The present project will involve a much smaller sound source than used in typical seismic surveys. That, along with the monitoring and mitigation measures that are planned, are expected to minimize any possibility for strandings and mortality.

Potential Effects of Other Acoustic Devices

Sub-bottom Profiler Signals

A sub-bottom profiler will be operated from the source vessel at all times during the planned study. Sounds from the sub-bottom profiler are very short pulses, occurring for 12 or 24 ms once every 4.5–8 seconds. Most of the energy in the sound pulses emitted by this sub-bottom profiler is at mid frequencies, centered at 3.5 kHz. The beam width is approximately 80o (cone-shaped) and is directed downward.

The sub-bottom profiler on the *Wecoma* has a stated maximum source level of 211 dB re 1 µPa m (see section II of SIO's application). Thus, the received level would be expected to decrease to 180 dB and 160 dB approximately 35 m (115 ft) and 350 m (1,148.3 ft) below the transducer, respectively, assuming spherical spreading. Corresponding distances in the horizontal plane would be substantially lower, given the directionality of this source. Kremser *et al.* (2005) noted that the probability of a cetacean swimming through the area of exposure when a bottom profiler emits a pulse is small, and if the animal was in the area, it would have to pass the transducer at close range in order to be subjected to sound levels that could cause TTS.

Marine mammal communications will not be masked appreciably by the sub-bottom profiler signals given their directionality and the brief period when an individual mammal is likely to be within its beam. Furthermore, in the case of most odontocetes, the sonar signals do not overlap with the predominant frequencies in the calls, which would avoid significant masking.

Marine mammal behavioral reactions to other pulsed sound sources are discussed above, and responses to the sub-bottom profiler are likely to be similar to those for other pulsed sources if received at the same levels. Behavioral responses are not expected unless marine mammals are very close to the source.

Source levels of the sub-bottom profiler are much lower than those of the airguns and the multi-beam sonar, which are discussed above. Sounds from the sub-bottom profiler are estimated to decrease to 180 dB re 1 µPa (rms) at approximately 35 m (115 ft) downward from the source. Furthermore, received levels of pulsed sounds that are necessary to cause temporary or especially permanent hearing impairment in marine mammals appear to be higher than 180 dB (see earlier). Thus, it is unlikely that the sub-bottom profiler produces pulse levels strong enough to cause hearing impairment or other physical injuries even in an animal that is (briefly) in a position near the source.

The sub-bottom profiler is usually operated simultaneously with other higher-power acoustic sources. Many marine mammals will move away in response to the approaching higher-power sources or the vessel itself before the mammals would be close enough for there to be any possibility of effects from the less intense sounds from the sub-bottom profiler. In the case of mammals that do not avoid the approaching vessel and its various sound sources, mitigation measures that would be applied to minimize effects of the higher-power sources would further reduce or eliminate any minor effects of the sub-bottom profiler.

Estimated Take by Incidental Harassment

All anticipated takes would be ''takes by harassment'', involving temporary changes in behavior. The proposed mitigation measures are expected to minimize the possibility of injurious takes. (However, as noted earlier, there is no specific information demonstrating that injurious ''takes'' would occur even in the absence of the planned mitigation measures.) In the sections below, we describe methods to estimate ''take by harassment'', and present estimates of the numbers of marine mammals that might be affected during the proposed seismic survey in the northeast Pacific Ocean. The estimates are based on data concerning marine mammal densities (numbers per unit area) obtained during surveys off Oregon and Washington during 1996 and 2001 by NMFS Southwest Fisheries Science Center (SWFSC) and estimates of the size of the area where effects potentially could occur.

The following estimates are based on a consideration of the number of marine mammals that might be disturbed appreciably by operations with the GI gun to be used during approximately 340 line-km of surveys at 16 sites off the coast of Oregon in the northeastern Pacific Ocean. The anticipated radii of influence of the sub-bottom profiler are less than those for the GI gun. It is assumed that, during simultaneous operations of the GI gun and sub-bottom profiler, any marine mammals close enough to be affected by the sub-bottom profiler would already be affected by the airgun. No animals are expected to exhibit more than short-term and inconsequential responses to the sub-bottom profiler, given its characteristics (e.g., narrow downward-directed beam)

and other considerations described previously. Therefore, no additional allowance is included for animals that might be affected by this source.

Extensive systematic aircraft- and ship-based surveys have been conducted for marine mammals offshore of Oregon and Washington (Bonnell *et al.*, 1992; Green *et al.*, 1992, 1993; Barlow, 1997, 2003; Barlow and Taylor, 2001; Calambokidis and Barlow, 2004). The most comprehensive and recent density data available for cetacean species off slope and offshore waters of Oregon are from the 1996 and 2001 NMFS SWFSC ''ORCAWALE'' ship surveys as synthesized by Barlow (2003). The surveys were conducted from late July to early November (1996) or early December (2001). They were conducted up to approximately 556 km (1,824 ft) offshore from Oregon and Washington.Systematic, offshore, at-sea survey data for pinnipeds are more limited. The most comprehensive such studies are reported by Bonnell *et al.* (1992) and Green *et al.* (1993) based on systematic aerial surveys conducted in 1989 1990 and 1992, primarily from coastal to slope waters with some offshore effort as well.

Oceanographic conditions, including occasional El Nino and La Nina events, influence the distribution and numbers of marine mammals present in the northeastern Pacific Ocean, including Oregon, resulting in considerable year-to-year variation in the distribution and abundance of many marine mammal species (Forney and Barlow, 1998; Buchanan *et al.*, 2001; Escorza-Trevino, 2002; Ferrero *et al.*, 2002; Philbrick *et al.*, 2003). Thus, for some species the densities derived from recent surveys may not be representative of the densities that will be encountered during the proposed seismic survey.

Table 3 in SIO's application gives the average and maximum densities for each species or species group of marine mammals reported off Oregon and Washington (and used to calculate the take estimates in Table 1 here), corrected for effort, based on the densities reported for the 1996 and 2001 ORCAWALE surveys (Barlow, 2003). The densities from these studies had been corrected, by the original author, for both detectability bias and availability bias. Detectability bias is associated with diminishing sightability with increasing lateral distance from the trackline [f(0)]. Availability bias refers to the fact that there is less-than–100 percent probability of sighting an animal that is present along the survey trackline, and it is measured by g(0).

It should be noted that the following estimates of ''takes by harassment'' assume that the seismic surveys will be undertaken and completed; in fact, the planned number of line-kms has been increased by 25 percent to accommodate lines that may need to be repeated, equipment testing, etc. As is typical on offshore ship surveys, inclement weather, and equipment malfunctions may cause delays and may limit the number of useful line-kms of seismic operations that can be undertaken. Furthermore, any marine mammal sightings within or near the designated safety zones will result in the shut down of seismic operations as a mitigation measure. Thus, the following estimates of the numbers of marine mammals potentially exposed to 160–dB sounds are precautionary, and probably overestimate the actual numbers of marine mammals that might be involved. These estimates assume that there will be no weather, equipment, or mitigation delays, which is unlikely.

There is some uncertainty about the representativeness of the data and the assumptions used in the take calculations. However, the approach used here is believed to be the best available approach. Also, to provide some allowance for the uncertainties, ''maximum estimates'' as well as ''best estimates'' of the numbers potentially affected have been derived. Best and maximum estimates are based on the average and maximum estimates of densities reported by Barlow (2003) described above. SIO has requested authorization for the take of the maximum estimates and NMFS has analyzed the maximum estimate for it's effect on the species or stock.

The number of different individuals that may be exposed to GI-gun sounds with received levels ≥160 dB re 1 μPa (rms) on one or more occasions can be estimated by considering the total marine area that would be within the 160–dB radius around the operating GI gun on at least one occasion. The proposed seismic lines do not run parallel to each other in close proximity, which minimizes the number of times an individual mammal may be exposed during the survey. The best estimates in this section are based on the average of the densities from the 1996 and 2001 NMFS surveys, and maximum estimates are based on the higher estimate. Table 4 in SIO's application (and used to calculate the take estimates in Table 1 here) shows the best and maximum estimates of the number of marine mammals that could potentially be affected during the seismic survey.

The number of different individuals potentially exposed to received levels ≥160 dB re 1 μPa (rms) was calculated by multiplying:

- The expected species density, either ''average'' (i.e., best) or ''maximum'', times
- The anticipated minimum area to be ensonified to that level during GI gun operations.

The area expected to be ensonified was determined by entering the planned survey lines into a MapInfo Geographic Information System (GIS), using the GIS to identify the relevant areas by ''drawing'' the applicable 160–dB around each seismic line and then calculating the total area within the buffers. Areas where overlap occurred (because of intersecting lines) were included only once to determine the minimum area expected to be ensonified.

Applying the approach described above, approximately 206 km^2 would be within the 160–dB isopleth on one or more occasions. This approach does not allow for turnover in the mammal populations in the study area during the course of the studies. That might underestimate actual numbers of individuals exposed, although the conservative distances used to calculate the area may offset this. In addition, the approach assumes that no cetaceans will move away or toward the trackline as the *Wecoma* approaches in response to increasing sound levels prior to the time the levels reach 160 dB. Another way of interpreting the estimates that follow is that they represent the number of individuals that are expected (in the absence of a seismic program) to occur in the waters that will be exposed to ≥160 dB re 1 μPa (rms).

The 'best estimate' of the number of individual cetaceans that might be exposed to seismic sounds with received levels ≥160 dB re 1 μPa (rms) during the surveys is 57 (Table 4 in SIO's application). The total does not include any endangered or beaked whales. Dall's porpoise and Pacific white-sided and northern right whale dolphins are estimated to be the most common species exposed; the best estimates for those species are 39, 6, and 5, respectively. Estimates for the two other dolphin species that could be exposed are lower (Table 4 in SIO's application).

The 'maximum estimate' column in Table 4 of SIO's application shows an estimated total of 109 cetaceans that might be exposed to seismic sounds ≥160 dB during the surveys. In most cases, those estimates are based on survey data, as described above. For endangered species, the 'maximum estimate' is the mean group size (from Barlow and Forney, in prep) in cases where the calculated maximum number of individuals exposed was between

0.05 and the mean group size (humpback, fin, blue, and sperm whales). The numbers for which take authorization is requested, given in the far right column of Table 4 in SIO's application and Table 1 here, are the best estimates. Based on the abundance numbers given in Table 2 of SIO's application and Table 1 here for non-listed cetacean species, NMFS believes that the estimated take numbers are small relative to the stock sizes for these species (i.e., no more than 0.4 percent of any species).

Only two of the five pinniped species discussed in Section III of SIO's application the northern fur seal and the northern elephant seal are likely to occur in the offshore and slope waters (where 12 of the 16 OBSs are located) in numbers greater than a few stray individuals. The other three species of pinnipeds known to occur regularly off Oregon and Washington the California sea lion, Steller sea lion, and harbor seal likely would not be found at the OBS locations, or could be found only at the inshore locations, because they are coastal, usually staying within approximately 20 km (12.4 mi) of the coast (see Section III of SIO's application). A best estimate of three northern fur seals, one harbor seal, and one Steller sea lion could be exposed to airgun sounds with received levels ≥160 dB re 1 μPa (rms). Numbers of sightings of the other two species that could occur in the study area were too low to warrant density estimates. The numbers for which ''take authorization'' is requested, given in the far right column of Table 4 of SIO's application and Table 1 here, are for the average or (for the northern fur seal) the maximum estimate. The estimated numbers of pinnipeds that may be exposed to received levels ≥160 dB are probably overestimates of the actual numbers that will be affected significantly. Less than 0.01 percent of northern fur seals and harbor seals are expected to be affected.

Potential Effects on Habitat

The proposed seismic surveys will not result in any permanent impact on habitats used by marine mammals or to the food sources they use. The main impact issue associated with the proposed activity will be temporarily elevated noise levels and the associated direct effects on marine mammals, as discussed above.

One of the reasons for the adoption of airguns as the standard energy source for marine seismic surveys was that, unlike explosives, they do not result in any appreciable fish kill. However, the existing body of information relating to the impacts of seismic surveys on marine fish (see Appendix B of SIO's application) and invertebrate species is very limited. The various types of potential effects of exposure to seismic on fish and invertebrates can be considered in three categories: (1) pathological, (2) physiological, and (3) behavioral. Pathological effects include lethal and sub-lethal damage to the animals, physiological effects include temporary primary and secondary stress responses, and behavioral effects refer to changes in exhibited behavior of the fish and invertebrates. The three categories are interrelated in complex ways. For example, it is possible that certain physiological and behavioral changes could potentially lead to the ultimate pathological effect on individual animals (i.e., mortality).

Available information on the impacts of seismic surveys on marine fish and invertebrates provides limited insight on the effects only at the individual level. Ultimately, the most important knowledge in this area relates to how significantly seismic affects animal populations.

The following sections provide an overview of the information that exists on the effects of seismic surveys on fish and invertebrates. The information comprises results from scientific studies of varying degrees of soundness and some anecdotal information.

Pathological Effects – In water, acute injury and death of organisms exposed to seismic energy depends primarily on two features of the sound source: (1) the received peak pressure, and (2) the time required for the pressure to rise and decay (Hubbs and Rechnitzer, 1952 in Wardle *et al.*, 2001). Generally, the higher the received pressure and the less time it takes for the pressure to rise and decay, the greater the chance of acute pathological effects. Considering the peak pressure and rise/decay time characteristics of seismic airgun arrays used today, the pathological zone for fish and invertebrates would be expected to be within a few meters of the seismic source (Buchanan *et al.*, 2004). For the proposed survey, any injurious effects on fish would be limited to very short distances, especially considering the small source planned for use in this project (one 45–in3 GI gun). Numerous other studies provide examples of no fish mortality upon exposure to seismic sources (Falk and Lawrence, 1973; Holliday *et al.*, 1987; La Bella *et al.*, 1996; Santulli *et al.*, 1999; McCauley *et al.*, 2000a, 2000b, 2003; Bjarti, 2002; Hassel *et al.*, 2003; Popper *et al.*, 2005).

Little is known about the mechanisms and characteristics of damage to fish that may be inflicted by exposure to seismic survey sounds. Few data have been presented in the peer-reviewed scientific literature. There are two valid papers with proper experimental methods, controls, and careful pathological investigation implicating sounds produced by actual seismic survey airguns with adverse anatomical effects. One such study indicated anatomical damage and the second indicated TTS in fish hearing. McCauley *et al.* (2003) found that exposure to airgun sound caused observable anatomical damage to the auditory maculae of ''pink snapper'' (Pagrus auratus). This damage in the ears had not been repaired in fish sacrificed and examined almost two months after exposure. On the other hand, Popper *et al.* (2005) documented only TTS (as determined by auditory brainstem response) in two of three fishes from the Mackenzie River Delta. This study found that broad whitefish (*Coreogonus nasus*) that received a sound exposure level of 177 dB re 1 μPa^2.s showed no hearing loss. During both studies, the repetitive exposure to sound was greater than would have occurred during a typical seismic survey. However, the substantial low-frequency energy produced by the airgun arrays [less than approximately 400 Hz in the study by McCauley *et al.* (2003) and less than approximately 200 Hz in Popper *et al.* (2005)] likely did not propagate to the fish because the water in the study areas was very shallow (approximately 9 m, 29.5 ft, in the former case and <2 m, 6.6 ft, in the latter). Water depth sets a lower limit on the lowest sound frequency that will propagate (the ''cutoff frequency'') at about one-quarter wavelength (Urick, 1983; Rogers and Cox, 1988).

Except for these two studies, at least with airgun-generated sound treatments, most contributions rely on rather subjective assays such as fish ''alarm'' or ''startle response'' or changes in catch rates by fishers. These observations are important in that they attempt to use the levels of exposures that are likely to be encountered by most free-ranging fish in actual survey areas. However, the associated sound stimuli are often poorly described, and the biological assays are varied (Hastings and Popper, 2005).

Some studies have reported that mortality of fish, fish eggs, or larvae can occur close to seismic sources (Kostyuchenko, 1973; Dalen and Knutsen, 1986; Booman *et al.*, 1996; Dalen *et al.*, 1996). Some of the reports claimed seismic effects from treatments quite different from actual seismic survey sounds or even reasonable surrogates. Saetre and Ona (1996)

applied a 'worst-case scenario' mathematical model to investigate the effects of seismic energy on fish eggs and larvae and concluded that mortality rates caused by exposure to seismic are so low compared to natural mortality that the impact of seismic surveying on recruitment to a fish stock must be regarded as insignificant.

For the single GI gun planned for the proposed program, the pathological (mortality) zone for crustaceans and cephalopods is expected to be within a few meters of the seismic source; however, very few specific data are available on levels of seismic signals that might damage these animals. This premise is based on the peak pressure and rise/decay time characteristics of seismic airgun arrays currently in use around the world.

Some studies have suggested that seismic survey sound has a limited pathological impact on early developmental stages of crustaceans (Pearson *et al.*, 1994; Christian *et al.*, 2003; DFO, 2004). However, the impacts appear to be either temporary or insignificant compared to what occurs under natural conditions. Controlled field experiments on adult crustaceans (Christian *et al.*, 2003, 2004; DFO, 2004) and adult cephalopods (McCauley *et al.*, 2000a,b) exposed to seismic survey sound have not resulted in any significant pathological impacts on the animals. It has been suggested that exposure to commercial seismic survey activities has injured giant squid (Guerra *et al.*, 2004), but there is no evidence to support such claims.

Physiological Effects – Biochemical responses by marine fish and invertebrates to acoustic stress have also been studied, although in a limited way. Studying the variations in the biochemical parameters influenced by acoustic stress might give some indication of the extent of the stress and perhaps forecast eventual detrimental effects. Such stress could potentially affect animal populations by reducing reproductive capacity and adult abundance and increasing mortality.

Stress indicators in the haemolymph of adult male snow crabs were monitored after exposure of the animals to seismic energy (Christian *et al.*, 2003, 2004) and at various intervals after exposure. No significant acute or chronic differences between exposed and unexposed animals were found in the stress indicators (e.g., proteins, enzymes, cell type count).

Primary and secondary stress responses of fish after exposure to seismic energy all appear to be temporary in any studies done to date (Sverdrup *et al.*, 1994; McCauley *et al.*, 2000a,b). The periods necessary for these biochemical changes to return to normal are variable depending on numerous aspects of the biology of the species and of the sound stimulus. See Appendix B of SIO's application for more information on the effects of airgun sounds on marine fish.

Summary of Physical (Pathological and Physiological) Effects – As indicated in the preceding general discussion, there is a relative lack of knowledge about the potential physical (pathological and physiological) effects of seismic energy on marine fish and invertebrates. Available data suggest that there may be physical impacts on egg, larval, juvenile, and adult stages at very close range. Considering typical source levels associated with commercial seismic arrays, close proximity to the source would result in exposure to very high energy levels. Again, this study will employ a sound source that will generate low energy levels. Whereas egg and larval stages are not able to escape such exposures, juveniles and adults most likely would avoid it. In the case of eggs and larvae, it is likely that the numbers adversely affected by such exposure would not be that different from those succumbing to natural mortality. Limited data regarding physiological impacts on fish and invertebrates indicate that these impacts are short term and are most apparent after exposure at close range.

The proposed seismic program for 2007 is predicted to have negligible to low physical effects on the various life stages of fish and invertebrates for its short duration (approximately 2 hours at each of 16 sites off the coast of Oregon) and approximately 21–km (13–mi) extent. Therefore, physical effects of the proposed program on the fish and invertebrates would be not significant.

Behavioral Effects – Because of the apparent lack of serious pathological and physiological effects of seismic energy on marine fish and invertebrates, most concern now centers on the possible effects of exposure to seismic surveys on the distribution, migration patterns, mating, and catchability of fish. There is a need for more information on exactly what effects such sound sources might have on the detailed behavior patterns of fish and invertebrates at different ranges.

Studies investigating the possible effects of seismic energy on fish and invertebrate behavior have been conducted on both uncaged and caged animals (Chapman and Hawkins, 1969; Pearson *et al.*, 1992; Santulli *et al.*, 1999; Wardle *et al.*, 2001; Hassel *et al.*, 2003). Typically, in these studies fish exhibited a sharp ''startle'' response at the onset of a sound followed by habituation and a return to normal behavior after the sound ceased.

There is general concern about potential adverse effects of seismic operations on fisheries, namely a potential reduction in the ''catchability'' of fish involved in fisheries. Although reduced catch rates have been observed in some marine fisheries during seismic testing, in a number of cases the findings are confounded by other sources of disturbance (Dalen and Raknes, 1985; Dalen and Knutsen, 1986; Lokkeborg, 1991; Skalski *et al.*, 1992; Engas *et al.*, 1996). In other airgun experiments, there was no change in catch per unit effort of fish when airgun pulses were emitted, particularly in the immediate vicinity of the seismic survey (Pickett *et al.*, 1994; La Bella *et al.*, 1996). For some species, reductions in catch may have resulted from a change in behavior of the fish (e.g., a change in vertical or horizontal distribution) as reported in Slotte *et al.* (2004).

In general, any adverse effects on fish behavior or fisheries attributable to seismic testing may depend on the species in question and the nature of the fishery (season, duration, fishing method). They may also depend on the age of the fish, its motivational state, its size, and numerous other factors that are difficult, if not impossible, to quantify at this point, given such limited data on effects of airguns on fish, particularly under realistic at-sea conditions.

For marine invertebrates, behavioral changes could potentially affect such aspects as reproductive success, distribution, susceptibility to predation, and catchability by fisheries. Studies of squid indicated startle responses (McCauley *et al.*, 2000a,b). In other cases, no behavioral impacts were noted (e.g., crustaceans in Christian *et al.*, 2003, 2004; DFO, 2004). There have been anecdotal reports of reduced catch rates of shrimp shortly after exposure to seismic surveys; however, other studies have not observed any significant changes in shrimp catch rate (Andriguetto-Filho *et al.*, 2005). Any adverse effects on crustacean and cephalopod behavior or fisheries attributable to seismic survey sound depend on the species in question and the nature of the fishery (season, duration, fishing method). Additional information regarding the behavioral effects of seismic on invertebrates is contained in Appendix C of SIO's application.

Summary of Behavioral Effects – As is the case with pathological and physiological effects of seismic on fish and invertebrates, available information is relatively scant and often

contradictory. There have been well-documented observations of fish and invertebrates exhibiting behaviors that appeared to be responses to exposure to seismic energy (i.e., startle response, change in swimming direction and speed, and change in vertical distribution), but the ultimate importance of those behaviors is unclear. Some studies indicate that such behavioral changes are very temporary, whereas others imply that fish might not resume pre-seismic behaviors or distributions for a number of days. There appears to be a great deal of inter- and intra-specific variability. In the case of finfish, three general types of behavioral responses have been identified: startle, alarm, and avoidance. The type of behavioral reaction appears to depend on many factors, including the type of behavior being exhibited before exposure, and proximity and energy level of sound source.

During the proposed study, only a small fraction of the available habitat would be ensonified at any given time, and fish species would return to their pre-disturbance behavior once the seismic activity ceased. The proposed seismic program is predicted to have negligible to low behavioral effects on the various life stages of the fish and invertebrates during its short duration (approximately 2 hours at each of 16 sites off the coast of Oregon) and 21–km (31–mi) extent.Because of the reasons noted above and the nature of the proposed activities (small airgun and limited duration), the proposed operations are not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or their populations or stocks. Similarly, any effects to food sources are expected to be negligible.

Monitoring

Vessel-based marine mammal visual observers (MMVOs) will be based aboard the seismic source vessel and will watch for marine mammals and turtles near the vessel during all daytime GI gun operations and during start-ups of the gun at night. MMVOs will also watch for marine mammals and turtles near the seismic vessel for at least 30 minutes prior to the start of GI gun operations. When feasible, MMVOs will also make observations during daytime periods when the seismic system is not operating for comparison of animal abundance and behavior. Based on MMVO observations, the airgun will be shut down when marine mammals are observed within or about to enter a designated exclusion zone (EZ; safety radius). The EZ is a region in which a possibility exists of adverse effects on animal hearing or other physical effects.

MMVOs will be appointed by the academic institution conducting the research cruise, with NMFS Office of Protected Resources concurrence. At least one MMVO will monitor the EZ during daytime GI gun operations and any nighttime startups. MMVOs will normally work in shifts of 4 hours duration or less. The vessel crew will also be instructed to assist in detecting marine mammals and turtles.

The *Wecoma* is a suitable platform for marine mammal observations. Observing stations will be on the bridge wings, with observers' eyes approximately 6.5 m (21.3 ft) above the water line and a 180° view outboard from either side, on the whaleback deck in front of the bridge, with observers' eyes approximately 7.5 m (24.6 ft) above the waterline and an approximate 200° view forward, and on the aft control station, with observers' eyes approximately 5.5 m (18 ft) above the waterline and an approximate 180° view aft that includes the 40–m (131–ft; 180–dB) radius area around the GI gun. The eyes of the bridge watch will be at a height of approximately 6.5 m (21.3 ft). MMVOs will repair to the enclosed bridge during any inclement weather.

Standard equipment for MMVOs will be 7 x 50 reticule binoculars and optical range finders. At night, night-vision equipment will be available. Observers will be in wireless communication with ship officers on the bridge and scientists in the ship's operations laboratory, so they can advise promptly of the need for avoidance maneuvers or GI gun shut down.

MMVOs will record data to estimate the numbers of marine mammals exposed to various received sound levels and to document any apparent disturbance reactions. Data will be used to estimate the numbers of mammals potentially ''taken'' by harassment. It will also provide the information needed to order a shutdown of the GI gun when a marine mammal is within or near the EZ. When a mammal sighting is made, the following information about the sighting will be recorded:

(1) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the GI gun or seismic vessel (e.g., none, avoidance, approach, paralleling, etc.), and behavioral pace.

(2) Time, location, heading, speed, activity of the vessel (shooting or not), sea state, visibility, cloud cover, and sun glare.

The data listed under (2) will also be recorded at the start and end of each observation watch and during a watch, whenever there is a change in one or more of the variables.

All mammal observations and airgun shutdowns will be recorded in a standardized format. Data accuracy will be verified by the MMVOs at sea, and preliminary reports will be prepared during the field program and summaries forwarded to the operating institution's shore facility and to NSF weekly or more frequently. MMVO observations will provide the following information:

(1) The basis for decisions about shutting down the GI gun.

(2) Information needed to estimate the number of marine mammals potentially ''taken'' by harassment, which must be reported to NMFS.

(3) Data on the occurrence, distribution, and activities of marine mammals in the area where the seismic study is conducted.

(4) Data on the behavior and movement patterns of marine mammals seen at times with and without seismic activity.

Mitigation

Mitigation and monitoring measures proposed to be implemented for the proposed seismic survey have been developed and refined during previous SIO and L-DEO seismic studies and associated EAs, IHA applications, and IHAs. The mitigation and monitoring measures described herein represent a combination of the procedures required by past IHAs for other SIO and L-DEO projects. The measures are described in detail below.

The number of individual animals expected to be approached closely during the proposed activity will be small in relation to regional population sizes. With the proposed monitoring and shut-down provisions (see below), any effects on individuals are expected to be limited to behavioral disturbance and will have only negligible impacts on the species and stocks.

Mitigation measures that will be adopted will include (1) vessel speed or course alteration, provided that doing so will not compromise operational safety requirements, (2) GI gun shut down, and (3) minimizing approach to slopes and submarine canyons, if possible, because of sensitivity of beaked whales. Two other standard mitigation measures airgun array power down and airgun array ramp up are not possible because only one, low-volume GI gun will be used for the surveys.

Speed or Course Alteration – If a marine mammal is detected outside the EZ but is likely to enter it based on relative movement of the vessel and the animal, then if safety and scientific objectives allow, the vessel speed and/or direct course will be adjusted to minimize the likelihood of the animal entering the EZ. Major course and speed adjustments are often impractical when towing long seismic streamers and large source arrays, but are possible in this case because only one GI gun and a short (300–m, 984–ft) streamer will be used. If the animal appears likely to enter the EZ, further mitigative actions will be taken, i.e. either further course alterations or shut down of the airgun.

Shut-down Procedures – If a marine mammal is within or about to enter the EZ for the single GI gun, it will be shut down immediately. Following a shut down, GI gun activity will not resume until the marine mammal is outside the EZ for the full array. The animal will be considered to have cleared the EZ if it: (1) visually observed to have left the EZ; (2) has not been seen within the EZ for 15 minutes in the case of small odontocetes and pinnipeds; or (3) has not been seen within the EZ for 30 minutes in the case of mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, and beaked whales.

Minimize Approach to Slopes and Submarine Canyons – Although sensitivity of beaked whales to airguns is not known, they appear to be sensitive to other sound sources (mid-frequency sonar; see section IV of SIO's application). Beaked whales tend to concentrate in continental slope areas and in areas where there are submarine canyons. Avoidance of airgun operations over or near submarine canyons has become a standard mitigation measure, but there are none within or near the study area. Four of the 16 OBS locations are on the continental slope, but the GI gun is low volume (45 in^3), and it will operate only a short time (approximately 2 hours) at each location.

Reporting

A report will be submitted to NMFS within 90 days after the end of the cruise. The report will describe the operations that were conducted and the marine mammals that were detected near the operations. The report will be submitted to NMFS, providing full documentation of methods, results, and interpretation pertaining to all monitoring. The 90–day report will summarize the dates and locations of seismic operations, all marine mammal sightings (dates, times, locations, activities, associated seismic survey activities), and estimates of the amount and nature of potential ''take'' of marine mammals by harassment or in other ways.

ESA

Under section 7 of the ESA, the NSF has begun informal consultation on this proposed seismic survey. NMFS will also consult informally on the issuance of an IHA under section 101(a)(5)(D) of the MMPA for this activity. Consultation will be concluded prior to a determination on the issuance of the IHA.

National Environmental Policy Act (NEPA)

NSF prepared an Environmental Assessment of a Planned Low-Energy Marine Seismic Survey by the Scripps Institution of Oceanography in the Northeast Pacific Ocean, September 2007. NMFS will either adopt NSF's EA or conduct a separate NEPA analysis, as necessary, prior to making a determination on the issuance of the IHA.

Preliminary Determinations

NMFS has preliminarily determined that the impact of conducting the seismic survey in the northeast Pacific Ocean may result, at worst, in a temporary modification in behavior (Level B Harassment) of small numbers of eight species of marine mammals. Further, this activity is expected to result in a negligible impact on the affected species or stocks. The provision requiring that the activity not have an unmitigable adverse impact on the availability of the affected species or stock for subsistence uses does not apply for this proposed action.

For reasons stated previously in this document, this determination is supported by: (1) the likelihood that, given sufficient notice through relatively slow ship speed, marine mammals are expected to move away from a noise source that is annoying prior to its becoming potentially injurious; (2) the fact that marine mammals would have to be closer than either 35 m (115 ft) in intermediate depths or 23 m (75.5 ft) in deep water from the vessel to be exposed to levels of sound (180 dB) believed to have even a minimal chance of causing TTS; and (3) the likelihood that marine mammal detection ability by trained observers is high at that short distance from the vessel. As a result, no take by injury or death is anticipated and the potential for temporary or permanent hearing impairment is very low and will be avoided through the incorporation of the proposed mitigation measures.

While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals in the vicinity of the survey activity, the number of potential harassment takings is estimated to be small, less than a few percent of any of the estimated population sizes, and has been mitigated to the lowest level practicable through incorporation of the measures mentioned previously in this document.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to SIO for conducting a low-energy seismic survey in the Pacific Ocean during September, 2007, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: July 26, 2007.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E7–14883 Filed 7–31–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 050107N]

Taking and Importing Marine Mammals; Increasing Usage and Enhancing Capability of the U.S. Navy's Hawaii Range Complex

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

ACTION: Notice; receipt of application for letter of authorization; request for comments and information.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization for the take of marine mammals incidental to the training events conducted within the Hawaii Range Complex (HRC) for the period of July 2008 through July 2013. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is announcing our receipt of the Navy's request for the development and implementation of regulations governing the incidental taking of marine mammals and inviting information, suggestions, and comments on the Navy's application and request.

DATES: Comments and information must be received no later than August 31, 2007.

ADDRESSES: Comments on the application should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225. The mailbox address for providing email comments is *PR1.050107N@noaa.gov*. NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10–megabyte file size.

FOR FURTHER INFORMATION CONTACT: Jolie Harrison, Office of Protected Resources, NMFS, (301) 713–2289, ext. 166.

SUPPLEMENTARY INFORMATION:

Availability

A copy of the Navy's application may be obtained by writing to the address specified above

(See ADDRESSES), telephoning the contact listed above (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm*. The Navy's Draft Environmental Impact Statement (DEIS) for the Hawaii Range Complex was made available to the public on July 27th, 2007, and may be viewed at *http://www.govsupport.us/hrc*. Because NMFS is participating as a cooperating agency in the development of the Navy's DEIS for the Hawaii Range Complex, NMFS staff will be present at the associated public meetings and prepared to discuss NMFS' participation in the development of the EIS as well as the MMPA process for the issuance of incidental take authorizations. The dates and times of the public meetings may be viewed at: *http://www.govsupport.us/hrc*.

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have no more than a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and that the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as:

> an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

With respect to military readiness activities, the MMPA defines ''harassment'' as:

> (i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Summary of Request

On June 25, 2007, NMFS received an application from the Navy requesting authorization for the take of 26 species of marine mammals incidental to upcoming Navy training activities to be conducted within the HRC, which covers 235,000 nm^2 around the Main Hawaiian Islands (see page 17 of the application), over the course of 5 years. These training activities are classified as military readiness activities. The Navy states that these training activities may expose some of the marine mammals present within the HRC to sound from hull-mounted mid-frequency active tactical sonar or to underwater detonations. The Navy requests authorization to take 26 species of marine mammals by Level B Harassment. Further, the Navy requests authorization to take 20 individual marine mammals per year by serious injury or mortality (2 each of the following: bottlenose dolphin, Kogia spp., melon-headed whale, pantropical spotted dolphin, pygmy killer whale, short-finned pilot whale, striped dolphin, and Cuvier's, Longman's, and Blainesville's beaked whale).

Specified Activities

The Navy has prepared a Draft Environmental Impact Statement analyzing the effects on the human environment of implementing their preferred alternative (among other alternatives), which includes conducting current and emerging training and research, development, test, and evaluation (RDT&E) operations in the HRC. The HRC complex consists of targets and instrumented areas, airspace, surface operational areas (OPAREAS), and land range facilities. The activities described in the EIS include current and future proposed Navy training and RDT&E operations within Navy-controlled OPAREAs, airspace, and ranges, and Navy-funded range capabilities enhancements (including infrastructure improvement).

In the application submitted to NMFS, the Navy requests authorization for take of marine mammals incidental to conducting a subset of the activities analyzed in the EIS. Table 1–1 in the application lists the categories of Navy training operations and RDT&E operations and indicates those that the Navy believes: (1) could potentially result in harassment of marine mammals through exposure to underwater detonations; (2) could potentially result in harassment of marine mammals through exposure to tactical mid-frequency sonar; and, (3) do not have the potential to harass marine mammals. The Navy is requesting authorization for take incidental to the following categories of Navy training operations: (1) Naval Surface Fire Support Exercises, (2) Surface-to-Surface Gunnery Exercises, (3) Surface-to-Surface Missile Exercises, (4) Air-to-Surface Missile Exercises, (5) Bombing Exercises, (6) Sink Exercises, (7) Mine Neutralization, (8) Anti-submarine Warfare (ASW) Tracking Exercises, (9) ASW Torpedo Exercises, and (10) Major Integrated ASW Training Exercises (such as RIMPAC, USWEX, and Multiple Strike Group Exercises).

Information Solicited

Interested persons may submit information, suggestions, and comments concerning the Navy's request (see **ADDRESSES**). All information, suggestions, and comments related to the Navy's HRC request and NMFS' potential development and implementation of regulations governing the incidental taking of marine mammals by the Navy in the HRC will be considered by NMFS in developing, if appropriate, the most effective regulations governing the issuance of letters of authorization.

Dated: July 26, 2007.

James H. Lecky,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. E7–14891 Filed 7–31–07; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Privacy Act of 1974; System of Records

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice of proposed new Privacy Act system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, the United States Patent and Trademark Office (USPTO) gives notice of a proposed new system of records entitled ''COMMERCE/PAT–TM–20 Customer Call Center, Assistance and Satisfaction Survey Records.'' We invite the public to comment on the system announced in this publication.

DATES: Written comments must be received no later than August 31, 2007. The proposed system of records will be effective on August 31, 2007, unless the USPTO receives comments that would result in a contrary determination.

ADDRESSES: You may submit written comments by any of the following methods:

E-mail: Susan.Fawcett@uspto.gov.

Fax: (571) 273–0112, marked to the attention of Susan Fawcett.

Mail: Susan K. Fawcett, Records Officer, Office of the Chief Information Officer, Customer Information Services Group, Public Information Services Division, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

All comments received will be available for public inspection at the Public Search Facilities, Madison East—1st Floor, 600 Dulany Street, Alexandria, VA 22314.

FOR FURTHER INFORMATION CONTACT: Manager, Patent Electronic Business Center, SIRA, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450, (571) 272–2723.

SUPPLEMENTARY INFORMATION: The United States Patent and Trademark Office (USPTO) is giving notice of a new system of records that is subject to the Privacy Act of 1974. The proposed system of records will maintain information on individuals who request information or assistance through the agency's telephone support system or customer service centers.

The proposed new system of records, ''COMMERCE/PAT–TM–20 Customer Call Center, Assistance and Satisfaction Survey Records,'' is published in its entirety below.

COMMERCE/PAT–TM–20

SYSTEM NAME:

Customer Call Center, Assistance and Satisfaction Survey Records.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Office of the Chief Information Officer, United States Patent and Trademark Office, 600 Dulany Street, Alexandria, VA 22314.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Members of the public, employees, contractors, and other individuals requesting information or assistance through the agency call centers and customer service centers.

CATEGORIES OF RECORDS IN THE SYSTEM:

Customer name, company name, e-mail address, telephone and fax numbers, mailing address, date and time of contact, agent name, customer number, description and resolution of the problem or request, customer contact experience and satisfaction, service recommendations, and desire to be contacted to discuss survey results.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, 35 U.S.C. 2, and E.O. 12862.

PURPOSE(S):

To carry out the duties of the USPTO as outlined in 35 U.S.C. concerning the dissemination of information, i.e., facilitating communications and providing quality assistance services upon individual user request. This system serves as a controlled repository for call center and customer data. The USPTO also uses this information to obtain customer feedback concerning their service experience and the level of satisfaction provided by the agency's Electronic Business Center.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

See Prefatory Statement of General Routine Uses Nos. 1–5, 9–10, and 12–13, as found at 46 FR 63501–63502 (December 31, 1981). The USPTO may use the information contained in this system of records to contact customers regarding their survey responses and comments.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

Not applicable.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

On electronic media.

RETRIEVABILITY:

By individual's name or other identifier such as e-mail address or telephone number.

SAFEGUARDS:

Maintained in areas accessible only to authorized personnel in a building protected by security guards during nonbusiness hours. Systems are password protected.

RETENTION AND DISPOSAL:

Records retention and disposal is in accordance with the series record schedules.

SYSTEM MANAGER(S) AND ADDRESS:

Manager, Patent Electronic Business Center, SIRA, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450.

NOTIFICATION PROCEDURE:

Information may be obtained from the Manager, Patent Electronic Business Center, SIRA, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA 22313–1450. Requesters should provide their names in accordance with the inquiry provisions appearing in 37 CFR part 102 subpart B.

RECORD ACCESS PROCEDURES:

Requests from individuals should be addressed to the same address as stated in the notification section above.

CONTESTING RECORD PROCEDURES:

The rules for access, contesting contents, and appealing initial determinations by the individual concerned appear in 37 CFR part 102 subpart B. Requests from individuals should be addressed to the same address as stated in the notification section above.

RECORD SOURCE CATEGORIES:

Subject individuals and those authorized by the individual to furnish information.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Dated: July 25, 2007.

Susan K. Fawcett,

Records Officer, USPTO, Office of the Chief Information Officer, Customer Information Services Group, Public Information Services Division.

[FR Doc. E7–14865 Filed 7–31–07; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The IC Clearance Official, Regulatory Information Management Services, Office of Management, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before October 1, 2007.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The IC Clearance Official, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: July 25, 2007.

Angela C. Arrington,

IC Clearance Official, Regulatory Information Management Services, Office of Management

Office of the Chief Financial Officer

Type of Review: Extension.

Title: U.S. Department of Education Grant Performance Report Form and Instructions (ED 524B).

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs; Individuals or household; Businesses or other for-profit; Not-for-profit institutions; Federal Government.

Reporting and Recordkeeping Hour Burden:

Responses: 9,000.

Burden Hours: 201,000.

Abstract: The U.S. Department of Education (ED) information collection package, OMB Control number 1890–0004, which expires on October 31, 2007, currently includes three distinct information collection instruments: the ED 524 Budget Form, the ED 524B Grant Performance Report and the recordkeeping and reporting requirements in the Education Department General Administrative Regulations (EDGAR). As part of the renewal of these instruments, ED is requesting that each of these information collection instruments be approved under separate OMB control numbers. The ED 524B will retain the 1890–0004 control number. In this information collection package, ED is requesting a two-year renewal of the ED 524B. In separate information collection packages, ED is requesting a new OMB control number for the ED 524, Budget Information Form and Instructions and a new OMB control number for the EDGAR administrative requirements.

The ED 524B form and instructions are used in order for grantees to meet ED deadline dates for submission of performance reports for Department discretionary grant programs. Recipients of multi-year discretionary grants must submit an annual performance report for each year funding has been approved in order to receive a continuation award. The annual performance report should demonstrate whether substantial progress has been made toward meeting the approved goals and objectives of the project. ED program offices may also require recipients of ''forward funded'' grants that are awarded funds for their entire multi-year project up-front in a single grant award to submit the ED 524B on an annual basis. In addition, ED program offices may also require recipients to use the ED 524B to submit their final performance reports to demonstrate project success, impact and outcomes. In both the annual and final performance reports, grantees are required to provide data on established performance measures for the grant program (e.g., Government Performance and Results Act measures) and on project performance measures that were included in the grantee's approved grant application. The ED 524B also contains a number of questions related to project financial data such as Federal and non-Federal expenditures and indirect cost information.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, by selecting the ''Browse Pending Collections'' link and by clicking on link number 3415. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., Potomac Center, 9th Floor, Washington, DC 20202–4700. Requests may also be electronically mailed to *ICDocketMgr@ed.gov* or faxed to 202–245–6623. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov*. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. E7–14817 Filed 7–31–07; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Postsecondary Education; Overview Information; Underground Railroad Educational and Cultural Program (URR); Notice Inviting Applications for New Awards for Fiscal Year (FY) 2007

Catalog of Federal Domestic Assistance (CFDA) Number: 84.345A

Dates:

Applications Available: August 1, 2007.

Deadline for Transmittal of Applications: August 31, 2007.

Eligible Applicants: Nonprofit educational organizations that research, display, interpret, and collect artifacts relating to the history of the Underground Railroad.

Available Funds: $1,980,000.

Estimated Range of Awards: $500,000–$1,000,000 total for up to three years.

Estimated Number of Awards: 2.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The purpose of this program is to provide grants to establish a facility to house, display, and interpret artifacts related to the history of the Underground Railroad, and to make the interpretive efforts available to institutions of higher education that award a baccalaureate or graduate degree.

Special Requirements: Each nonprofit educational organization awarded a grant under this program must enter into an agreement with the Department. Each agreement must require the organization—

(1) To demonstrate substantial private support for the facility through the implementation of a public-private partnership between a State or local public entity and a private entity for the support of the facility. The private entity must provide matching funds in an amount equal to *four times* the amount of the contribution of the State or local public entity, except that not more than 20 percent of the matching funds may be provided by the Federal Government;

(2) To create an endowment to fund any and all shortfalls in the costs of the on-going operations of the facility;

(3) To establish a network of satellite centers throughout the United States to help disseminate information regarding the Underground Railroad throughout the United States. These satellite centers must raise 80 percent of the funds required to establish the satellite centers from non-Federal public and private sources;

(4) To establish the capability to link the facility electronically with other local and regional facilities that have collections and programs that interpret the history of the Underground Railroad; and

(5) To submit, for each fiscal year for which an organization receives funding under this program, a report to the Department that contains—

(a) A description of the programs and activities supported by the funding;

(b) The audited financial statement of the organization for the preceding fiscal year;

(c) A plan for the programs and activities to be supported by the funding, as the Secretary may require; and

(d) An evaluation of the programs and activities supported by the funding, as the Secretary may require.

Program Authority: 20 U.S.C. 1153.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 82, 84, 85, 86, 97, 98 and 99.

II. Award Information

Type of Award: Discretionary grants.
Available Funds: $1,980,000.
Estimated Range of Awards: $500,000–$1,000,000 total for up to three years.
Estimated Number of Awards: 2.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 36 months.

III. Eligibility Information

1. *Eligible Applicants:* Nonprofit educational organizations that research, display, interpret, and collect artifacts relating to the history of the Underground Railroad.

2. *Cost Sharing or Matching:* Not more than 20% of the total funds for this project may be provided by the Federal Government. See 20 U.S.C. 1153(b)(2).

IV. Application and Information Submission

1. *Address to Request Application Package:* Jay Donahue, U.S. Department of Education, room 6164, 1990 K Street, NW., Washington, DC 20006–8544. Telephone: (202) 502–7507 or by e-mail: *jay.donahue@ed.gov.*

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 a copy of the application package in an alternative format (e.g., Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of applications, together with the forms you must submit, are in the application package and instructions for this program. Page Limit: The program narrative is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. You must limit the section of the narrative that addresses the selection criteria to the equivalent of no more than 30 pages, using the following standards:

• A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides. Page numbers and an identifier may be within the 1″ margin.

• Double space (no more than three lines per vertical inch) all text in the application narrative, *except* titles, headings, footnotes, quotations, references, captions and all text in charts, tables, and graphs.

• Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial. Applications submitted in any other font (including Times Roman and Arial Narrow) will be rejected.

• Use not less than 12-point font.

• The page limit does not apply to: the application for federal assistance (SF 424), the Supplemental Information Required for Department of Education Grants, the budget information summary form (ED Form 524), and the assurances and certifications. The page limit also does not apply to a table of contents. The budget narrative and any attachments or appendices will be counted as part of the Program Narrative for purposes of the page limit requirement. You must include your complete response to the selection criteria in the program narrative.

We will reject your application if—

• You apply these standards and exceed the page limit; or

• You apply other standards and exceed the equivalent of the page limit.

3. *Submission Dates and Times:*

Applications Available: August 1, 2007.

Deadline for Transmittal of Applications: August 31, 2007.

Applications for grants under this competition must be submitted electronically using the Grants.gov Apply site (Grants.gov). For information (including dates and times) about how to submit your application electronically or by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 6. *Other Submission Requirements.*

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice. If the Department provides accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR

part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this program.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Other Submission Requirements:* Applications for grants under this competition must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section at: *http://www.grants.gov.*

a. *Electronic Submission of Applications.* Applications for grants under the Underground Railroad Educational and Cultural Program—CFDA Number 84.345A must be submitted electronically using the Governmentwide Grants.gov Apply site at: *http://www.Grants.gov.* Through this site, you will be able to download a copy of the application package, complete it offline, and then upload and submit your application. You may not e-mail an electronic copy of a grant application to us.

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

• You may access the electronic grant application for the Underground Railroad Educational and Cultural Program at: *http://www.grants.gov.* You must search for the downloadable application package for this program by the CFDA number. Do not include the CFDA number's alpha suffix in your search.

Please note the following:

• When you enter the Grants.gov site, you will find information about submitting an application electronically through the site, as well as the hours of operation.

• Applications received by Grants.gov are date and time stamped. Your application must be fully uploaded and submitted, and must be date and time stamped by the Grants.gov system no later than 4:30 p.m., Washington, DC time, on the application deadline date. Except as otherwise noted in this section, we will not consider your application if it is date and time stamped by the Grants.gov system later than 4:30 p.m., Washington, DC time, on the application deadline date. When we retrieve your application from Grants.gov, we will notify you if we are rejecting your application because it was date and time stamped by the Grants.gov system after 4:30 p.m., Washington, DC time, on the application deadline date.

• The amount of time it can take to upload an application will vary depending on a variety of factors including the size of the application and the speed of your Internet connection. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the submission process through Grants.gov.

• You should review and follow the Education Submission Procedures for submitting an application through Grants.gov that are included in the application package for this competition to ensure that you submit your application in a timely manner to the Grants.gov system. You can also find the Education Submission Procedures pertaining to Grants.gov at *http://e-Grants.ed.gov/help/GrantsgovSubmissionProcedures.pdf.*

• To submit your application via Grants.gov, you must complete all steps in the Grants.gov registration process (see *http://www.grants.gov/applicants/get_registered.jsp*). These steps include (1) registering your organization, a multi-part process that includes registration with the Central Contractor Registry (CCR); (2) registering yourself as an Authorized Organization Representative (AOR); and (3) getting authorized as an AOR by your organization. Details on these steps are outlined in the Grants.gov 3-Step Registration Guide (see *http://www.grants.gov/section910/GrantsgovRegistrationBrochure.pdf*). You also must provide on your application the same D-U-N-S Number used with this registration. Please note that the registration process may take five or more business days to complete, and you must have completed all registration steps to allow you to submit successfully an application via Grants.gov. In addition you will need to update your CCR registration on an annual basis. This may take three or more business days to complete.

• You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.

• You must submit all documents electronically, including all information you typically provide on the following forms: Application for Federal Education Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. Please note that two of these forms—the SF 424 and the Department of Education Supplemental Information for SF 424—have replaced the ED 424 (Application for Federal Education Assistance).

• You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password-protected file, we will not review that material.

• Your electronic application must comply with any page-limit requirements described in this notice.

• After you electronically submit your application, you will receive from Grants.gov an automatic notification of receipt that contains a Grants.gov tracking number. (This notification indicates receipt by Grants.gov only, not receipt by the Department.) The Department then will retrieve your application from Grants.gov and send a second notification to you by e-mail. This second notification indicates that the Department has received your application and has assigned your application a PR/Award number (an ED-specific identifying number unique to your application).

• We may request that you provide us original signatures on forms at a later date.

Application Deadline Date Extension in Case of Technical Issues With the Grants.gov System: If you are experiencing problems submitting your application through Grants.gov, please contact the Grants.gov Support Desk at 1–800–518–4726. You must obtain a Grants.gov Support Desk Case Number and must keep a record of it.

If you are prevented from electronically submitting your application on the application deadline date because of technical problems with the Grants.gov system, we will grant you an extension until 4:30 p.m., Washington, DC time, the following business day to enable you to transmit your application electronically, or by hand delivery. You also may mail your application by following the mailing instructions as described elsewhere in this notice.

If you submit an application after 4:30 p.m., Washington, DC time, on the

application deadline date, please contact the person listed elsewhere in this notice under **FOR FURTHER INFORMATION CONTACT** in section VII in this notice and provide an explanation of the technical problem you experienced with Grants.gov, along with the Grants.gov Support Desk Case Number. We will accept your application if we can confirm that a technical problem occurred with the Grants.gov system and that the problem affected your ability to submit your application by 4:30 p.m., Washington, DC time, on the application deadline date. The Department will contact you after a determination is made on whether your application will be accepted.

Note: The extensions to which we refer in this section apply only to the unavailability of, or technical problems with, the Grants.gov system. We will not grant you an extension if you failed to fully register to submit your application to Grants.gov before the application deadline date and time, or if the technical problem you experienced is unrelated to the Grants.gov system.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through the Grants.gov system because—

- You do not have access to the Internet; or
- You do not have the capacity to upload large documents to the Grants.gov system; *and*
- No later than two weeks before the application deadline date (14 calendar days; or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevent you from using the Internet to submit your application.

If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Jay Donahue, U.S. Department of Education, room 6164, 1990 K Street, NW., Washington, DC 20006–8544. FAX: (202) 502–7877.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the applicable following address:

By mail through the U.S. Postal Service: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.345A), 400 Maryland Avenue, SW., Washington, DC 20202–4260; or

By mail through a commercial carrier: U.S. Department of Education, Application Control Center—Stop 4260, *Attention:* (CFDA Number 84.345A), 7100 Old Landover Road, Landover, MD 20785–1506,

Regardless of which address you use, you must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark,

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service,

(3) A dated shipping label, invoice, or receipt from a commercial carrier, or

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark, or

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, *Attention:* (CFDA Number 84.345A), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8 a.m. and 4:30 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and— if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application control Center will mail to you a notification of receipt of your grant application. If you do not receive this notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

Selection Criteria: The selection criteria for this competition are from 34 CFR 75.210 of EDGAR and are listed in the application package.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may also notify you informally.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multi-year award, you must submit an annual performance report that provides the most current performance and financial expenditure information as specified by the Secretary in 34 CFR 75.118.

4. *Performance Measures:* The success of this program depends upon the manner in which projects are being institutionalized and continued after funding. This performance measure constitutes the indicator of the success of the program. If funded, you will be asked to collect and report data from your project on steps taken toward

achieving this goal. Consequently, applicants are advised to include this outcome in conceptualizing the design, implementation, and evaluation of their proposed projects.

VII. Agency Contact

For Further Information Contact: Jay Donahue, U.S. Department of Education, room 6164, 1990 K Street, NW., Washington, DC 20006–8544. *Telephone:* (202) 502–7507.

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) on request to the program contact person listed in this section.

VIII. Other Information

Eletronic Access to This Document: You may view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

Note: The official version of this document is the document published in the **Federal Register** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: July 26, 2007.

James F. Manning,

Delegated the Authority of Assistant Secretary for Postsecondary Education.

[FR Doc. E7–14929 Filed 7–31–07; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Recognition of Accrediting Agencies, State Agencies for the Approval of Public Postsecondary Vocational Education

AGENCY: National Advisory Committee on Institutional Quality and Integrity, Department of Education (The Advisory Committee).

What Is the Purpose of This Notice?

The purpose of this notice is to invite written comments on accrediting agencies and State approval agencies whose applications to the Secretary for renewed recognition, requests for an expansion of the scope of recognition, or reports will be reviewed at the Advisory Committee meeting to be held on December 17–19, 2007, in the Mt. Vernon Rooms A and B at The Madison, 1177 15th Street, NW., Washington, DC 20005, telephone: 202–862–1600.

Where Should I Submit My Comments?

Please submit your written comments by mail, fax, or e-mail no later than August 31, 2007 to Ms. Robin Greathouse, Accreditation and State Liaison. You may contact her at the U.S. Department of Education, Room 7126, MS 8509, 1990 K Street, NW., Washington, DC 20006, telephone: (202) 219–7011, fax: (202) 219–7005, or e-mail: *Robin.Greathouse@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service at 1–800–877–8339.

What is the Authority for the Advisory Committee?

The National Advisory Committee on Institutional Quality and Integrity is established under Section 114 of the Higher Education Act (HEA), as amended, 20 U.S.C. § 1011c. One of the purposes of the Advisory Committee is to advise the Secretary of Education on the recognition of accrediting agencies and State approval agencies.

Will This Be My Only Opportunity to Submit Written Comments?

Yes, this notice announces the only opportunity you will have to submit written comments. However, a subsequent **Federal Register** notice will announce the meeting and invite individuals and/or groups to submit requests to make oral presentations before the Advisory Committee on the agencies that the Committee will review. That notice, however, does not offer a second opportunity to submit written comments.

What Happens to the Comments That I Submit?

We will review your comments, in response to this notice, as part of our evaluation of the agencies' compliance with Section 496 of the Higher Education Act of 1965, as amended, and the Secretary's Criteria for Recognition of Accrediting Agencies and State Approval Agencies. The Criteria are regulations found in 34 CFR part 602 (for accrediting agencies) and in 34 CFR part 603 (for State approval agencies) and are found at the following site: *http://www.ed.gov/admins/finaid/accred/index.html.*

We will also include your comments with the staff analyses we present to the Advisory Committee at its December 2007 meeting. Therefore, in order for us to give full consideration to your comments, it is important that we receive them by (August 31, 2007. In all instances, your comments about agencies seeking continued recognition and/or an expansion of an agency's scope of recognition must relate to the Criteria for Recognition. In addition, your comments for any agency whose interim report is scheduled for review must relate to the issues raised and the Criteria for Recognition cited in the Secretary's letter that requested the interim report.

What Happens to Comments Received After the Deadline?

We will review any comments received after the deadline. If such comments, upon investigation, reveal that the accrediting agency or State approval agency is not acting in accordance with the Criteria for Recognition, we will take action either before or after the meeting, as appropriate.

What Agencies Will the Advisory Committee Review at the Meeting?

The Secretary of Education recognizes accrediting agencies and State approval agencies for public postsecondary vocational education and nurse education if the Secretary determines that they meet the Criteria for Recognition. Recognition means that the Secretary considers the agency to be a reliable authority as to the quality of education offered by institutions or programs it accredits that are encompassed within the scope of recognition she grants to the agency.

The following agencies will be reviewed during the December 2007 meeting of the Advisory Committee:

Nationally Recognized Accrediting Agencies

Petition for Renewal of Recognition That Includes a Contraction of the Scope of Recognition

1. *American Optometric Association, Accreditation Council on Optometric Education (Current scope of recognition:* The accreditation in the United States of professional optometric degree programs, optometric technician (associate degree) programs, and optometric residency programs and for the preaccreditation categories of Preliminary Approval and Reasonable Assurance for professional optometric

degree programs and Candidacy Pending for optometric residency programs in Veterans' Administration facilities.)

(Requested scope of recognition: The accreditation in the United States of professional optometric degree programs, optometric technician (associate degree) programs, and optometric residency programs and for the preaccreditation categories of Preliminary Approval for professional optometric degree programs and Candidacy Pending for optometric residency programs in Department of Veterans' Affairs facilities.)

Petitions for Renewal of Recognition That Include an Expansion of the Scope of Recognition

1. *National Association of Schools of Art and Design, Commission on Accreditation (Current scope of recognition:* The accreditation throughout the United States of institutions and units within institutions offering degree-granting and non-degree-granting programs in art and design and art and design-related disciplines.)

(Requested scope of recognition: The accreditation throughout the United States of free-standing institutions and units offering art/design and art/design-related programs (both degree- and non-degree-granting) including those offered via distance education.)

2. *National Association of Schools of Dance, Commission on Accreditation (Current scope of recognition:* The accreditation throughout the United States of institutions and units within institutions offering degree-granting and non-degree-granting programs in dance and dance-related disciplines.)

(Requested scope of recognition: The accreditation throughout the United States of free-standing institutions and units offering dance and dance-related programs (both degree- and non-degree-granting) including those offered via distance education.)

3. *National Association of Schools of Music, Commission on Accreditation, Commission on Community/Junior College Accreditation (Current scope of recognition:* The accreditation throughout the United States of institutions and units within institutions offering degree-granting programs in music and music-related disciplines, including community/junior colleges and independent degree-granting and non-degree-granting institutions.)

(Requested scope of recognition: The accreditation throughout the United States of free-standing institutions and units offering music and music-related programs (both degree- and non-degree-granting) including those offered via distance education.)

4. *National Association of Schools of Theatre, Commission on Accreditation (Current scope of recognition:* The accreditation throughout the United States of institutions and units within institutions offering degree-granting and non-degree-granting programs in theatre and theatre-related disciplines.)

(Requested scope of recognition: The accreditation throughout the United States of free-standing institutions and units offering theatre and theatre-related programs (both degree- and non-degree-granting) including those offered via distance education.)

5. *New England Association of Schools and Colleges, Commission on Institutions of Higher Education (Current scope of recognition:* The accreditation and preaccreditation (''Candidacy status'') of institutions of higher education in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont that award bachelor's, master's, and/or doctoral degrees and associate degree-granting institutions in those states that include degrees in liberal arts or general studies among their offerings, including the accreditation of programs offered via distance education within these institutions. This recognition extends to the Board of Trustees of the Association jointly with the Commission for decisions involving preaccreditation, initial accreditation, and adverse actions.)

(Requested scope of recognition: The accreditation and preaccreditation (''Candidacy status'') of institutions of higher education in Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont that award associate's, bachelor's, master's, and/or doctoral degrees, including the accreditation of programs offered via distance education within these institutions. This recognition extends to the Board of Trustees of the Association jointly with the Commission for decisions involving preaccreditation, initial accreditation, and adverse actions.)

6. *North Central Association of Colleges and Schools, The Higher Learning Commission (Current scope of recognition:* The accreditation and preaccreditation (''Candidate for Accreditation'') of degree-granting institutions of higher education in Arizona, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, West Virginia, Wisconsin, and Wyoming, including schools of the Navajo Nation and the accreditation of programs offered via distance education within these institutions. This recognition extends to the Institutional Actions Committee jointly with the Board of Trustees of the Commission for decisions on cases for continued accreditation or reaffirmation, and continued candidacy. This recognition also extends to the Review Committee of the Accreditation Review Council jointly with the Board of Trustees of the Commission for decisions on cases for continued accreditation or candidacy and for initial candidacy or initial accreditation when there is a consensus decision by the Review Committee.)

(Requested scope of recognition: The accreditation and preaccreditation (''Candidate for Accreditation'') of degree-granting institutions of higher education in Arizona, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, West Virginia, Wisconsin, and Wyoming, including the tribal institutions and the accreditation of programs offered via distance education within these institutions. This recognition extends to the Institutional Actions Committee jointly with the Board of Trustees of the Commission for decisions on cases for continued accreditation or reaffirmation, and continued candidacy. This recognition also extends to the Review Committee of the Accreditation Review Council jointly with the Board of Trustees of the Commission for decisions on cases for continued accreditation or candidacy and for initial candidacy or initial accreditation when there is a consensus decision by the Review Committee.)

Petitions for Renewal of Recognition

1. *Accrediting Council for Continuing Education and Training (Current scope of recognition:* The accreditation of institutions of higher education throughout the United States that offer non-collegiate continuing education programs and those that offer occupational associate degree programs and those that offer such programs via distance education.)

(Requested scope of recognition: The accreditation throughout the United States of institutions of higher education that offer continuing education coursework and vocational programs that confer certificates or occupational associate degrees, including those programs offered via distance education.)

2. *American Academy for Liberal Education (Current and requested scope of recognition:* The accreditation and

preaccreditation (''Candidacy for Accreditation'') of institutions of higher education and programs within institutions of higher education throughout the United States that offer liberal arts degree(s) at the baccalaureate level or a documented equivalency.)

3. *Midwifery Education Accreditation Council (Current and requested scope of recognition:* The accreditation and preaccreditation throughout the United States of direct-entry midwifery educational institutions and programs conferring degrees and certificates, including the accreditation of such programs offered via distance education.)

4. *Northwest Commission on Colleges and Universities (Current scope of recognition:* The accreditation and preaccreditation (''Candidacy status'') of postsecondary educational institutions in Alaska, Idaho, Montana, Nevada, Oregon, Utah, and Washington and the accreditation of such programs offered via distance education within these institutions.)

(Requested scope of recognition: The accreditation and preaccreditation (''Candidacy status'') of postsecondary degree-granting educational institutions in Alaska, Idaho, Montana, Nevada, Oregon, Utah, and Washington and the accreditation of such programs offered via distance education within these institutions.)

5. *Western Association of Schools and Colleges, Accrediting Commission for Community and Junior Colleges (Current scope of recognition:* The accreditation and preaccreditation (''Candidate for Accreditation'') of community and junior colleges located in California, Hawaii, the United States territories of Guam and American Samoa, the Republic of Palau, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, and the Republic of the Marshall Islands, and the accreditation of such programs offered via distance education at these colleges.)

(Requested scope of recognition: The accreditation and preaccreditation (''Candidate for Accreditation'') of two-year, Associate degree granting institutions located in California, Hawaii, the United States territories of Guam and American Samoa, the Republic of Palau, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, and the Republic of the Marshall Islands, and the accreditation of such programs offered via distance education at these colleges.)

Interim Reports (An interim report is a follow-up report on an accrediting agency's compliance with specific criteria for recognition.)

1. Accrediting Council for Independent Colleges and Schools.

2. Accreditation Council for Pharmacy Education.

3. American College of Nurse-Midwives, Division of Accreditation

4. The Council on Chiropractic Education, Commission on Accreditation.

5. National Accrediting Commission of Cosmetology Arts and Sciences.

6. Southern Association of Colleges and Schools, Commission on Colleges.

Interim Report With a Request for an Expansion of Scope

1. *Joint Review Committee on Education in Radiologic Technology (Current scope of recognition:* The accreditation of educational programs in radiography, including magnetic resonance, radiation therapy, and medical dosimetry, at the certificate, associate, and baccalaureate levels.)

(Requested scope of recognition: The accreditation of educational programs in radiography, magnetic resonance, radiation therapy, and medical dosimetry, including those offered via distance education, at the certificate, associate, and baccalaureate levels.)

State Agency Recognized for the Approval of Public Postsecondary Vocational Education

Petition for Renewal of Recognition

1. Puerto Rico State Agency for the Approval of Public Postsecondary Vocational, Technical Institutions and Programs

Federal Agency Seeking Degree-Granting Authority

In accordance with the Federal policy governing the granting of academic degrees by Federal agencies (approved by a letter from the Director, Bureau of the Budget, to the Secretary, Health, Education, and Welfare, dated December 23, 1954), the Secretary is required to establish a review committee to advise the Secretary concerning any legislation that may be proposed that would authorize the granting of degrees by a Federal agency. The review committee forwards its recommendation concerning a Federal agency's proposed degree-granting authority to the Secretary, who then forwards the committee's recommendation and the Secretary's recommendation to the Office of Management and Budget for review and transmittal to the Congress. The Secretary uses the Advisory Committee as the review committee required for this purpose. Accordingly, the Advisory Committee will review the following institution at this meeting:

Proposed Master's Degree-Granting Authority

1. United States Naval Test Pilot School, Patuxent River, Maryland (request to award a Master's of Science in Flight Test Engineering Degree.)

Where Can I Inspect Petitions and Third-Party Comments Before and After the Meeting?

All petitions and those third-party comments received in advance of the meeting will be available for public inspection at the U.S. Department of Education, Room 7126, MS 8509, 1990 K Street, NW., Washington, DC 20006, telephone (202) 219–7011 between the hours of 8 a.m. and 3 p.m., Monday through Friday, until November 19, 2007. They will be available again after the December 17–19, 2007 Advisory Committee meeting. An appointment must be made in advance of such inspection.

How May I Obtain 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/legislation/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/index.html.*

Authority: 5 U.S.C. Appendix 2.

Dated: July 26, 2007.

James F. Manning,

Acting Assistant Secretary, Office of Postsecondary Education.

[FR Doc. E7–14912 Filed 7–31–07; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Sunshine Act Meetings

AGENCY: United States Election Assistance Commission.

ACTION: Notice of Public Teleconference Meetings for the Working

Subcommittees of the Technical Guidelines Development Committee.

DATES & TIMES: Tuesday August 6, 2007 at 10:30 a.m. ET. Thursday, August 9, 2007, at 1 a.m. ET. Friday, August 10, 2007 at 11 a.m. ET. Tuesday August 14, 2007 at 10:30 a.m. ET.

STATUS: Audio recordings or working subcommittee teleconferences are available upon conclusion of each meeting at: *http://vote.nist.gov/subcomm_mtgs.htm.* Agendas for each teleconference will be posted approximately one week in advance of each meeting at the above Web site.

SUMMARY: The Technical Guidelines Development Committee (the ''Development Committee'' was established to act in the public interest to assist the Executive Director of the U.S. Election Assistance Commission (EAC) in the development of voluntary voting system guidelines. The Committee held their first plenary meeting on July 9, 2004. At this meeting, the Development Committee agreed to a resolution forming three working groups: (1) Human Factors & Privacy; (2) Security & Transparency; and (3) Core Requirements & Testing to gather and analyze information on relevant issues. These working subcommittees propose resolutions to the TGDC on best practices, specifications and standards. Specifically, NIST staff and Committee members will meet via the above scheduled teleconferences to review and discuss progress on tasks defined in resolutions passed at Development Committee plenary meetings. The resolutions define technical work tasks for NIST that will assist the Committee in developing recommendations for voluntary voting system guidelines. The Committee met in its eighth plenary session on March 22–23, 2007. Documents and transcriptions of Committee proceedings are available at: *http://vote.nist.gov/PublicHearingandMeetings.html.*

PURPOSE: At the direction of the Committee and with technical support from NIST staff, the three working subcommittees gather and analyze information relevant to requirement recommendations fro the next iteration of the voluntary voting system guidelines. The Human Factors and Privacy Subcommittee considers usability, accessibility, and privacy functions of voting systems and the environment of the polling place. The Secretary and Transparency Subcommittee considers the security of computers, computer networks and computer data storage used in voting systems. The Core Requirements and Testing Subcommittee considers precise and testable specifications for voting systems. The Subcommittees' recommendations are then presented to the Development Committee as a whole at public plenary sessions.

SUPPLEMENTARY INFORMATION: The Technical Guidelines Development Committee (the ''Development Committee'') was established pursuant to 42 U.S.C. 15361, to act in the public interest to assist the Executive Director of the Election Assistance Commission in the development of the voluntary voting system guidelines. The information gathered and analyzed by the working subcommittees during their teleconference meetings will be reviewed at future Development Committee plenary meetings.

CONTACT INFORMATION: Allan Eustis, 301–975–5099. If a member of the public would like to submit written comments concerning the Committee's affairs at any time before or after subcommittee teleconference meetings, written comments should be addressed to the contact person indicated above or to *voting@nist.gov.*

Thomas R. Wilkey,

Executive Director, U.S. Election Assistance Commission.

[FR Doc. 07–3760 Filed 7–27–07; 8:45 am]

BILLING CODE 6820–KF–M

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0037; FRL–8141–4]

Pesticide Registration Review; New Dockets Opened for Review and Comment

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has established registration review dockets for the following pesticides: Fenoxycarb (case number 7401) and urea sulfate (case number 7213). With this document, EPA is opening the public comment period for these registration reviews. Registration review is EPA's periodic review of pesticide registrations to ensure that each pesticide continues to satisfy the statutory standard for registration, that is, the pesticide can perform its intended function without unreasonable adverse effects on human health or the environment. Registration review dockets contain information that will assist the public in understanding the types of information and issues that the Agency may consider during the course of registration reviews. Through this program, EPA is ensuring that each pesticide's registration is based on current scientific and other knowledge, including its effects on human health and the environment.

DATES: Comments must be received on or before October 30, 2007.

ADDRESSES: Submit your comments identified by the docket identification (ID) number for the specific pesticide of interest provided in the table in Unit III.A., by one of the following methods:

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

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.,) 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to the docket ID numbers listed in the table in Unit III.A. for the pesticides you are commenting on. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, 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 regulations.gov or e-mail. The regulations.gov website is 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties

and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov web site to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., 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 electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.,) 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: For information about the pesticides included in this document, contact the specific Chemical Review Managers for these pesticides as identified in the table in Unit III.A.

For general questions on the registration review program, contact Kennan Garvey, Special Review and Reregistration Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7106; fax number: (703) 308–8090; e-mail address: *garvey.kennan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, farmworker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also 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 the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Authority

EPA is initiating its reviews of the pesticides identified in this document pursuant to section 3(g) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Procedural Regulations for Registration Review published in the **Federal Register** of August 9, 2006, and effective on October 10, 2006 (71 FR 45719) (FRL–8080–4). You may also access the Procedural Regulations for Registration Review on the Agency's website at *http://www.epa.gov/fedrgstr/EPA-PEST/2006/August/Day-09/p12904.htm*. Section 3(g) of FIFRA provides, among other things, that the registrations of pesticides are to be periodically reviewed. The goal is a review of a pesticide's registration every 15 years. Under FIFRA section 3(a), a pesticide product may be registered or remain registered only if it meets the statutory standard for registration given in FIFRA section 3(c)(5). When used in accordance with widespread and commonly recognized practice, the pesticide product must perform its intended function without unreasonable adverse effects on the environment; that is, without any unreasonable risk to man or the environment, or a human dietary risk from residues that result from the use of a pesticide in or on food.

III. Registration Reviews

A. What Action is the Agency Taking?

As directed by FIFRA section 3(g), EPA is periodically reviewing pesticide registrations to assure that they continue to satisfy the FIFRA standard for registration—that is, they can still be used without unreasonable adverse effects on human health or the environment. The implementing regulations establishing the procedures for registration review appear at 40 CFR part 155. A pesticide's registration review begins when the Agency establishes a docket for the pesticide's registration review case and opens the docket for public review and comment. At present, EPA is opening registration review dockets for the cases identified in the following table.

TABLE—REGISTRATION REVIEW DOCKETS OPENING

Registration Review Case Name and Number	Pesticide Docket ID Number	Chemical Review Manager, Telephone Number, E-mail Address
Fenoxycarb (7401)	EPA–HQ–OPP–2006–0111	Katie Hall (703) 308–0166 hall.katie@epa.gov
Urea Sulfate (1:1) (7213)	EPA–HQ–OPP–2007–0202	Andrea Carone (703) 308–0122 carone.andrea@epa.gov

B. Docket Content

1. *Review dockets*. The registration review dockets contain information that the Agency may consider in the course of the registration review. The Agency may include information from its files including, but not limited to, the following information:

• An overview of the registration review case status.

• A list of current product registrations and registrants.

• **Federal Register** notices regarding any pending registration actions.

• **Federal Register** notices regarding current or pending tolerances.

• Risk assessments.

• Bibliographies concerning current registrations.

• Summaries of incident data.

• Any other pertinent data or information.

Each docket contains a document summarizing what the Agency currently knows about the pesticide case and a preliminary work plan for anticipated data and assessment needs. Additional documents provide more detailed information. During this public comment period, the Agency is asking that interested persons identify any additional information they believe the Agency should consider during the registration reviews of these pesticides. The Agency identifies in each docket the areas where public comment is specifically requested, though comment in any area is welcome.

2. *Other related information*. More information on these cases, including the active ingredients for each case, may be located in the registration review schedule on the Agency's website at *http://www.epa.gov/oppsrrd1/registration_review/schedule.htm*. Information on the Agency's registration review program and its implementing regulation may be seen at *http://www.epa.gov/oppsrrd1/registration_review*.

3. *Information submission requirements*. Anyone may submit data or information in response to this document. To be considered during a pesticide's registration review, the submitted data or information must meet the following requirements:

• To ensure that EPA will consider data or information submitted, interested persons must submit the data or information during the comment period. The Agency may, at its discretion, consider data or information submitted at a later date.

• The data or information submitted must be presented in a legible and useable form. For example, an English translation must accompany any material that is not in English and a written transcript must accompany any information submitted as an audiographic or videographic record. Written material may be submitted in paper or electronic form.

• Submitters must clearly identify the source of any submitted data or information.

• Submitters may request the Agency to reconsider data or information that the Agency rejected in a previous review. However, submitters must explain why they believe the Agency should reconsider the data or information in the pesticide's registration review.

• As provided in 40 CFR 155.58, the registration review docket for each pesticide case will remain publicly accessible through the duration of the registration review process; that is, until all actions required in the final decision on the registration review case have been completed.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: July 18, 2007.

Debra Edwards,

Director, Office of Pesticide Programs.

[FR Doc. E7–14762 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0596; FRL–8141–5]

Notice of Filing of a Pesticide Petition for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before August 31, 2007.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–0596 and the pesticide petition number (PP), by one of the following methods:

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

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007–0596. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, 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 regulations.gov or e-mail. The regulations.gov website is 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT:

Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305–6928; e-mail address: *bryceland.andrew@epa.gov*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production (NAICS 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 this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What Action is the Agency Taking?

EPA is printing notice of the filing of a pesticide petition received under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petition described in this notice contains data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the pesticide petition. Additional data may be needed before EPA rules on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition included in this notice, prepared by the petitioner, is included in a docket EPA has created for this rulemaking. The docket for this petition is available on-line at *http://www.regulations.gov*.

New Exemption from Tolerance

PP 6F7141. Aberdeen Road Company d/b/a Hercon Environmental, P.O. Box 453, Emigsville, PA 17318–0435, proposes to establish an exemption from the requirement of a tolerance for residues of the biochemical mating disruptant insecticide (Z)-7,8-epoxy-2-methyloctadecane in or on food commodities, unintentional spray or drift from application when treating trees and shrubs along with pastures, as well as unintentional spray and drift to non-target vegetation including native and ornamental species, and food and feed crops. Because this petition is a request for an exemption from the requirement of a tolerance without numerical limitations, no analytical method is required. Contact: Andrew

Bryceland, (703) 305–6928, *bryceland.andrew@epa.gov*.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 25, 2007.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E7–14901 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2006–0936; FRL–8138–1]

Notice of Filing of Pesticide Petitions for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of pesticide petitions proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before August 31, 2007.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest, by one of the following methods:

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

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to the assigned docket ID number and the pesticide petition number of interest. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, 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 regulations.gov or e-mail. The regulations.gov website is 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., 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. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: The person listed at the end of the pesticide petition summary of interest.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

• Crop production (NAICS 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 this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the pesticide petition summary of interest.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a

Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Docket ID Numbers

When submitting comments, please use the docket ID number and the pesticide petition number of interest, as shown in the table.

PP Number	Docket ID Number
PP 7E7218	EPA–HQ–OPP–2007–0495
PP 6F7024	EPA–HQ–OPP–2007–0539
PP 6F7119	EPA–HQ–OPP–2007–0475
PP 7F7222	EPA–HQ–OPP–2007–0504

III. What Action is the Agency Taking?

EPA is printing notice of the filing of pesticide petitions received under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petitions described in this notice contain data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. Additional data may be needed before EPA rules on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions included in this notice, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov*.

New Tolerances

1. *PP 7E7218*. (EPA–HQ–OPP–2007–0495). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W, Princeton, NJ 08540–6635, proposes to establish a tolerance for residues of the insecticide methoxyfenozide in or on food commodities avocado, black-sapote, canistel, mamey sapote, mango, papaya, sapodilla, and star apple at 0.6 parts per million (ppm); guava, feijoa, jaboticaba, wax jambu, starfruit, passion fruit, and acerola at 0.4 ppm; green onion, fresh chive leaves, fresh Chinese chive leaves, Elegans Hosta, Fritillaria leaves, kurrat, Lady's leek, leek, wild leek, Beltsville bunching onion, fresh onion, macrostem onion, tree onion tops, Welsh onion tops, and fresh shallot leaves at 5.0 ppm. Adequate enforcement methods are available for determination of methoxyfenozide residues in plant commodities based on the Rohm and Haas Company Technical Report No. 34–98–87, ''Tolerance Enforcement Method for Parent RH–2485 in Pome Fruit''. The available Analytical Enforcement Methodology was previously reviewed in the **Federal Register** of September 20, 2002 (67 FR 59193). Contact: Susan Stanton, telephone number: (703) 305–5218; e-mail address: *stanton.susan@epa.gov*.

2. *PP 6F7024*. (EPA–HQ–OPP–2007–0539). Bayer CropScience, P.O. Box 12014, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709, proposes to establish a tolerance for residues of the fungicide trifloxystrobin in or on food commodities grass, forage at 10.0 ppm and grass, hay at 14.0 ppm. A practical analytical methodology for detecting and measuring levels of trifloxystrobin in or on raw agricultural commodities has been submitted. The limit of detection (LOD) for each analyte of this method is 0.08 ng injected, and the limit of quantitation (LOQ) is 0.02 ppm. The method is based on crop specific cleanup procedures and determination by gas chromatography with nitrogen-phosphorus detection. Contact: Janet Whitehurst, telephone number: (703) 305–6129; e-mail address: *whitehurst.janet@epa.gov*.

3. *PP 6F7119*. (EPA–HQ–OPP–2007–0475). Bayer CropScience, P.O. Box 12014, 2 T.W. Alexander Dr., Research Triangle Park, NC 27709, proposes to establish a tolerance for residues of the insecticide spirotetramat, cis–3–(2,5–dimethylphenyl)–8–methoxy–2–oxo–1–azaspiro[4.5]dec–3–en–4–yl ethyl carbonate and its metabolite cis–3–(2,5–dimethylphenyl)–4–hydroxy–8–methoxy- 1–azaspiro[4.5]dec–3–en–2–one], calculated as spirotetramat equivalents, in or on food commodities vegetable, tuberous and corm, subgroup 1C at 1.0 ppm; potato, granules/flakes at 2.5 ppm; onions, dry bulb, subgroup 3A at 0.3 ppm; vegetables, leafy, except *Brassica*, group 4 at 5.0 ppm; *Brassica*, head and stem, subgroup 5A at 3.0 ppm; *Brassica*, leafy greens, subgroup 5B at 16.0 ppm; vegetables, fruiting, group 8 at 1.0 ppm; tomato, dried pomace at 2.5 ppm; vegetable, cucurbit, group 9 at 0.2 ppm; fruit, citrus, group 10 at 0.5 ppm; citrus, oil at 4.0 ppm; fruit, pome, group 11 at 0.5 ppm; fruit, stone, group 12 at 2.0 ppm; nut, tree, group 14 at 0.5 ppm; almond, hulls at 9.0 ppm; grape at 1.0 ppm; grape, raisin at 2.5 ppm; hop at 10.0 ppm; strawberry at 0.5 ppm; cattle, goat, hog, sheep and horse, meat at 0.01 ppm; cattle, goat, hog, sheep and horse, fat at 0.01 ppm; cattle, goat, hog, sheep and horse, liver at 0.01 ppm; cattle, goat, hog, sheep and horse, meat byproducts, except liver at 0.02 ppm. The residues of spirotetramat and its metabolites were quantified by high pressure liquid chromatography/triple stage quadrupole mass spectrometry (LC-MS/MS) using the stable isotopically labeled analytes as internal standards. The individual analyte residues were converted to spirotetramat molar equivalents and summed to give total spirotetramat residues. The limit of quantification (LOQ) for each analyte was 0.01 ppm for all commodities, except citrus (0.05 ppm) and hops (0.1 ppm). Contact: Rita Kumar, telephone number: (703) 308–8291; e-mail address: *kumar.rita@epa.gov*.

4. *PP 7F7222*. Dow AgroSciences, 9330 Zionsville Road, Indianapolis, IN, 46268, proposes to establish a tolerance for residues of the herbicide isoxaben in or on food commodities grape/grape, juice/grape, raisin at 0.01 ppm; nut, tree, group 14 and pistachio at 0.03 ppm; almond, hulls at 0.35 ppm; and to request a waiver for the requirement of a tolerance for isoxaben in or on the raw agricultural commodity cattle, meat byproducts; meat and milk. There is a practical method (liquid chromatography with positive ion atmospheric pressure chemical ionization tandem mass spectrometry (LC-MS/MS)) for detection of isoxaben residues. The limit of detection (LOD) and limit of quantitation (LOQ) are 0.003 µg/g and 0.01 µg/g, respectively and are suitable for detecting and measuring levels of isoxaben in or on food and allows monitoring of food with residues at or above the level set for these tolerances. The method has an independent laboratory validation. Contact: Kathryn Montague, telephone number: (703) 305–1243; e-mail address: *montague.kathryn@epa.gov*.

List of Subjects

Environmental protection, Agricultural commodities, Feed

additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 16, 2007.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. E7–14678 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2006–0936; FRL–8140–4]

Notice of Filing of Pesticide Petitions for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of pesticide petitions proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before August 31, 2007.

ADDRESSES: Submit your comments, identified by docket identification (ID) number and the pesticide petition number (PP) of interest, by one of the following methods:

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

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to the assigned docket ID number and the pesticide petition number of interest. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, 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 regulations.gov or e-mail. The regulations.gov website is 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., 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. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: The person listed at the end of the pesticide petition summary of interest.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

• Crop production (NAICS 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 this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the pesticide petition summary of interest.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at

your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Docket ID Numbers

When submitting comments, please use the docket ID number and the pesticide petition number of interest, as shown in the table.

PP Number	Docket ID Number
PP 6E7125	EPA–HQ–OPP–2007–0471
PP 6E7126	EPA–HQ–OPP–2007–0471
PP 6E7127	EPA–HQ–OPP–2007–0471
PP 6E7128	EPA–HQ–OPP–2007–0471
PP 7E7227	EPA–HQ–OPP–2007–0535

III. What Action is the Agency Taking?

EPA is printing notice of the filing of pesticide petitions received under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petitions described in this notice contain data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. Additional data may be needed before EPA rules on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions included in this notice, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov*.

New Tolerances

1. *PPs 6E7125, 6E7126, 6E7127* and *6E7128*. (EPA–HQ–OPP–2007–0471). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W., Princeton, NJ 08540–6635, proposes to establish a tolerance for residues of the insecticide bifenthrin ((2-methyl [1,1'-biphenyl]-3-yl) methyl-3-(2-chloro-3,3,3,-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate) in or on food commodities pistachio at 0.05 parts per million (ppm); mayhaw at 1.4 ppm; vegetables, fruiting, group 8 at 0.5 ppm; peanut at 0.05 ppm; soybean at 0.2 ppm; vegetable, root, except sugar beet and garden beet, subgroup 1B at 0.07 ppm; beet, garden, roots at 0.45 ppm; and beet, garden, tops at 15 ppm. There is a practical analytical method for detecting and measuring levels of bifenthrin in or on food with a limit of detection that allows monitoring of food with residues at or above the levels set in these tolerances gas chromatography with electron capture detection (GC/ECD). Contact: Shaja R. Brothers, telephone number: (703) 308–3194; e-mail address: *brothers.shaja@epa.gov*.

2. *PP 7E7227*. (EPA–HQ–OPP–2007–0535). Interregional Research Project Number 4 (IR–4), 500 College Road East, Suite 201 W., Princeton, NJ 08540–6635, proposes to establish a tolerance for residues of the insecticide bifenthrin ((2-methyl [1,1'-biphenyl]-3-yl) methyl-3-(2-chloro-3,3,3,-trifluoro-1-propenyl)-2,2-dimethylcyclopropanecarboxylate) in or on food commodities bushberry subgroup 13-B and juneberry; lingonberry; salal; aronia berry; blueberry, lowbush; buffalo currant; chilean guava; European barberry; highbush cranberry; honeysuckle; jostaberry; native currant; sea buckthorn at 2.0 ppm; and leafy petioles subgroup 4-B at 3.0 ppm. There is a practical analytical method for detecting and measuring levels of bifenthrin in or on food with a limit of detection that allows monitoring of food with residues at or above the levels set in these tolerances GC/ECD. Contact: Shaja R. Brothers, telephone number: (703) 308–3194; e-mail address: *brothers.shaja@epa.gov*.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 18, 2007.

Lois Rossi,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. E7–14698 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0346; FRL–8129–8]

Notice of Filing of Pesticide Petitions for Residues of Pesticide Chemicals in or on Various Commodities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of pesticide petitions proposing the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities.

DATES: Comments must be received on or before August 31, 2007.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–0346 and the pesticide petition number (PP) of interest, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to EPA–HQ–OPP–2007–0346 and the pesticide petition number of interest. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, 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 regulations.gov or e-mail. The regulations.gov website is 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., 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. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: The person listed at the end of the pesticide petition summary of interest.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

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

- Crop production (NAICS 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 this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed at the end of the pesticide petition summary of interest.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Docket ID Numbers

When submitting comments, please use the docket ID number and the pesticide petition number of interest, as shown in the table.

PP Number	Docket ID Number
PP 6F7142	EPA–HQ–OPP–2007–0346
PP 6F7143	EPA–HQ–OPP–2007–0346

III. What Action is the Agency Taking?

EPA is printing notice of the filing of pesticide petitions received under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in 40 CFR part 174 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petitions described in this notice contain data or information regarding the elements set forth in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the pesticide petitions. Additional data may be needed before EPA rules on these pesticide petitions.

Pursuant to 40 CFR 180.7(f), a summary of each of the petitions included in this notice, prepared by the petitioner, is included in a docket EPA has created for each rulemaking. The docket for each of the petitions is available on-line at *http://www.regulations.gov*.

Amendment to Existing Temporary Tolerance Exemptions

1. *PP 6F7142*. Monsanto Company, 800 North Lindbergh Blvd., St. Louis, MO 63167, proposes to amend the temporary tolerance(s) in 40 CFR 174.502 to establish a permanent exemption from the requirement of a tolerance for *Bacillus thuringiensis* Cry 1A.105 protein in all plants when used as plant – incorporated protectant in all food commodities Contact: Susanne Cerrelli, telephone number: (703) 308-8077; e-mail address: *cerrelli.susanne@epa.gov*.

2. *PP 6F7143*. Monsanto Company, 800 North Lindbergh Blvd., St. Louis, MO 63167, proposes to amend the tolerance(s) in 40 CFR 174.503 to establish a permanent exemption from the requirement of a tolerance for *Bacillus thuringiensis* Cry2Ab2 protein in all plants when used as plant – incorporated protectant in all food

commodities. Contact: Susanne Cerrelli, telephone number: (703) 308-8077; e-mail address: *cerrelli.susanne@epa.gov*.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 16, 2007.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E7–14682 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0547; FRL–8140–3]

Experimental Use Permit; Receipt of Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of an application 71693–EUP–E from Interregional Research Project Number 4 (IR–4), on behalf of Arizona Cotton Research and Protection Council, requesting an experimental use permit (EUP) for *Aspergillus flavus* AF36. The Agency has determined that the application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments must be received on or before August 31, 2007.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–0547, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007–0547. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, 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 regulations.gov or e-mail. The regulations.gov website is 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Shanaz Bacchus, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8097; e-mail address: *bacchus.shanaz@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to food and pesticide manufacturers, growers, or others who are interested in agricultural biotechnology or may be required to conduct testing of pesticidal substances under the Federal Food, Drug, and Cosmetic Act (FFDCA) or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also 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 the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a

Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

IR–4, Rutgers University, 500 College Road East, Suite 201W, Princeton, NJ 08540, on behalf of Arizona Cotton Research and Protection Council, 3721 East Wier Avenue, Phoenix, AZ 85040–2933, is requesting an EUP to apply *Aspergillus flavus* AF36 on corn in certain counties in Arizona and Texas. This microbial pesticide, *Aspergillus flavus* AF36, is conditionally registered for use on cotton in Arizona, California, and Texas. The registrant has requested a temporary exemption from a tolerance for the proposed EUP on corn in a non-crop destruct program.

III. What Action is the Agency Taking?

Following the review of the IR–4 application and any comments and data received in response to this notice, EPA will decide whether to issue or deny the EUP request for this EUP program, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

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

The Agency's authority for taking this action is under FIFRA section 5.

List of Subjects

Environmental protection, Experimental use permits.

Dated: July 13, 2007.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E7–14769 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–515; FRL–8139–4]

Experimental Use Permit; Receipt of Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of an application 67979–EUP–6 from Syngenta Seeds, Inc. requesting an experimental use permit (EUP) for the plant-incorporated protectants MIR162 *Bacillus thuringiensis* Vip3Aa20 protein and the genetic material (plasmid vector pNOV1300) necessary for its production in corn, Bt11 *Bacillus thuringiensis* Cry1Ab protein and the genetic material (plasmid vector pZO1502) necessary for its production in corn, and MIR604 *Bacillus thuringiensis* mCry3A protein and the genetic material (plasmid vector pZM26) necessary for its production in corn. The Agency has determined that the application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments must be received on or before August 31, 2007.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–515, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007–515. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, 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 regulations.gov or e-mail. The regulations.gov website is 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Alan Reynolds, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number:

(703) 605–0515; e-mail address: *reynolds.alan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to those interested in agricultural biotechnology and those persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA) or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also 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 the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

In the **Federal Register** of June 20, 2007 (72 FR 34009) (FRL–8133–5), EPA announced the issuance of EUP 67979–EUP–6 to Syngenta Seeds, Inc., 3054 Cornwallis Road, P.O. Box 12257, Research Triangle Park, NC 27709. Syngenta has requested to further extend this EUP to October 31, 2009 and to amend it by allowing an additional 4,844 acres to be planted in 2008 and 4,856 acres to be planted in 2009. For 2008, the proposed acreage includes 659 acres of MIR162, 465 acres of Bt11, 465 acres of MIR604, 575 acres of Bt11 x MIR162, 575 acres of Bt11 x MIR604, 132 acres of MIR162 x MIR604, 575 acres of Bt11 x MIR162 x MIR604, and 1,398 acres of non plant-incorporated protectant border areas (4,844 total acres). For 2009, the proposed acreage includes 660 acres of MIR162, 466 acres of Bt11, 466 acres of MIR604, 576 acres of Bt11 x MIR162, 576 acres of Bt11 x MIR604, 135 acres of MIR162 x MIR604, 576 acres of Bt11 x MIR162 x MIR604, and 1,401 acres of non plant-incorporated protectant border areas (4,856 total acres). MIR162 contains the lepidopteran protecting *Bacillus thuringiensis* Vip3Aa20 protein and the genetic material (plasmid vector pNOV1300) necessary for its production. Bt11 contains the lepidopteran protecting *Bacillus thuringiensis* Cry1Ab protein and the genetic material (plasmid vector pZO1502) necessary for its production. MIR604 contains the coleopteran protecting *Bacillus thuringiensis* mCry3A protein and the genetic material (plasmid vector pZM26) necessary for its production.

Proposed shipment/use dates are November 1, 2007 through October 31, 2009. Five trial protocols have been proposed, including the following:

- Breeding and observation.
- Efficacy evaluation.
- Agronomic observation.
- Inbred and hybrid seed production.
- Regulatory studies.

States involved include: Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Virginia, Washington, and Wisconsin.

III. What Action is the Agency Taking?

Following the review of the Syngenta Seeds, Inc. application and any comments and data received in response to this notice, EPA will decide whether to issue or deny the EUP request for this EUP program, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

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

The Agency's authority for taking this action is under FIFRA section 5.

List of Subjects

Environmental protection, Experimental use permits.

Dated: July 18, 2007.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E7–14683 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–516; FRL–8139–8]

Experimental Use Permit; Receipt of Application

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of an application 67979–EUP–7 from Syngenta Seeds, Inc. requesting an experimental use permit (EUP) for the plant-incorporated protectants COT102 *Bacillus thuringiensis* Vip3Aa19 protein and the genetic material (plasmid vector pCOT1) necessary for its production in cotton and COT67B *Bacillus thuringiensis* Cry1Ab protein and the genetic material (plasmid vector pNOV4641) necessary for its production in cotton. The Agency has determined that the application may be of regional and national significance. Therefore, in accordance with 40 CFR 172.11(a), the Agency is soliciting comments on this application.

DATES: Comments must be received on or before August 31, 2007.

ADDRESSES: Submit your comments, identified by docket identification (ID)

number EPA–HQ–OPP–2007–516, by one of the following methods:

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

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007–516. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, 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 regulations.gov or e-mail. The regulations.gov website is 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Alan Reynolds, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 605–0515; e-mail address: *reynolds.alan@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to those interested in agricultural biotechnology and those persons who are or may be required to conduct testing of chemical substances under the Federal Food, Drug, and Cosmetic Act (FFDCA) or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Since other entities may also 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 the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments*. When submitting comments, remember to:

i. Identify the document by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background

In the **Federal Register** of June 20, 2007 (72 FR 34009) (FRL–8133–5), EPA announced the issuance of EUP 67979–EUP–7 to Syngenta Seeds, Inc., 3054 Cornwallis Road, P.O. Box 12257, Research Triangle Park, NC 27709. Syngenta has requested to further extend this EUP to March 1, 2009 and to amend it by allowing an additional 2,225.3 acres to be planted. The proposed acreage includes 67.5 acres of COT102, 67.5 acres of COT67B, 324.3 acres of COT102 x COT67B, and 1,766 acres of non plant-incorporated protectant border areas (2,225.3 total acres). COT102 contains the lepidopteran protecting *Bacillus thuringiensis* Vip3Aa19 protein and the genetic material (plasmid vector pCOT1) necessary for its production. COT67B contains the lepidopteran protecting *Bacillus thuringiensis* Cry1Ab protein and the genetic material (plasmid vector p NOV4641) necessary for its production.

Proposed shipment/use dates are March 1, 2008 through March 1, 2009. Five trial protocols have been proposed, including the following:

- Breeding and observation nursery.
- Insect efficacy.
- Agronomic evaluation.
- Seed production.
- Production characterization and performance.

States involved include: Alabama, Arizona, Arkansas, California, Florida, Georgia, Hawaii, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia.

III. What Action is the Agency Taking?

Following the review of the Syngenta Seeds, Inc. application and any comments and data received in response to this notice, EPA will decide whether to issue or deny the EUP request for this EUP program, and if issued, the conditions under which it is to be conducted. Any issuance of an EUP will be announced in the **Federal Register**.

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

The Agency's authority for taking this action is under FIFRA section 5.

List of Subjects

Environmental protection, Experimental use permits.

Dated: July 18, 2007.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. E7–14684 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0632; FRL–8142–7]

Explanatory Document to the September 2005 Draft North American Free Trade Agreement Standard Operating Procedure for Determining Pesticide Maximum Residue Limits; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is seeking public comment on the document entitled *Statistical Basis of the NAFTA Method for Calculating Pesticide Maximum Residue Limits from Field Trial Data* available at *http://www.pmra-arla.gc.ca/english/pdf/nafta/docs/nafta_mrls-e.pdf*. Although Canada's Management Regulatory Agency (PMRA) is also accepting comments, EPA and PMRA will be jointly responding to comments submitted to either agency. The document was prepared by the NAFTA MRL Harmonization Working Group (a group comprised of United States and Canadian governments, created to develop a coordinated pesticides regulatory framework among North American Free Trade Agreement (NAFTA) partners). The document provides additional technical and explanatory material for a standard operating procedure (SOP) previously released by Canada's PMRA for public comment in September 2005. The document currently open for public comment supports the September 2005 draft SOP that is intended for use by residue chemistry reviewers in the United States and Canada to ensure that the same or similar residue chemistry data sets will result in the same or similar recommendation for maximum residue limit (MRL) levels for pesticide residues on food and feed commodities by each agency. The goal for this method is to minimize trade barriers of pesticide treated commodities between the United States and Canada.

DATES: Comments must be received on or before August 31, 2007.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2007–0632, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2007–0632. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, 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 regulations.gov or e-mail. The regulations.gov website is 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 regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available in regulations.gov. To access the electronic docket, go to *http://www.regulations.gov*, select ''Advanced Search,'' then ''Docket Search.'' Insert the docket ID number where indicated and select the ''Submit'' button. Follow the instructions on the regulations.gov website to view the docket index or access available documents. Although listed in the index, some information is not publicly available, e.g., 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 in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Philip Villanueva, Health Effects Division (7509P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8665; e-mail address: *villanueva.philip@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are engaged in pesticide and other agricultural chemical manufacturing. Potentially affected entities may include, but are not limited to:

• Pesticide and other agricultural chemical manufacturing (NAICS code 325320) e.g., individuals or entities engaged in activities related to the registration of a pesticide product.

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

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. What Action is the Agency Taking?

EPA is seeking public comment on the document entitled *Statistical Basis of the NAFTA Method for Calculating Pesticide Maximum Residue Limits from Field Trial Data*. The document, prepared by the NAFTA MRL Harmonization Working Group, serves as an added explanatory document to Canada's PMRA and EPA's OPP September 2005 draft document entitled *Guidance for Setting Pesticide Maximum Residue Limits Based on Field Trial Data* which is available at *http://www.pmra-arla.gc.ca/english/pdf/pro/pro2005-04-e.pdf*. The SOP includes procedures for using the companion ''NAFTA MRL calculator,'' the Microsoft Excel® spreadsheet that incorporates the decision algorithm and automates the statistical calculations as outlined by the SOP. The NAFTA MRL calculator can be downloaded from the PMRA website (*http://www.pmra-arla.gc.ca/english/pdf/mrl/method_calc.xls*). The September 2005 draft SOP is intended for use by residue chemistry reviewers in the United States and Canada to ensure that the same or similar data sets will result in the same or similar recommendation for MRL levels in each regulatory program. A 60–day comment period was opened for this by PMRA in September 2005 and is now closed. The comments received by PMRA were shared with EPA.

Upon the September 2005 release of the draft SOP, PMRA and EPA announced that an additional explanatory document would be published at a future date. This document is now available on the PMRA website (see *http://www.pmra-arla.gc.ca/english/pdf/nafta/docs/nafta_mrls-e.pdf*) and EPA is seeking comment on the statistical (and non-statistical) basis of the selected procedures and algorithms. More detailed statistical, simulation, and other support for the methods described in the September 2005 draft SOP are provided in this follow-on document which is intended to provide a permanent and enduring record of the rationale, reasoning, historical context, and technical/statistical support for the MRL estimation methodologies described and discussed in the September 2005 SOP.

Once the public comment period closes for this document, the statistical support document, the SOP and the associated MRL calculator will be modified as appropriate to address the comments from this current public comment period and the previous PMRA comment period for the draft SOP, and then reissued. We anticipate these documents will be released in final form in December 2007.

List of Subjects

Environmental protection, Administrative practice and procedure, Agricultural commodities, North American Free Trade Agreement (NAFTA), Pesticides and pests.

Dated: July 26, 2007.

Debra Edwards,

Director, Office of Pesticide Programs.

[FR Doc. E7–14889 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2007–0218; FRL–8130–2]

Pesticides; Science Policy; Notice of Withdrawal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA announces the withdrawal of the revised version of the pesticide science policy document ''Standard Operating Procedures for Incorporating Screening-Level Estimates of Drinking Water Exposure into Aggregate Risk Assessments'' *http://www.epa.gov/oppfead1/trac/science/screeningsop.pdf*. This science policy document was developed during the implementation of the new safety standard in section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended by the Food Quality Protection Act of 1996 (FQPA). EPA's assessment of exposure to pesticide residues in drinking water no longer involves performing screening level assessments as described in this policy paper. Accordingly, EPA is withdrawing this science policy document. Instead, the Agency now routinely develops estimates of exposure to pesticides in drinking water using the more advanced

methods that EPA has described in other science policy papers.

FOR FURTHER INFORMATION CONTACT: David J. Miller, Health Effects Division, Office of Pesticide Programs (7509P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 305–5352; fax number: (703) 305–5147; e-mail address: *miller.davidj@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. This action, however, may be of interest to persons who produce or formulate pesticides or who register pesticide products. Since other entities may also 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 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 a docket for this action under docket identification (ID) number EPA–HQ–OPP–2007–0218. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility 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*.

II. Background

On August 3, 1996, FQPA was signed into law. The FQPA significantly amended the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and FFDCA. Among other changes, FQPA established a stringent health-based standard (''a reasonable certainty of no harm'') for pesticide residues in foods to assure protection from unacceptable pesticide exposure and strengthened health protections for infants and children from pesticide risks.

During 1998 and 1999, EPA and the U.S. Department of Agriculture (USDA) established a subcommittee of the National Advisory Council For Environmental Policy and Technology (NACEPT), the Tolerance Reassessment Advisory Committee (TRAC), to address FFDCA issues and implementation. TRAC comprised more than 50 representatives of affected user, producer, consumer, public health, environmental, states, and other interested groups. The TRAC met from May 27, 1998, through April 29, 1999.

In order to continue the constructive discussions about FFDCA, in 2000 EPA and USDA established, under the auspices of NACEPT, the Committee to Advise on Reassessment and Transition (CARAT). The CARAT provided a forum for a broad spectrum of stakeholders to consult with and advise the Agency and the Secretary of Agriculture on pest and pesticide management transition issues related to the tolerance reassessment process. The CARAT was intended to further the valuable work initiated by earlier advisory committees toward the use of sound science and greater transparency in regulatory decision-making, increased stakeholder participation, and reasonable transition strategies that reduce risks without jeopardizing American agriculture and farm communities.

As a result of the 1998 and 1999 TRAC process, EPA decided that the implementation process and related policies would benefit from providing notice and comment on major science policy issues. The TRAC identified nine science policy areas it believed were key to implementation of tolerance reassessment. EPA agreed to provide one or more documents for comment on each of the nine issues by announcing their availability in the **Federal Register**. In a notice published in the **Federal Register** of October 29, 1998 (63 FR 58038) (FRL–6041–5), EPA described its intended approach. Since then, EPA has issued a series of draft and revised documents concerning the nine science policy issues. Publication of this notice is intended to update the public on the status of two of the FQPA science policy papers.

III. Summary: Why the Policy Is No Longer Needed

As a result of the new procedures for estimating concentrations of pesticide residues in drinking water, this notice announces the withdrawal of ''Standard Operating Procedures for Incorporating Screening-Level Estimates of Drinking Water Exposure into Aggregate Risk Assessments'' *http://www.epa.gov/fedrgstr/EPA-PEST/2000/October/Day-11/p25934.htm*.

In assessing the risks of pesticide exposure, scientists frequently use mathematical models to predict pesticide concentrations in food, water, residential, and occupational environments. This notice pertains to how the Agency determines pesticide risk from drinking water. (For more information on the models the Agency uses to estimate concentrations of pesticides in drinking water see *http://www.epa.gov/oppefed1/models/water/models4.htm*). This approach provides a more realistic estimate of exposure through drinking water since actual drinking water consumption data and reported body weight from the Combined Survey of Food Intake by Individuals (CSFII) are used, rather than the standard assumptions used in the Drinking Water Level of Comparison approach.

This action is also responsive to the recommendations made by EPA's Office of Inspector General during its review of EPA's implementation of FQPA. In its report ''Opportunities to Improve Data Quality and Children's Health through the FQPA'' issued January 10, 2006 *http://www.epa.gov/oigearth/reports/2006/20060110-2006-P-00009.pdf*, the Office of Inspector General recommended that EPA should update the status of its Science Policy issue papers. This **Federal Register** notice updates the public on the status of one of the Science Policy papers which has been rendered obsolete by the availability of more robust data and models.

List of Subjects

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

Dated: July 20, 2007.

James B. Gulliford,

Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.

[FR Doc. E7–14685 Filed 7–31–07; 8:45 am]

BILLING CODE 6560–50–S

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

July 23, 2007.

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 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 October 1, 2007. 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 PRA comments to Jasmeet K. Seehra, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–3123, or via fax at (202) 395–5167, or via e-mail to *Jasmeet_K._Seehra@omb.eop.gov*, and to Jerry Cowden, Federal Communications Commission (FCC), Room 1–B135, 445 12th Street, SW., Washington, DC 20554 or via e-mail to: *PRA@fcc.gov*. If you would like to obtain or view a copy of this information collection after the 60 day comment period, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), send an e-mail to *PRA@fcc.gov* or contact Jerry Cowden at (202) 418–0447.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0806.

Title: Universal Service—Schools and Libraries Universal Service Program.

Form No.: FCC Forms 470 and 471.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit, state, local or tribal government.

Number of Respondents: 60,000 respondents.

Estimated Time per Response: Range of 10 minutes to 4.5 hours.

Frequency of Response: Recordkeeping, Third Party Disclosure, and Annual Reporting.

Obligation to Respond: Required to obtain or retain benefits.

Total Annual Burden: 470,166 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: This collection will be submitted as an extension after this 60 day comment period to Office of Management and Budget (OMB) in order to obtain the full three year clearance. The Commission adopted rules providing support for all telecommunications services, Internet access, and internal connections for all eligible schools and libraries. To participate in the program, schools and libraries must submit a description of the services desired to the Universal Service Administrative Company, the Administrator of the Universal Service Fund, via FCC Form 470. FCC Form 471 is submitted by schools and libraries that have ordered telecommunications services, internet access, and internal connections. The data is used by the Administrator to determine eligibility. Additionally, the Administrator collects an FCC registration number from each school and library.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E7–14548 Filed 7–31–07; 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

July 23, 2007.

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 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: Persons wishing to comment on this information collection should submit comments by October 1, 2007. 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 PRA comments to Jasmeet K. Seehra, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–3123, or via fax at (202) 395–5167, or via e-mail to *Jasmeet_K._Seehra@omb.eop.gov*, and to Jerry Cowden, Federal Communications Commission (FCC), Room 1–B135, 445 12th Street, SW., Washington, DC 20554 or via e-mail to: *PRA@fcc.gov*. If you would like to obtain or view a copy of this information collection after the 60 day comment period, you may do so by visiting the FCC PRA web page at: *http://www.fcc.gov/omd/pra.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s) send an e-mail to *PRA@fcc.gov* or contact Jerry Cowden at (202) 418–0447.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–1060.

Title: Wireless E911 Coordination Initiative Letter.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: State, Local or Tribal Government.

Number of Respondents: 50 respondents; 50 responses.

Estimated Time Per Response: 0.75 hour.

Frequency of Response: On occasion reporting requirement.

Obligation to Respond: Voluntary.

Total Annual Burden: 37.5 hours.

Annual Cost Burden: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: This collection will be submitted as an extension (no change in reporting, recordkeeping or third party disclosure requirements) after this 60-day comment period to the Office of Management and Budget (OMB) in order to obtain the full three-year clearance. This voluntary collection was implemented in a letter that was sent, following the FCC's Second E911 Coordination Initiative, to pertinent State officials who had been appointed to oversee their States' programs to implement emergency (E911) Phase II service. This collection is necessary so that the Commission can correct inaccuracies and have up-to-date information to ensure the integrity of the Commission's database of Public Safety Answering Points (PSAPs) throughout the nation. The accurate compiling and maintaining of this database is an inherent part of the Commission's effort to achieve the expeditious implementation of E911 service across the nation and to ensure homeland security.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E7–14549 Filed 7–31–07; 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

July 24, 2007.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and other Federal agencies to take this opportunity to (PRA) of 1995 (PRA), Public Law No. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. Subject to the PRA, no person shall be subject to any penalty for failing to comply with a collection of information 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 PRA comments should be submitted on or before October 1, 2007. 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: You may submit all PRA comments by e-mail or U.S. post mail. To submit your comments by e-mail, send them to *PRA@fcc.gov.* To submit your comments by U.S. mail, mark them to the attention of Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554 or via Internet at *Cathy.Williams@fcc.gov,* and to Jasmeet Seehra, Office of Management and Budget (OMB), Room 10236 NEOB, 725 17th Street, NW., Washington, DC 20503 or via Internet at *Jasmeet _K._Seehra@omb.eop.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection(s), contact Cathy Williams at (202) 418–2918 or send an e-mail to *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–0844.

Title: Carriage of the Transmission of Digital Television Broadcast Stations, R&O and FNPRM.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 10,100.

Estimated Time per Response: 30 minutes to 40 hours.

Frequency of Response: On occasion reporting requirement; Third party disclosure requirement.

Obligation to Respond: Required to obtain or retain benefits.

Total Annual Burden: 81,296 hours.

Total Annual Cost: $2,359,681.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: There is no need for confidentiality required for this information collection.

Needs and Uses: The FCC adopted a Report and Order (R&O) on January 23, 2001 and Further Notice of Proposed Rulemaking (FNPRM). The R&O modified 47 CFR 76.64(f) to provide that stations that return their analog spectrum and broadcast only in digital format, as well as new digital-only stations, are entitled to elect must-carry or retransmission consent status following the procedures previously applicable to new television stations. Furthermore, the R&O established a framework for voluntary retransmission consent agreements between DTV station licensees and multi-channel video programming distributors and modified several sections of the rules accordingly. The FNPRM sought additional comments on carriage requirements relating to digital television stations generally, as proposed in the initial NPRM.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E7–14776 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collection Requirement Submitted to OMB for Review and Approval

July 24, 2007.

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, 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 Paperwork Reduction Act (PRA) comments should be submitted on or before August 31, 2007. 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 contacts listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Jasmeet K. Seehra, Office of Management and Budget (OMB), Room 10236 NEOB, Washington, DC 20503, (202) 395–3123, or via fax at (202) 395–5167 or via Internet at *Jasmeet_K._Seehra@omb.eop.gov* and to Cathy Williams, Federal Communications Commission, Room 1–C823, 445 12th Street, SW., Washington, DC 20554.

If you would like to obtain or view a copy of this information collection, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra.*

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 *PRA@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1100.

Title: 47 CFR Section 15.117, Broadcast Receivers.

Form Number: Not applicable.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 10,000.

Estimated Time per Response: 0.25 hours.

Frequency of Response: On time reporting requirement.

Total Annual Burden: 25,000 hours.

Total Annual Cost: None.

Nature of Response: Mandatory.

Confidentiality: No need for confidentiality required.

Privacy Impact Assessment: No impact(s).

Needs and Uses: The Commission adopted on April 25, 2007, a Second Report and Order, In the Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MB Docket 03–15, FCC 07–69. The DTV Act amended 47 U.S.C. 309(j)(14)(A) to establish a final date of February 17, 2009 set by Congress for the transition from analog to digital television service by full power television broadcasters. In a continuing effort to inform consumers of this impending deadline, the Commission will require sellers at the point-of-sale to alert consumers about analog-only televisions. Analog-only television equipment will not be able to receive an over-the-air broadcast signal unless they get a digital TV or a box to convert the digital signals to analog or subscribe to pay TV service after February 17, 2009. To further protect consumers, the Commission established 47 CFR 15.117(i) which prohibits the manufacture or import of television receivers that do not contain a digital tuner after March 1, 2007. Because the rule does not prohibit sale of analog-only television equipment from inventory, the Commission decided it is necessary to require retailers and other sellers who choose to continue selling analog-only television equipment to display a sign or label disclosing the limitations of analog-only equipment after February 17, 2009. Therefore, the Commission adopted on April 25, 2007, a Second Report and Order, In the Matter of Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, MB Docket 03–15, FCC 07–69. This rulemaking established 47 CFR 15.117(k) which became effective on May 25, 2007. 47 CFR 15.117(k) states that any person that displays or offers for sale or rent television receiving equipment that is not capable of receiving, decoding and tuning digital signals that the seller must place conspicuously and in close proximity to the television broadcast receivers a sign containing, in clear and conspicuous print, the Consumer Alert Disclosure. The text should be in a size of type large enough to be clear, conspicuous and readily legible, consistent with the dimensions of the equipment and the label. The information may be printed on a transparent material and affixed to the screen, if the receiver includes a display, in a manner that is removable by the consumer and does not obscure the picture, or, if the receiver does not include a display, in a prominent location on the device, such as on the top or front of the device, when displayed for sale, or the information in this format may be displayed separately immediately adjacent to each television broadcast receiver offered for sale and clearly associated with the analog-only model to which it pertains. This requirement would also apply to persons whom offer for sale or television broadcast receivers via direct mail, catalog, or electronic means. The Consumer Alert Disclosure must contain the following text: This television receiver has only an analog broadcast tuner and will require a converter box after February 17, 2009, to receive over-the-air broadcasts with an antenna because of the Nation's transition to digital broadcasting. Analog-only TVs should continue to work as before with cable and satellite TV services, gaming consoles, VCRs, DVD players, and similar products. For more information, call the Federal Communications Commission at 1–888–225–5322 (TTY: 1–888–835–5322) or visit the Commission's digital television Web site at: *http://www.dtv.gov.*''

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E7–14777 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Submitted for Review to the Office of Management and Budget

July 24, 2007.

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 Act (PRA) comments should be submitted on or before October 1, 2007. If you anticipate that you will be submitting PRA comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the FCC contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Jasmeet K. Seehra, Office of Management and Budget, Room 10236 NEOB, Washington, DC 20503, (202) 395–3123, or via fax at 202–395–5167 or

via internet at *Jasmeet_K._Seehra@omb.eop.gov* and to *Judith-B.Herman@fcc.gov,* Federal Communications Commission, Room 1–B441, 445 12th Street, SW., DC 20554 or an email to *PRA@fcc.gov.* If you would like to obtain or view a copy of this information collection after the 60 day comment period, you may do so by visiting the FCC PRA Web page at: *http://www.fcc.gov/omd/pra.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Judith B. Herman at 202–418–0214 or via the Internet at *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number: 3060–1008.

Title: Sections 27.50(c)(8), Power and Antenna Height Limits; and 27.602, Guard Band Manager Agreements.

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local and tribal government.

Number of Respondents: 518 respondents; 518 responses.

Estimated Time Per Response: .50–6 hours.

Frequency of Response: On occasion reporting requirement and recordkeeping requirement.

Obligation to Respond: Mandatory.

Total Annual Burden: 631 hours.

Total Annual Cost: N/A.

Privacy Act Impact Assessment: N/A.

Nature and Extent of Confidentiality: There is no need for confidentiality.

Needs and Uses: The Commission will submit this revision to the OMB after this 60 day comment period to obtain the full three-year clearance from them. This information collection is being revised to combine it with another collection (OMB Control No. 3060–1027). Guard Band Managers' agreements requirements (3060–1027) are now included in the same proceedings with power and antenna height limits (3060–1008). Upon OMB approval, the Commission will discontinue 3060–1027.

The information gathered in this collection will be used to support the development of new services in the lower 700 MHz band while still protecting television operations that continue to occupy the band throughout the transition to digital television. Further, Guard Band Managers are required to enter into written agreements with other licensees who plan on using their licensed spectrum by others, subject to certain conditions outlined in the rules. They must retain these records for at least two years after the date such agreements expire. Such records need to be kept current and made available upon request for inspection by the Commission or its representatives.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E7–14870 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket Nos. 96–262, 94–1, 99–249, 96–45; DA 07–2968]

Reconsideration of CALLS Order

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document dismisses as moot the only remaining petition for reconsideration of the *CALLS Order*, 65 FR 38684, June 21, 2000.

DATES: Effective July 3, 2007.

ADDRESSES: This is a summary of the Commission's document in CC Docket Nos. 96–262, 94–1, 99–249, 96–45; DA 07–2968, released July 3, 2007. The full text of this document is available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St. SW., Room CY–A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488–5300, facsimile (202) 488–5563, TTY (202) 488–5562, e-mail *fcc@bcpiweb.com.* These documents may also be viewed on the Commission's Web site at *http://www.fcc.gov/cgb/ecfs.* People with Disabilities: 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).

FOR FURTHER INFORMATION CONTACT: Victoria Goldberg, Wireline Competition Bureau, Pricing Policy Division, (202) 418–1520, *victoria.goldberg@fcc.gov.*

SUPPLEMENTARY INFORMATION: After the Commission released the *CALLS Order* on May 31, 2000, 65 FR 38684, June 21, 2000, four parties filed petitions for reconsideration of that order. These petitions were filed by the Association for Local Telecommunications Services (ALTS) and Focal Communications Corp., One Call Communications, Inc., Pathfinder Communications, Inc., and the Texas Office of Public Utility Counsel. The Commission addressed the petition filed by One Call Communications, Inc. in a subsequent order, 68 FR 43327, July 22, 2003, and the Texas Office of Public Utility Counsel withdrew its petition on July 27, 2000.

Since these petitions were filed, there has been a court of appeals decision and additional Commission orders addressing the rules adopted in the *CALLS Order*, including a decision by the United States Court of Appeals for the Fifth Circuit, an order on remand, 68 FR 50077, August 20, 2003, and an order on reconsideration, 68 FR 43327, July 22, 2003. In addition, the reform proposal adopted in the *CALLS Order* has reached the end of its five-year term and the Commission is developing a record on comprehensive intercarrier compensation reform in CC Docket No. 01–92 and on regulation of special access services in WC Docket No. 05–25. Issues raised in the pending petitions for reconsideration may therefore have become moot or outdated. As a result, it was not clear whether issues arising out of the *CALLS Order*, if any, remained in dispute.

On March 5, 2007, the Wireline Competition Bureau (the Bureau) released a public notice inviting interested parties to update the record pertaining to petitions for reconsideration filed with respect to the rules the Commission adopted in the *CALLS Order*, 72 FR 13283, March 21, 2007. Specifically, the Bureau requested that parties that filed petitions for reconsideration of the *CALLS Order* file a supplemental notice indicating those issues that they still wish to be reconsidered. On April 5, 2007, COMPTEL and Broadwing Communications, LLC, the successors to ALTS and Focal respectively, withdrew their petition for reconsideration. Thus, the only remaining petition for reconsideration is that filed by Pathfinder. No other notices were received in response to the request to update the record pertaining to petitions for reconsideration. Due to the passage of time, the fact that the *CALLS Order* has reached the end of its term and the Commission is considering comprehensive reform of the access charge regime, and the fact that no other notices to pursue the petition were received, the Commission hereby dismisses the remaining petition as moot.

Authority: 47 U.S.C. 151–154, 201–209, 218–222, 254, 403.

Federal Communications Commission.

Kirk S. Burgee,

Chief of Staff, Wireline Competition Bureau.

[FR Doc. E7–14594 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA No. 07–2092; MB Docket No. 05–136; RM–11163, RM–11296]

Radio Broadcasting Services; Arapaho, Edmond, Oklahoma City, Ponca City, Stillwater, The Village, and Woodward, OK

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The *Report and Order* dismissed the Petition for Rule Making filed by Charles Crawford, proposing the allotment of Channel 251C3 at Arapaho, Oklahoma, as the community's first local service. Additionally, the *Report and Order* granted a counterproposal filed by Citadel Broadcasting Company, requesting the substitution of Channel 251C1 for Channel 250A at Edmond, Oklahoma, the reallotment of Channel 251C1 from Edmond to The Village, Oklahoma, as its first local service, and the modification of the Station WWLS–FM license accordingly. The Media Bureau's Consolidated Database System (CDBS) will reflect this change. *See* **SUPPLEMENTARY INFORMATION.**

DATES: Petitions for Reconsideration may be filed through August 31, 2007.

ADDRESSES: Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Helen McLean, 202–418–2738.

SUPPLEMENTARY INFORMATION: The *Report and Order,* MB Docket No. 05–136, adopted March 16, 2007, and released March 18, 2007, also modified the Media Bureau's Consolidated Data Base System (CDBS) to reflect: (1) The substitution of Channel 266A for Channel 251A at Stillwater, Oklahoma and modification of the Station KVRO license accordingly; (2) substitution of Channel 264C3 for Channel 265A at Ponca City, Oklahoma and modification of the Station KPNC license; (3) substitution of Channel 263C1 for Channel 263C at Oklahoma City, Oklahoma and modification of the Station KATT–FM license. On July 2, 2007, the effective date, the Media Bureau's Consolidated Data Base System will reflect for the following stations in Oklahoma: (1) Channel 251C1 at The Village as the reserved assignment for Station WWLS–FM in lieu of Channel 250A at Edmond; (2) Channel 266A at Stillwater as the reserved assignment for Station KVRO in lieu of Channel 251A; (3) Channel 264C3 at Ponca City as the reserved assignment for Station KPNC in lieu of Channel 265A; and (4) Channel 263C1 at Oklahoma City as the reserved assignment for Station KATT–FM in lieu of Channel 263C.

The complete text of this decision is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 12th 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 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. E7–14871 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[EB Docket No. 07–143; FCC 07–125]

Pendleton C. Waugh, Charles M. Austin, and Jay R. Bishop, Preferred Communication Systems, Inc., Preferred Acquisitions, Inc.—Order To Show Cause and Notice of Opportunity for Hearing

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document commences a hearing proceeding by directing Preferred Communication Systems, Inc., Preferred Acquisitions, Inc., and their principals, to show cause why the wireless licenses held by these entities should not be revoked, and by designating those licenses for an evidentiary hearing on issues relating to the qualifications of Preferred Communication Systems, Inc., Preferred Acquisitions, Inc., and their principals, to be and remain Commission licensees.

DATES: Petitions by persons desiring to participate as a party in the hearing, pursuant to 47 CFR 1.223, may be filed no later August 31, 2007. See **SUPPLEMENTARY INFORMATION** section for dates that named parties should file appearances.

ADDRESSES: Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554, and copies thereof shall be served on the Chief, Investigations and Hearings Division, Enforcement Bureau, Room 4–C330.

FOR FURTHER INFORMATION CONTACT: Gary A. Oshinsky and Anjali K. Singh, Investigations and Hearings Division, Enforcement Bureau at (202) 418–1420; and Jennifer A. Lewis, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau at (202) 418–1420.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order to Show Cause and Notice of Opportunity for Hearing, FCC 07–125, released July 20, 2007. The full text of the Order to Show Cause and Notice of Opportunity for Hearing (Order) is available for inspection and copying from 8 a.m. to 4:30 p.m. Monday through Thursday or from 8 a.m. to 11:30 a.m. on Friday at the FCC Reference Information Center, Room CY–A257, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 202–488–5300, facsimile 202–488–5563, or you may contact BCPI at its Web site: *http://www.BCPIWEB.com.* When ordering documents from BCPI, please provide the appropriate FCC document number, FCC 07–125. The Order is also available on the Internet at the Commission's Web site through its Electronic Document Management System (EDOCS): *http://hraunfoss.fcc.gov/edocs—public/SilverStream/Pages/edocs.html.* Alternative formats are available to persons with disabilities (Braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), (202) 418–0432 (tty).

Summary of the Order

In the Order, the Commission commences a hearing proceeding to determine whether Pendleton C. Waugh (''Waugh''), Jay R. Bishop (''Bishop''), Charles M. Austin (''Austin''), and the entities they own and control, Preferred Communication Systems, Inc. (''PCSI''), and Preferred Acquisitions, Inc. (''PAI''), its wholly-owned subsidiary (collectively, ''Preferred''), licensee of certain wireless stations, are qualified to be and remain Commission licensees. Among other issues, the hearing proceeding will consider whether these parties: (1) Failed to disclose a real-party-in-interest and engaged in unauthorized transfers of control of

Commission licenses; (2) misrepresented material facts to the Commission; (3) lacked candor in their dealings with the Commission; (4) failed to disclose the involvement of convicted felons in ownership and control of the licenses; (5) failed to file required forms and information and respond fully to Enforcement Bureau letters of inquiry; and (6) discontinued operation of certain licenses without prior Commission approval. Based on whether violations of the Commission's rules are found, the hearing proceeding will also determine whether forfeitures are to be issued and/or whether the subject licenses must be revoked.

PCSI is the licensee of the following Specialized Mobile Radio (''SMR''), site-by-site stations, which are subject to the hearing: WPDU206 (Santurce, PR); WPDU210 (Santurce, PR); WPDU218 (Santurce, PR); WPDU222 (Santurce, PR); WPDU263 (Santurce, PR); WPDU266 (Santurce, PR); WPDU271 (Santurce, PR); WPDU275 (Santurce, PR); WPDU279 (Santurce, PR); WPDU287 (Santurce, PR); WPEF461 (Santurce, PR); WPEU434 (Santurce, PR); WPEX345 (Santurce, PR); WPEY418 (Santurce, PR); WPEY419 (Santurce, PR); WPEY421 (Santurce, PR); WPEY422 (Santurce, PR); WPEY423 (Santurce, PR); WPEY424 (Santurce, PR); WPEY425 (Santurce, PR); WPEY427 (Santurce, PR); WPEY429 (Santurce, PR); WPEY430 (Santurce, PR); WPEY431 (Santurce, PR); WPEY432 (Santurce, PR); WPEY445 (Santurce, PR); WPEY446 (San Juan, PR); WPEY447 (Santurce, PR); WPEY448 (Santurce, PR); WPEY450 (Santurce, PR); WPEY451 (Santurce, PR); WPEZ750 (Santurce, PR); WPFA265 (San Juan, PR); WPFA266 (Santurce, PR); WPFA268 (Santurce, PR); WPFA269 (Santurce, PR); WPFA270 (Santurce, PR); WPFA273 (Santurce, PR); WPFA278 (Santurce, PR); WPFA280 (Santurce, PR); WPFD607 (Santurce, PR); WPFD808 (Santurce, PR); WPFD809 (Santurce, PR); WPFD810 (Santurce, PR); WPFD811 (Santurce, PR); WPFD812 (Santurce, PR); WPFE472 (Santurce, PR); WPFE934 (Cayey, PR); WPFG589 (no ULS address; coordinates 18–16–08.8 N, 066–04–00.5 W); WPFG599 (Caguas, PR); WPFM597 (Cayey, PR); WPFM600 (San Juan, PR); WPFN354 (Aguada, PR); WPFN600 (Anasco, PR); WPFN636 (Anasco, PR); WPFN725 (Anasco, PR); WPFQ293 (Charlotte Amalie, VI); WPFS846 (Saint Croix, VI); WPFS856 (Saint Croix, VI); WPFT334 (Saint Croix, VI); WPFT335 (Saint Croix, VI); WPFT335 (Aguada, PR); WPFT356 (Aguada, PR); WPFT357 (Saint Croix, VI); WPFT369 (Charlotte Amalie, VI); WPFT416 (Charlotte Amalie, VI); WPFT417 (Saint Croix, VI); WPFT968 (Charlotte Amalie, VI); WPFV692 (Charlotte Amalie, VI); WPFV884 (Mayaguez, PR); WPFX997 (Mayaguez, PR); WPFZ805 (Mayaguez, PR); WPFZ806 (Mayaguez, PR); WPFZ807 (Mayaguez, PR); WPFZ808 (Mayaguez, PR); WPGD852 (Mayaguez, PR); and WPGD855 (Mayaguez, PR).

Preferred Acquisitions, Inc., is the licensee of the following SMR Economic Area (''EA'') stations, which are subject to the hearing: WPRQ941 (BEA013—Washington-Baltimore, DC–MD–VA–WV–PA); WPRQ942 (BEA015—Richmond-Petersburg, VA); WPRQ943 (BEA016—Staunton, VA–WV); WPRQ944 (BEA017—Roanoke, VA–NC–WV); WPRQ945 (BEA048—Charleston, WV–KY–OH); WPRQ946 (BEA164—Sacramento-Yolo, CA); WPRQ947 (BEA165—Redding, CA–OR); WPRQ948 (BEA174—Puerto Rico and the U.S. Virgin Islands); WPRQ949 (BEA016—Staunton, VA–WV); WPRQ950 (BEA017—Roanoke, VA–NC–WV); WPRQ951 (BEA048—Charleston, WV–KY–OH); WPRQ952 (BEA162—Fresno, CA); WPRQ953 (BEA165—Redding, CA–OR); WPRQ954 (BEA174—Puerto Rico and the U.S. Virgin Islands); WPRQ955 (BEA016—Staunton, VA–WV); WPRQ956 (BEA017—Roanoke, VA–NC–WV); WPRQ957 (BEA048—Charleston, WV–KY–OH); WPRQ958 (BEA162—Fresno, CA); WPRQ959 (BEA163—San Francisco-Oakland-San Jose, CA); WPRQ960 (BEA164—Sacramento-Yolo, CA); WPRQ961 (BEA165—Redding, CA–OR); WPRQ962 (BEA174—Puerto Rico and the U.S. Virgin Islands); WPRQ963 (BEA013—Washington-Baltimore, DC–MD–VA–WV–PA); WPRQ964 (BEA015—Richmond-Petersburg, VA); WPRQ965 (BEA016—Staunton, VA–WV); WPRQ966 (BEA017—Roanoke, VA–NC–WV); WPRQ967 (BEA174—Puerto Rico and the U.S. Virgin Islands); WPRQ968 (BEA013—Washington-Baltimore, DC–MD–VA–WV–PA); WPRQ969 (BEA015—Richmond-Petersburg, VA); WPRQ970 (BEA016—Staunton, VA–WV); WPRQ971 (BEA017—Roanoke, VA–NC–WV); WPRQ972 (BEA174—Puerto Rico and the U.S. Virgin Islands); WPRQ973 (BEA013—Washington-Baltimore, DC–MD–VA–WV–PA); WPRQ974 (BEA015—Richmond-Petersburg, VA); WPRQ975 (BEA016—Staunton, VA–WV); WPRQ976 (BEA017—Roanoke, VA–NC–WV); WPRQ977 (BEA162—Fresno, CA); and WPRQ978 (BEA164—Sacramento-Yolo, CA).

The Commission received information that alleged, among other things, that PCSI had transferred control over its licenses to Waugh, a convicted felon, and that Waugh was in control of PCSI's and PAI's licenses. The Commission directed two letters of inquiry to PCSI. During the course of the investigation, the Commission discovered that PCSI, PAI, Austin, Waugh, and Bishop may have engaged in additional violations of the Commission's rules. For example, it appeared that PCSI may have also transferred ownership interests to Bishop, another convicted felon. Additionally, it appeared that PCSI and PAI may have misrepresented information concerning their ownership status and PAI's operational readiness. Further, it appeared that PCSI failed to respond fully to the Commission's second letter of inquiry and that PAI failed to update the Commission concerning material changes in its operational readiness. The Commission determined that Waugh's and Bishop's felony convictions and potential ownership interest in and control over PCSI and PAI raise a substantial and material question of fact as to the qualifications of PCSI, PAI, and their principals to be and to remain Commission licensees, and may warrant revocation of PCSI's and PAI's licenses. Thus, pursuant to sections 312(a) and 312(c) of the Communications Act of 1934, as amended, 47 U.S.C. 312(a) and (c) and section 1.91 of the Commission's rules, 47 CFR 1.91, the Order directs PCSI, PAI, Waugh, Austin, and Bishop to show cause why the PCSI's and PAI's licenses should not be revoked, based upon the following issues: (1) Whether Pendleton C. Waugh was an undisclosed real party in interest in filings before the Commission, in willful and/or repeated violation of section 1.2112 of the Commission's Rules, 47 CFR 1.2112; (2) whether Preferred Communication Systems, Inc. (''PCSI''), engaged in an unauthorized transfer of control, in willful and/or repeated violation of section 310(d) of the Communications Act of 1934, as amended (the ''Act''), 47 U.S.C. 310(d); (3) whether PCSI and/or Preferred Acquisitions Inc. (''PAI'') misrepresented material facts to, and/or lacked candor in its dealings, with the Commission, in willful and/or repeated violation of section 1.17 of the Commission's Rules, 47 CFR 1.17; (4) the effect of Pendleton C. Waugh's and Jay R. Bishop's felony convictions on their qualifications and those of PCSI and PAI to be and remain Commission licensees; (5) whether PCSI and/or PAI failed to maintain the continuing accuracy of filings pending before the Commission in willful and/or repeated violation of section 1.65 of the

Commission's Rules, 47 CFR 1.65; (6) whether PCSI failed to respond fully and completely to official requests for information from the Commission, in willful and/or repeated violation of section 308(b) of the Act, 47 U.S.C. 308(b); (7) whether, in fact, PCSI discontinued operation of its licenses for more than one year, pursuant to section 90.157 of the Commission's Rules, 47 CFR 90.157; (8) in light of the evidence adduced pursuant to the foregoing issues, whether the captioned individuals and/or entities are qualified to be and remain Commission licensees; and (9) in light of the evidence adduced pursuant to the foregoing issue, whether the referenced authorizations should be revoked.

The hearing will also consider whether, in light of the findings on the above issues, forfeitures shall be issued in an amount not to exceed $5,280,000.

Copies of the Order to Show Cause and Notice of Opportunity for Hearing are being sent by certified mail, return receipt requested, to Austin, PCSI, PAI, their counsel of record, Charles J. Ryan, III, Waugh, and Bishop. To avail themselves of the opportunity to be heard, Preferred Communication Systems, Inc., Preferred Acquisitions, Inc., Pendleton C. Waugh, Charles M. Austin, and Jay R. Bishop, pursuant to section 1.91(c) and section 1.221 of the Commission's rules, 47 CFR 1.91(c) and 47 CFR 1.221, in person or by their attorneys, must within 30 days of the Commission's release of this Order, file in triplicate a written notice of appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. E7–14876 Filed 7–31–07; 8:45 am]

BILLING CODE 6712–01–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. Chapter 409 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:

Oriental Air Transport (Chicago) Inc.; dba A.T. International, 1329 W. Irving Park Rd., Suite 207, Bensenville, IL 60106. *Officer:* Steven C. Hugh, President (Qualifying Individual).

Ocean Freight Forwarder—Ocean Transportation Intermediary Applicants:

Marietha International Forwarding, LLC., 3501 North Causeway Blvd., Suite 324, Metairie, LA 70002. *Officer:* Marietha Barrett, Owner (Qualifying Individual).

AIT International, LLC., 11835 South Ridgewood Circle, Houston, TX 77071. *Officers:* Owen Anderson, President, (Qualifying Individual) Nichelle Jones, CEO.

Pacific Systems, Inc., 235 Vaness Drive, McDonough, GA 30253. *Officers:* Remigius Idaewor, CEO, (Qualifying Individual) Edith Idaewor, President.

Dated: July 27, 2007.

Bryant L. VanBrakle,

Secretary.

[FR Doc. E7–14917 Filed 7–31–07; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Reissuances

Notice is hereby given that the following Ocean Transportation Intermediary licenses have been reissued by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR Part 515.

License No.	Name/address	Date reissued
019355N	ABAD Air, Inc., 2685 Northwest 105th Avenue, Miami, FL 33178	June 28, 2007.
018197N	Cargozone, Inc., 1490 Beachey Drive, Carson, CA 90746	June 20, 2007.
003139F	GAC International Transport, Inc., 320 Cantor Avenue, Linden, NJ 07036	February 4, 2005.
003989F	Time Definite Services, Inc., 2551 Allan Drive, Elk Grove Village, IL 60007	June 22, 2007.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E7–14911 Filed 7–31–07; 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. Chapter 409) and the regulations of the Commission pertaining to the licensing of Ocean Transportation Intermediaries, 46 CFR part 515, effective on the corresponding date shown below:

License Number: 020139NF.
Name: Adora International Services, LLC dba; Adora Shipping Company.
Address: 16809 FM 1485, Conroe, TX 77306.
Date Revoked: July 6, 2007.
Reason: Failed to maintain valid bonds.

License Number: 016783N.
Name: C & A Shipping, Inc.
Address: 100 Menlo Park, Ste. 326, Edison, NJ 08827.
Date Revoked: July 12, 2007.
Reason: Failed to maintain a valid bond.

License Number: 017378N.
Name: E.M.W. Freight Forwarding Corp.
Address: 10300 Northwest 19th Street, Ste. 104, Miami, FL 33172.
Date Revoked: July 15, 2007.
Reason: Failed to maintain a valid bond.

License Number: 018772NF.
Name: Global Cargo Expediters Inc.
Address: 1 Cross Island Plaza, Ste. 220, Rosedale, NY 11422.
Date Revoked: June 20, 2007.
Reason: Failed to maintain valid bonds.

License Number: 017141N.
Name: I.C.S. Customs Service, Inc.
Address: 812 Thorndale, Bensenville, IL 60106.

Date Revoked: July 8, 2007.
Reason: Failed to maintain a valid bond.

License Number: 019352N.
Name: Internet Shipping Lines, Inc.
Address: 175–18, 147th Ave., Jamaica, NY 11434.
Date Revoked: July 1, 2007.
Reason: Failed to maintain a valid bond.

License Number: 018289N.
Name: JUC Ocean Express Inc.
Address: 3380 Flair Drive, Ste. 234, El Monte, CA 91731.
Date Revoked: July 4, 2007.
Reason: Failed to maintain a valid bond.

License Number: 004318F.
Name: Lax Freight Services, Inc.
Address: 460 South Hindry Ave., Ste. A, Inglewood, CA 90301.
Date Revoked: July 23, 2007.
Reason: Failed to maintain a valid bond.

License Number: 019445N.
Name: Logistics Container Line, LLC.
Address: 45 Rason Road, Inwood, NY 11096.
Date Revoked: July 23, 2007.
Reason: Surrendered license voluntarily.

License Number: 017385F.
Name: New Horizons International Group Inco.
Address: 6480 New Hampshire Ave., Takoma Park, MD 20912.
Date Revoked: July 1, 2007.
Reason: Failed to maintain a valid bond.

License Number: 019822F.
Name: R.T.I. Shipping Inc.
Address: 191–03 Jamaica Ave., Hollis, NY 11423.
Date Revoked: July 7, 2007.
Reason: Failed to maintain a valid bond.

License Number: 018311N.
Name: S.F. Systems, Inc.
Address: 12335 Denholm Drive, #C, El Monte, CA 91732.
Date Revoked: July 1, 2007.
Reason: Failed to maintain a valid bond.

License Number: 019643NF.
Name: Sigma Logistics, Inc.
Address: 1100 S. EL Molino Ave., Pasadena, CA 91106.
Date Revoked: July 20, 2007.
Reason: Failed to maintain valid bonds.

License Number: 015605N.
Name: Solid Trans Inc.
Address: 1401 S. Santa Fe Ave., Compton, CA 90221.
Date Revoked: July 1, 2007.
Reason: Failed to maintain a valid bond.

License Number: 019040NF.
Name: Tisco Logistics, Inc.
Address: 347 South Stimson Ave., City of Industry, CA 91744.
Date Revoked: July 16, 2007.
Reason: Surrendered license voluntarily.

License Number: 018462NF.
Name: Trans Pacific Logistics Incorporated.
Address: 4701 W. Imperial Hwy, Ste., 202, Hawthorne, CA 90304.
Date Revoked: June 28, 2007.
Reason: Failed to maintain valid bonds.

License Number: 004027N.
Name: U.S. Airfreight, Inc.
Address: 2624 Northwest 112th Ave., Doral, FL 33172.
Date Revoked: July 15, 2007.
Reason: Failed to maintain a valid bond.

Sandra L. Kusumoto,

Director, Bureau of Certification and Licensing.

[FR Doc. E7–14909 Filed 7–31–07; 8:45 am]
BILLING CODE 6730–01–P

FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Proposed Collection; Comment Request; Extension

AGENCY: Federal Trade Commission.

ACTION: Notice.

SUMMARY: The information collection requirements described below will be submitted to the Office of Management and Budget (''OMB'') for review, as required by the Paperwork Reduction Act. The Federal Trade Commission (''FTC'') is seeking public comments on its proposal to extend through November 30, 2010 the current OMB clearance for information collection requirements contained in its Prescreen Opt-Out Disclosure Rule. That clearance expires on November 30, 2007.

DATES: Comments must be filed by October 1, 2007.

ADDRESSES: Interested parties are invited to submit written comments. Comments should refer to ''Prescreen Opt-Out Disclosure Rule: FTC File No. P075417'' 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, with two complete copies, to the following address: Federal Trade Commission, Room H 135 (Annex J), 600 Pennsylvania Ave., NW., Washington, DC 20580. Because paper mail in the Washington area and at the Commission is subject to delay, please consider submitting your comments in electronic form, as prescribed below. However, if the comment contains any material for which confidential treatment is requested, it must be filed in paper 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.

Comments filed in electronic form should be submitted by using the following weblink: *https://secure.commentworks.com/ftc-PrescreenOpt-Out* (and following the instructions on the Web-based form). To ensure that the Commission considers an electronic comment, you must file it on the Web-based form at the weblink: *https://secure.commentworks.com/ftc-PrescreenOpt-Out*. If this notice appears at *www.regulations.gov*, you may also file an electronic comment through that Web site. The Commission will consider all comments that regulations.gov forwards to it. 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 will be considered by the Commission and will be available to the public on the FTC website, to the extent practicable, at *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 website. 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*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be addressed to Katherine Armstrong, Attorney, Division of Privacy and Identity Protction, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–3250.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act (''PRA''), 44 U.S.C. 3501–3520, federal agencies must obtain approval from OMB for each collection of information they conduct

[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).

or sponsor. ''Collection of information'' means agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). As required by section 3506(c)(2)(A) of the PRA, the FTC is providing this opportunity for public comment before requesting that OMB extend the existing paperwork clearance for the information collection requirements contained in the Commission's Prescreen Opt-Out Disclosure Rule (''Prescreen Rule'' or ''Rule''), 16 CFR Part 642.

The FTC invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before October 1, 2007.

Section 615(d) of the Fair Credit Reporting Act (''FCRA''), 15 U.S.C. 1681m(d)(1), requires any person who uses a consumer report in order to make an unsolicited firm offer of credit or insurance to the consumer to provide with each written solicitation a clear and conspicuous statement that:

> (A) information contained in the consumer's consumer report was used in connection with the transaction; (B) the consumer received the offer of credit or insurance because the consumer satisfied the criteria for credit worthiness or insurability under which the consumer was selected for the offer; (C) if applicable, the credit or insurance may not be extended if, after the consumer responds to the offer, the consumer does not meet the criteria used to select the consumer for the offer or any applicable criteria bearing on credit worthiness or insurability or does not furnish any required collateral; (D) the consumer has a right to prohibit information contained in the consumer's file with any consumer reporting agency from being used in connection with any credit or insurance transaction that is not initiated by the consumer; and (E) the consumer may exercise the right referred to in subparagraph (D) by notifying a notification system established under section 604(e) [of the FCRA].

Section 615(d)(1) of the FCRA, 15 U.S.C. 1681m(d)(1).

The Fair and Accurate Credit Transactions Act of 2003, Pub. L. 108–159, 117 Stat. 1952 (''FACT Act'') was signed into law on December 4, 2003. Section 213(a) of the FACT Act amended FCRA Section 615(d) to require that the statement mandated by Section 615(d) ''be presented in such format and in such type size and manner as to be simple and easy to understand, as established by the Commission, by rule, in consultation with the Federal banking agencies and the National Credit Union Administration.'' The Commission published the Final Rule in the **Federal Register** on January 31, 2005 and the Rule became effective August 1, 2005.

The Rule adopted a ''layered'' notice approach that requires a short, simple, and easy-to-understand statement of consumers' opt-out rights on the first page of the prescreened solicitation, along with a longer statement containing additional details elsewhere in the solicitation. Specifically, the Rule required that a short notice be placed on the front side of the first page of the principal promotional document in the solicitation, or, if provided electronically, on the same page and in close proximity to the principal marketing message. The Rule specifies that the type size be larger than the type size of the principal text on the same page, but in no event smaller than 12-point type, or if provided by electronic means, then reasonable steps shall be taken to ensure that the type size is larger than the type size of the principal text on the same page. The Rule further provides that the long notice, that appears elsewhere in the solicitation, be in a type size that is no smaller than the type size of the principal text on the same page, but in no event smaller than 8-point type. The long notice shall begin with a heading in capital letters and underlined, and identifying the long notice as the ''PRESCREEN & OPT-OUT NOTICE'' in a type style that is distinct from the principal type style used on the same page and be set apart from other text on the page. The Rule also includes model notices in English and Spanish.

Burden statement:

Estimated total annual hours burden: 1,000 to 1,500 hours (rounded to the nearest thousand).

Based on public comments received in response to the Commission's 2004 Notice of Proposed Rulemaking,[2] when issuing the final Rule, the Commission estimated that the annual burden to industry would be between 43,600 and 45,600 hours.[3] This estimate was comprised of 500 to 750 companies each spending 8 hours to revise an existing solicitation plus 100 companies each needing an additional 396 hours to revise multiple solicitations ((500 companies x 8 burden hours + 39,600 burden hours = 43,600 burden hours); (750 companies x 8 burden hours + 39,600 burden hours = 45,600 burden hours)).[4] The Commission further estimated that the total annual cost to industry would be between $1,157,894 and $1,213,329.[5]

The requirements of the Rule have not changed since OMB's 2004 approval of the final Rule. The previous estimates included a one-time burden to reprogram and update systems to revise existing notices and to re-format solicitations to comply with the Rule. Because the Rule has been in effect since August 1, 2005, covered entities have already incurred the one time costs of transition to compliant notice formats. Accordingly, the annual PRA-related burden associated with the Rule is now reduced. FTC staff believes that the primary cost of continuing to comply with the Rule is limited to the legal review each entity determines is necessary to remain in compliance.

FTC staff continues to estimate that between 500 and 750 entities make prescreened solicitations. However, since no additional revision or reformatting is necessary, staff has lowered the estimate of the burden hours to approximately 2 hours (one quarter of one business day), rather than 8 hours which was the estimate to revise and reformat solicitations when the Rule was promulgated. Accordingly, the total annual burden is between 1,000

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[2] 69 FR 58861 (Oct. 1, 2004).

[3] 70 FR 5022 (Jan. 31, 2005).

[4] The Commission estimated that each of the 100 companies would revise 99 additional solicitations and incur 4 hours of burden per solicitation (100 companies x 99 solicitations x 4 hours of burden = 39,600 burden hours).

[5] This estimate was based on Bureau of Labor Statistics data (as of July, 2002), as follows: 2 hours of managerial/professional time at $31.55 per hour; plus 6 hours of skilled technical labor at $26.44 per hour; multiplied by 500 and 750 companies, for a total of $110,870 and $166,305, respectively. Plus, an additional $1,047,024 (39,600 hours of skilled technical labor at $26.44 per hour) for revising multiple solicitations.

and 1,500 hours (500 to 750 entities x 2 hours of annual burden). FTC staff has assumed that in-house legal counsel will handle most of the compliance review and has applied an average hourly wage of $250/hour for their labor. Accordingly, the total cost for all affected entities would be between $250,000 and $375,000 (1000 to 1,500 burden hours x $250 per hour of legal review time).

John D. Graubert

Acting General Counsel

[FR Doc. E7–14860 Filed 7–31–07: 8:45 am]

BILLING CODE 6750–01–S

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

Trans No.	Acquiring	Acquired	Entities
Transactions Granted Early Termination—07/09/2007			
20071517	Windstream Corporation	CT Communications, Inc	CT Communications, Inc.
20071560	Millennium International, Ltd	Sunrise Senior Living, Inc	Sunrise Senior Living, Inc.
20071611	Warburg Pincus Private Equity IX, L.P.	Bausch & Lomb Incorporated	Bausch & Lomb Incorporated.
20071612	Warburg Pincus Private Equity X, L.P.	Bausch & Lomb Incorporated	Bausch & Lomb Incorporated.
20071621	Industrial Growth Partners III, L.P	Heat Transfer Parent, Inc	Heat Transfer Parent, Inc.
20071622	SiRF Technology Holdings, Inc	Centrality Communications, Inc	Centrality Communications, Inc.
20071628	Michael Joseph Jackson	Mr. Sumner M. Redstone	Famous Music LLC.
20071629	Sony Corporation	Mr. Sumner M. Redstone	Famous Music LLC.
20071634	Quadrangle Capital Partners II LP.	Felix Dennis	Dennis Publishing, Inc.
20071662	HOYA Corporation	PENTAX Corporation	PENTAX Corporation.
Transactions Granted Early Termination—07/10/2007			
20070514	TDS Investor (Cayman) L.P	Citigroup, Inc	Worldspan Technologies, Inc.
20071549	Highfields Capital I LP	Clear Channel Communications, Inc.	Clear Channel Communications, Inc.
20071550	Highfields Capital II LP	Clear Channel Communications, Inc.	Clear Channel Communications, Inc.
20071552	Highfields Capital Ltd	Clear Channel Communications, Inc.	Clear Channel Communications, Inc.
20071569	Amgen Inc	Alantos Pharmaceuticals Holdings, Inc.	Alantos Pharmaceuticals Holdings, Inc.
20071573	Amgen Inc	Ilypsa, Inc	Ilypsa, Inc.
20071592	Linx Partners II, L.P.	John W. More, Jr	Cimarron Central, L.L.C.
20071596	Mr. William Collins	Vertrue, Inc	Vertrue, Inc.
20071603	TCV VI, L.P	FX Alliance Inc	FX Alliance Inc.
20071610	CIT Group Inc	EVP Holdings, LLC	Edgeview Partners LLC.
20071615	Corinthian Equity Fund, L.P	CellXion, LLC	CellXion, LLC.
20071625	Sun Capital Partners IV, LP	Interface, Inc	InterfaceFABRIC, Inc.
20071626	Sun Capital Partners V, LP	Interface, Inc	InterfaceFABRIC, Inc.
20071627	Zarlink Semconductor Inc	Legerity Holdings, Inc	Legerity Holdings, Inc.
20071646	Babcock & Brown Spinco LLC	GTCR Fund VII, L.P	Coinmach Service Corp.
20071647	Umeco plc	Michael C. Burkitt	J.D. Lincoln, Inc.
20071656	GTCR Fund VIII, L.P	Vincent A. Naccarato	Wilton Industries, Inc.
20071663	John L. Nau III	Sis Co., L.L.P	BudCo, Ltd.
20071666	Centerbridge Capital Partners, L.P..	Charlesbank Equity Fund V, Limited Partnership.	GSI Holdings Corp.
20071670	GTCR Fund VIII, L.P	Dimensions Holding LLC	Dimensions Acquisition LLC.
20071676	Mohawk Industries, Inc	Columbia Forest Products, Inc	Appalachian Custome Dry Kilns, LLC. Appalachian Precision Hardwood Flooring, LLC Century Flooring Company, LLC. Columbia Flooring, Inc. Danville Doolittle, Inc. Danville Kentuck, Inc. Malaytex, Inc. Sharikat Malaysia Wood Industries Sdn Bhd. Universal Hardwood Flooring LP LLLP. Universal Woodfloor (Europe) AB.
20071683	Grubb & Ellis Company	NNN Realty Advisors, Inc	NNN Realty Advisors, Inc.

Trans No.	Acquiring	Acquired	Entities
Transactions Granted Early Termination—07/11/2007			
20071540	Wellmont Health System	Health Management Associates, Inc.	Norton, HMA, Inc. Pennington Gap HMA, Inc. Pennington Gap HMA Physician Management, Inc. Western Virginia HMA Physician Management Inc.
20071542	Northrop Grumman Corporation	SAIC, Inc	AMSEC LLC.
20071591	Dr. Phillip Frost	Opko Health, Inc	Opko Health, Inc.
20071654	Berkshire Hathaway Inc	Boat America Corporation Employee Stock Ownership Trust.	Boat America Corporation.
20071660	Nautic Partners VI, L.P	Lincolnshire Equity Fund II, L.P	Prince Sports Holdings, Inc.
20071672	Humana Inc	CompBenefits Corporation	CompBenefits Corporation.
20071677	Nucor Corporation	MAGNATRAX Corporation	MAGNATRAX Corporation.
20071692	Elevation Partners, L.P	Palm, Inc	Palm, Inc.
Transactions Granted Early Termination—07/12/2007			
20071376	L'Air Liquide S.A	GEA Group Aktiengesellschaft	Lurgi, Inc.
20071616	Simms Group Limited	SA Recycling LLC	SA Recycling LLC.
20071618	Self Serve Auto Dismantlers Inc	SA Recycling LLC	SA Recycling LLC.
20071678	Nuance Communications, Inc	Time Warner Inc	Tegic Communications, Inc.
Transactions Granted Early Termination—07/13/2007			
20071679	The Weir Group PLC	Dan E. Lowrance	SPM Flow Control, Inc.
20071685	Anthony W. Thompson	Grubb & Ellis Company	Grubb & Ellis Company.
20071690	Madison Dearborn Capital Partners V–A, L.P.	CDW Corporation	CDW Corporation.
20071699	Autonomy Corporation plc	ZANTAZ, Inc	ZANTAZ, Inc.
Transactions Granted Early Termination—07/16/2007			
20071562	Flextronics International Ltd	Solectron Corporation	Solectron Corporation.
20071604	Veolia Environnement S.A	President and Fellows of Harvard College.	Thermal North America, Inc. Trigen Atlanta Holdings Corporation.
20071613	DCP Midstream Partners, LP	Spectra Energy Corp	MEG Colorago Gas Services, LLC. Momentum Energy Group LLC.
20071614	DCP Midstream Partners, L.P	ConocoPhillips	MEG Colorago Gas Services, LLC. Momentum Energy Group LLC.
20071619	ConocoPhillips	Momentum Energy Group Inc	Momentum Energy Group Inc.
20071620	Spectra Energy Corp	Momentum Energy Group Inc	Momentum Energy Group, Inc.
20071632	Invus, L.P	Lexicon Pharmaceuticals, Inc	Lexicon Pharmaceuticals, Inc.
20071643	McMoRan Expoloration Co	Newfield Exploration Company	Newfield Exploration Company.
20071649	Texas Energy Future Holdings Limited Partnership.	TXU Corp	TXU Corp.
20071655	Quad-C Partners VI, L.P	David S. Littman	Hudson Valley Lighting, Inc. Troy-CSL Lighting, Inc.
20071664	XTO Energy Inc	Dominion Resources, Inc	Dominion Reserves—Utah, Inc. Dominion San Juan, Inc. Havre Pipeline Company, LLC.
20071667	Loews Corporation	Dominion Resources, Inc	DEPI Survivor LP. DEPI Texas Holdings, LLC. Dominion Black Warrior Basin, Inc. Dominion Energy, Inc. Dominion Exploration & Production, Inc. Dominion Gas Processing MI, Inc. Dominion Midwest Energy, Inc. Dominion Oklahoma Texas Exploration & Production, Inc. Dominion Reserves, Inc. DOTEPI Survivor LP. LDNG Texas Holdings, LLC. Stonewater Pipeline Company LP. Stonewater Pipeline Company of Texas, Inc.
20071668	K–Sea Transportation Partners L.P.	Sirius Maritime, LLC.	Sirius Maritime, LLC.
20071674	Sun Capital Partners IV, LP	Friendly Ice Cream Corporation	Friendly Ice Cream Corporation.
20071675	Sun Capital Partners IV, LP	Friendly Ice Cream Corporation	Friendly Ice Cream Corporation.
20071686	K–Sea Transportation Partners L.P.	Gordon L. K. Smith	Go Big Chartering, LLC. Smith Maritime, Ltd.
20071696	KGen Power Corporation	Complete Energy Holdings, LLC	Complete Energy Holdings, LLC.
20071700	Schering-Plough Corporation	Dennis T. Mangano, Ph.D	PeriCor Therapeutics, Inc.

Trans No.	Acquiring	Acquired	Entities
20071704	Wells Fargo & Company	Breater Bay Bancorp	ABD Financial Services, Inc. ABD Insurance and Financial Services. Lucini/Parish Insurance, Inc.
20071706	Sonic Healthcare Limited	Lawrence Siedlick	Sunrise Medical Laboratories.
20071707	Sonic Healthcare Limited	Patricia Lanza	Sunrise Medical Laboratories.
20071711	The Bear Stearns Companies Inc	Universal American Financial Corp.	Universal American Financial Corp.
20071719	The Estee Lauder Companies Inc	Ojon Corporation	Ojon Corporation.
Transactions Granted Early Termination—07/17/2007			
20071684	Thomas & Betts Corporation	Danaher Corporation	Danaher Power Solutions, LLC. Danaher UK Industries Limited. Fisher Pierce Co. Jennings Technology Company, LLC. Joslyn Canada. Josyln Hi-Voltage Company, LLC. Joslyn Holding Company. Royce Thompson Limited.
20071691	Madison Dearborn Capital Partners V–A, L.P.	Nuveen Investments, Inc	Nuveen Investments, Inc.
Transactions Granted Early Termination—07/18/2007			
20071341	BAE Systems plc	Armor Holdings, Inc	Armor Holdings, Inc.
20071636	Empeiria Conner LLC	Besser Company	Aggregate Plant Products Company.
Transactions Granted Early Termination—07/19/2007			
20071681	RFS Holdings V.V	ABN Amro Holdings N.V	ABN Amro Holdings N.V.
20071763	Walgreen Co	Option Care, Inc	Option Care, Inc.
Transactions Granted Early Termination—07/20/2007			
20071715	Intercontinental-Exchange, Inc	The Northerwestern Mutual Life Insurance Company.	Frank Russell Company.
20071725	ONEOK Partners, L.P	Knight Holdco LLC	Heartland Pipeline Company. ONEOK North System, L.L.C.
20071728	ACON–Bastion Partners II, L.P	Spencer Gifts Holdings, Inc	Spencer Gifts Holdings, Inc.
20071730	Biogen Idec Inc	CardioKine, Inc	CardioKine, Inc.
20071734	General Electric Company	DTE Energy Company	EIUC Holdings, LLC.
20071735	Hellman & Friedman Capital Partners V, L.P.	Intuit Inc	Intuit Inc.
20071744	Franklin Holdings (Bermuda), Ltd	James River Group	James River Group.
20071745	Wellpoint	Nautic Partners V, L.P	Imaging Management Holdings, LLC.
20071749	Welsh, Carson, Anderson & Stowe X, L.P.	Cornelius Durpe, II	Venture Transport Logistics LLC.
20071753	Bain Capital Fund IX, L.P	Guitar Center, Inc.	Guitar Center, Inc.
20071753	Cameron 1 S.a.r.l	Samsonite Corporation	Samsonite Corporation.
20071768	Elevation Partners, L.P	Warburg Pincus Private Equity VIII, L.P.	SDI Media Holding, Inc.

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay, Contact Representative or Renee Hallman, Contact Representative. Gederal Trade Commission, Premerger Notification Office, Bureau of Competition, Room H–303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark

SEcretary

[FR Doc. 07–3745 Filed 7–31–07; 8:45 am]

BILLING CODE 6750–01–M

GENERAL SERVICES ADMINISTRATION

Federal Travel Regulation (FTR); Fly America Act—United States and European Union Open Skies Agreement (US–EU Open Skies Agreement)

AGENCY: Office of Governmentwide Policy (MTT), General Services Administration (GSA).

ACTION: Notice.

SUMMARY: This notice provides preliminary information to Federal agencies on the US–EU Open Skies Agreement.

DATES: The US–EU Open Skies Agreement dated April 30, 2007 will be effective for the transportation of passengers on March 30, 2008.

FOR FURTHER INFORMATION CONTACT: Ms. Umeki Gray Thorne, phone: (202) 208–7636; e-mail at *Umeki.thorne@gsa.gov,* or Jim Harte, phone: (202) 501–0483 or e-mail at *Jim.Harte@gsa.gov,* Office of Governmentwide Policy (MTT), General Services Administration, 1800 F Street, NW., Washington, DC 20405.

SUPPLEMENTARY INFORMATION: On April 30, 2007, the United States—European Union Air Transport Agreement was signed, providing community airlines (airlines of the European Community and its Member States) the right to

transport passengers and cargo on U.S. Government procured transportation for both scheduled and charter flights, subject to certain conditions. Specifically, community airlines may transport passengers and cargo on scheduled and charter flights for which a U.S. Government civilian department, agency, or instrumentality:

(1) Obtains the transportation for itself or in carrying out an arrangement under which payment is made by the U.S. Government or payment is made from amounts provided for the use of the U.S. Government, or

(2) Provides the transportation to or for a foreign country or international or other organization without reimbursement, and the transportation is:

(a) between any point in the United States and any point in a Member State, except—with respect to passengers only—between points for which there is a city-pair contract fare in effect, or

(b) between any two points outside the United States.

This provision described above does not apply to transportation funded by the Secretary of Defense or the Secretary of a military department.

The Federal Travel Regulation (FTR), section 301–10.135 (b) (41 CFR 301–10.135(b)) includes an exception to the use of U.S. flag air carrier service when the transportation is provided under a bilateral or multilateral air transportation agreement to which the U.S. Government and the government of a foreign country are parties, and which the Department of Transportation has determined meets the requirements of the Fly America Act. As the U.S.–EU Open Skies agreement is such an air transportation agreement, the General Services Administration (GSA) intends to issue regulations addressing the content of the provision on U.S. Government procured transportation included in the agreement to ensure that all are aware of the change made by the agreement. Regulations addressing air passenger transportation will be included in the FTR.

GSA is in the process of drafting a proposed rule with request for comments on proposed revisions to the FTR that will be published in the **Federal Register**.

Dated: July 17, 2007.

Becky Rhodes,

Deputy Associate Administrator.

[FR Doc. E7–14900 Filed 7–31–07; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day-07–0026]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Report of Verified Case of Tuberculosis (RVCT), (OMB No. 0920–0026)—Revision—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

In the United States, an estimated 10 to 15 million people are infected with *Mycobacterium tuberculosis* and about 10% of these persons will develop tuberculosis (TB) disease at some point in their lives. The purpose of this project is to conduct the first major revision since 1993 of the national tuberculosis surveillance form, the Report of Verified Case of Tuberculosis (RVCT), to capture changes in the diagnosis and treatment of TB, and to better monitor trends in TB epidemiology and outbreaks, in order to develop strategies to meet the national goal of TB elimination.

CDC currently conducts and maintains the national surveillance system pursuant to the provisions of section 301(a) of the Public Service Act [42 U.S.C. 241] and section 306 of the Public Service Act [42 U.S.C. 241(a)]. Data are collected by 60 reporting areas (the 50 states, the District of Columbia, New York City, Puerto Rico, and 7 jurisdictions in the Pacific and Caribbean). In 2001, CDC's Division of Tuberculosis Elimination (DTBE) initiated a comprehensive review of the RVCT. A work group with nearly 30 members from 15 TB programs, CDC, and the National TB Controllers Association (NTCA) convened 26 conference calls to consider variable revisions based on surveillance significance, ease of data collection, and ability to yield meaningful and useful data. The proposed revision further benefited from review by TB experts active in research and field services and was pilot-tested in two phases. Revisions resulting from stakeholder input include the capture of data on verified TB cases who do not meet the national surveillance definition since counted by another U.S. area, TB treatment was initiated in another country, or TB recurred less than 12 months after completion of therapy. The year the case was reported and the reporting jurisdiction were incorporated into state case identification number with fields for linking state case numbers to allow better tracking of such cases. New variables reflecting diagnostic updates since 1993 include nucleic acid amplification, interferon gamma release assay, computerized tomography, and genotyping. The dates of tuberculin skin test and of specimen collection for other diagnostic tests, along with result dates by laboratory type, were added. The primary reason the patient was evaluated for TB disease, and reasons for extending TB therapy beyond one year were added. Risk characteristics such as diabetes, end-stage renal disease, post-organ transplantation, other immunosuppression, anti-tumor necrosis factor-alpha therapy, contact with a drug-resistant case, contact with an infectious case, missed contacts, incomplete treatment for latent TB infection, immigration status for TB screening, and parental origin and international background for pediatric cases will also be collected. A variable was added to capture whether the TB patient moved during treatment and if so, where, with a check box to indicate

transnational referral. Modifications include updates to drug regimens and drug susceptibility tests. Date of death and whether TB was a cause of death were added to status at diagnosis. Major site and additional sites of TB disease were combined to a single question. Smear, pathology, or cytology now capture histology results in addition to microbiology, and a single field for anatomic specimen code replaced two codes for positive specimens. Initial chest radiograph or other chest imaging was updated to capture whether an abnormal chest image shows a cavity or miliary TB, replacing miliary as a site of disease and simplifying check boxes for radiograph as cavitary, consistent with TB, stable, worsening, improving, or unknown. Whether patients were under custody of Immigration and Customs Enforcement was added to the correctional facility variable, and occupation was modified to capture the past year, with check boxes to differentiate persons not eligible for employment from the unemployed. Type of health care provider was clarified with categories of outpatient care. Reasons for culture conversion not being documented were incorporated, and adverse treatment event and death were added as reasons TB therapy stopped or never started. Deletions include removal of: (1) Soundex, a software code; (2) a text field to indicate who submitted the RVCT; (3) a check box asking whether the case was anergic; (4) CDC AIDS patient number; (5) how HIV positive status was determined; (6) a check box for more than one additional site of TB disease; and (7) site of directly observed therapy. DTBE is currently working with stakeholders and software team members towards development and implementation of an updated software module for the transition from the current software for RVCT data entry and electronic transmission of reports to CDC to collection and reporting of revised RVCT data. Following the transition, respondents will be able to use either the CDC associated TB module or their own TB surveillance application to collect and report RVCT data to CDC. CDC publishes an annual report using RVCT data to summarize national TB statistics and also periodically conducts special analyses for publication to further describe and interpret national TB data. These data assist in public health planning, evaluation, and resource allocation. Reporting areas also review and analyze their RVCT data to monitor local TB trends, evaluate program success, and focus resources to eliminate TB. No other Federal agency collects this type of national TB data. In addition to providing technical assistance on the use of RVCT, CDC provides technical support for reporting software. In this request, CDC is requesting approval for approximately 8050 burden hours, an estimated increase of 490 hours. This increase is due to the addition of information on new clinical diagnostic tests and factors to identify high-risk patients. There is no cost to respondents other than their time to participate in the survey.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Types of respondents	Number of respondents	No. of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Local, state, and territorial health departments	60	230	35/60	8050

Dated: July 26, 2007.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E7–14886 Filed 7–31–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–07–07BI]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Acting Reports Clearance Officer, 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an e-mail to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Rapid HIV Testing in Community Mental Health Settings Serving African Americans—New—National Center for HIV, Viral Hepatitis, STD and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

People with chronic mental illness, including those with substance use disorders, are at increased risk of HIV infection compared with the general population. However, not enough is known about the risk behaviors, willingness to be tested for HIV, and HIV prevalence among persons with chronic mental illness. In addition, the interrelations among diagnosis of HIV infection, compliance with medical care, subsequent risk behaviors, and the course of mental illness have not been well-described. Mental health clinics are an important setting for HIV rapid testing and promoting prevention efforts against the transmission of HIV infection.

The objectives of this project are to (1) increase the number of mental health providers who routinely provide HIV counseling, testing, and linkage to care in settings that provide mental health care, especially those serving African American communities; and (2) describe the relationship between mental illness,

HIV risk behaviors, and access to HIV testing and services, in order to inform the development of optimal HIV prevention interventions for persons with chronic mental illness, and particularly for African Americans with chronic mental illness. Staff at selected implementation sites will routinely offer counseling and rapid HIV testing to clients and administer a brief survey to assess HIV risk behaviors, previous access to HIV testing and services, and mental health symptoms. Collection of data from client medical records will provide information on diagnoses, clinical course, and treatment history. Clients who enroll will be followed longitudinally with a follow-up survey offered at 6-month intervals and repeat rapid HIV testing offered annually.

This project will collect data from clients using brief surveys administered on a voluntary basis. Collection of data will provide information on client demographics; current behaviors that may facilitate HIV transmission, including sexual and drug-use behaviors; current psychiatric symptoms, determined using brief rating scales; access and barriers to HIV testing, prevention, and treatment services; and adherence to psychiatric and medical treatment regimens. CDC is requesting approval for a 3-year clearance for data collection. Data will be collected in 4 community mental health sites. CDC estimates that an average of 900 clients will be asked to participate at each site annually and that 80% will accept, resulting in 2,880 new survey respondents each year across all sites. The average duration of the initial survey is estimated to be 45 minutes. CDC estimates an 80% acceptance rate at 6-month follow-up among the initial 2,880 respondents, resulting in 2,304 respondents for the follow-up survey at 6-month intervals and an average of 4,608 follow-up respondents per year over the course of the project. The average duration of the follow-up survey is estimated to be 30 minutes. Participation is voluntary. Data collection will provide important insights into the relationship between HIV risk behaviors and psychiatric illness. There is no cost to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of form	Average number of respondents per annum	Average number of responses per respondent	Average burden per response (Hours)	Total burden per annum (Hours)
Clinic Patient Initial Survey	2,880	1	45/60	2,160
Clinic Patient Follow-up Survey	4,608	2	30/60	4,608
Total	.....	.....	.....	6,768

Dated: July 26, 2007.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. E7–14893 Filed 7–31–07; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Reallotment of FY 2006 Funds for the Low Income Home Energy Assistance Program (LIHEAP)

AGENCY: Office of Community Services, ACF, HHS.

ACTION: Notice of determination concerning funds available for reallotment.

CFDA Number: 93.568

SUMMARY: Notice is hereby given of a preliminary determination that funds from the fiscal year (FY) 2006 Low Income Home Energy Assistance Program (LIHEAP) are available for reallotment to States, Territories, and Tribes and Tribal Organizations that receive FY 2007 direct LIHEAP grants. No subgrantees or other entities may apply for these funds. Section 2607(b)(1) of the Low Income Home Energy Assistance Act (the Act), Title XXVI of the Omnibus Budget Reconciliation Act of 1981 (42 U.S.C. 8621 *et seq.*), as amended, requires that if the Secretary of the Department of Health and Human Services (HHS) determines that, as of September 1 of any fiscal year, an amount in excess of certain levels allotted to a grantee for any fiscal year will not be used by the grantee during the fiscal year, the Secretary must notify the grantee and publish a notice in the **Federal Register** that such funds may be realloted to LIHEAP grantees during the following fiscal year. If reallotted, the LIHEAP block grant allocation formula will be used to distribute the funds. (No funds may be allotted to entities that are not direct LIHEAP grantees during FY 2007.) It has been determined that $326,894 may be available for reallotment during FY 2007. This determination is based on revised Carryover and Reallotment Reports from the Turtle Mountain Band of Chippewa Indians in North Dakota and Southern Ute Indian Tribe in Colorado, which were submitted to the Office of Community Services as required by 45 CFR 96.82.

The statute allows grantees who have funds unobligated at the end of the fiscal year for which they are awarded to request that they be allowed to carry over up to 10 percent of their allotments to the next fiscal year. Funds in excess of this amount must be returned to HHS and are subject to reallotment under section 2607(b)(1) of the Act. The amount described in this notice was reported as unobligated FY 2006 funds in excess of the amount that the Turtle Mountain Band of Chippewa Indians could carry over to FY 2007. Additionally, an amount from Southern Ute Indian Tribe is excess funds for FY 2006 plus the 10 percent carryover, since the tribe did not apply for FY 2007 LIHEAP funds.

The Turtle Mountain Band of Chippewa Indians was notified by certified mail that $297,492 of its FY 2006 funds may be reallotted. Additionally, the Southern Ute Indian Tribe was notified by certified mail that $29,402 of its FY 2006 funds may be reallotted. In accordance with section 2607(b)(3), the Chief Executive Officers of both the tribes have 30 days from the date of the letter to submit comments to: Josephine B. Robinson, Director, Office of Community Services, 370 L'Enfant Promenade, SW., Washington, DC 20447.

The comment period expires August 31, 2007.

After considering any comments submitted, the Chief Executive Officers will be notified of the final reallotment amount, and this decision also will be published in the **Federal Register**. If funds are reallotted, they will be

allocated in accordance with section 2604 of the Act and must be treated by LIHEAP grantees receiving them as an amount appropriated for FY 2007. As FY 2007 funds, they will be subject to all requirements of the Act, including section 2607(b)(2), which requires that a grantee obligate at least 90 percent of its total block grant allocation for a fiscal year by the end of the fiscal year for which the funds are appropriated, that is, by September 30, 2007.

FOR FURTHER INFORMATION CONTACT: Nick St. Angelo, Director, Division of Energy Assistance, Office of Community Services, 370 L'Enfant Promenade, SW., Washington, DC 20447; telephone (202) 401–9351.

Dated: July 26, 2007.

Yolanda J. Butler,

Deputy Director, Office of Community Services.

[FR Doc. E7–14875 Filed 7–31–07; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Filovirus Animal Models; Public Workshop

AGENCY: National Institutes of Health, HHS.

ACTION: Notice of public workshop.

The National Institutes of Health (NIH) is announcing a public workshop entitled: Filoviruses: Current Status of Research into Pathophysiology and Potential Uses of Animal Models. The purpose of the public workshop is to discuss the current state of understanding of filovirus infections, knowledge gaps and research needs, the current status of research exploring animal models, and the potential role of model development in approaches to investigation of therapeutic or vaccine strategies directed towards filoviruses.

DATE AND TIME: The public workshop will be held on September 11, 2007 from 8:30 a.m.–5 p.m. and on September 12, 2007 from 8:30 a.m.–1 p.m.

LOCATION: The public workshop will be held at the main auditorium, Natcher Conference Center, NIH Campus, 45 Center Drive, Bethesda, Maryland.

CONTACT PERSON: Ping Chen, 6610 Rockledge Drive, telephone: 301–451–3756, fax: 301–480–1263, e-mail: *chenpi@niaid.nih.gov*

REGISTRATION: Pre-registration is required and must be completed by August 24, 2007. Please go to the following web site for information about registration (*http://www.niaid.nih.gov/news/events/meetings/filo/*). There is no registration fee for the public workshop. Early registration is recommended because seating is limited. There will be no onsite registration.

If you need special accommodations due to a disability, please contact (see Contact Person) at least 7 days in advance.

SUPPLEMENTARY INFORMATION: NIH, CDC, DoD, and FDA, are cosponsoring a public workshop titled, ''Filoviruses: Current Status of Research into Pathophysiology and Potential Uses of Animal Models''. The meeting will discuss: (1) Background information on filovirus pathogenesis and clinical disease in humans and animals, and status of research into the understanding of human disease and development of animal models; (2) Background information on the scientific issues and regulatory approaches to the potential uses of animal data in the development of prevention and treatment strategies; (3) General review of filovirus vaccine design, rationale, and correlates of protection; (4) General review of the status of preliminary research approaches to filovirus-directed antiviral therapeutics. The workshop's goal is to enhance understanding of filovirus disease, identify knowledge gaps and research needs, and explore the potential strengths and limitations of various animal models.

TRANSCRIPTS: Transcripts of the public workshop will be available following the workshop. Procedures to obtain a transcript will be made available at a later date.

Dated: July 23, 2007.

Michael G. Kurilla,

Director, Office of Biodefense Research Affairs, Associate Director for Biodefense Product Development, DMID, NIAID, National Institutes of Health.

[FR Doc. E7–14874 Filed 7–31–07; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Delegation of Authority

Notice is hereby given that I have delegated to the Director, National Institutes of Health (NIH), the authorities under section 3 of Public Law 109–416 (Combating Autism Act of 2006), which amends Title III of the Public Health Service Act, by adding Part R, section 399CC, authorizing establishment of the Interagency Autism Coordinating Committee. I am also delegating the authority under Title III, section 399CC of the Public Health Service Act, as amended, to select Federal members of the Committee, including the chair, as appropriate. I will retain the authority under Title III, section 399CC(c)(2), pertaining to the selection of additional non-Federal public members of the Committee.

This delegation excludes the authority to submit reports to the Congress, and shall be exercised in accordance with the Department's applicable policies, procedures, and guidelines relating to regulations.

This delegation is effective upon signature. In addition, I ratified and affirmed any actions taken by the Director of the NIH or his subordinates which involved the exercise of the authorities delegated herein prior to the effective date of the delegation.

This delegation was effective upon date of signature.

Dated: July 18, 2007.

Michael O. Leavitt,

Secretary.

[FR Doc. 07–3735 Filed 7–31–07; 8:45 am]

BILLING CODE 4160–18–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5155–N–01]

Mortgage and Loan Insurance Programs Under the National Housing Act—Debenture Interest Rates

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This notice announces changes in the interest rates to be paid on debentures issued with respect to a loan or mortgage insured by the Federal Housing Administration under the provisions of the National Housing Act (the Act). The interest rate for debentures issued under section 221(g)(4) of the Act during the 6-month period beginning July 1, 2007, is 4¾ percent. The interest rate for debentures issued under any other provision of the Act is the rate in effect on the date that the commitment to insure the loan or mortgage was issued, or the date that the loan or mortgage was endorsed (or initially endorsed if there are two or more endorsements) for insurance, whichever rate is higher. The interest rate for debentures issued under these other provisions with respect to a loan or mortgage committed or endorsed during the 6-month period beginning

July 1, 2007, is 5 percent. However, as a result of an amendment to section 224 of the Act, if an insurance claim relating to a mortgage insured under sections 203 or 234 of the Act and endorsed for insurance after January 23, 2004, is paid in cash, the debenture interest rate for purposes of calculating a claim shall be the monthly average yield, for the month in which the default on the mortgage occurred, on United States Treasury Securities adjusted to a constant maturity of 10 years.

FOR FURTHER INFORMATION CONTACT: Yong Sun, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 2238, Washington, DC 20410–8000; telephone (202) 402–4778 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Section 224 of the National Housing Act (12 U.S.C. 1715o) provides that debentures issued under the Act with respect to an insured loan or mortgage (except for debentures issued pursuant to section 221(g)(4) of the Act) will bear interest at the rate in effect on the date the commitment to insure the loan or mortgage was issued, or the date the loan or mortgage was endorsed (or initially endorsed if there are two or more endorsements) for insurance, whichever rate is higher. This provision is implemented in HUD's regulations at 24 CFR 203.405, 203.479, 207.259(e)(6), and 220.830. These regulatory provisions state that the applicable rates of interest will be published twice each year as a notice in the **Federal Register**.

Section 224 further provides that the interest rate on these debentures will be set from time to time by the Secretary of HUD, with the approval of the Secretary of the Treasury, in an amount not in excess of the annual interest rate determined by the Secretary of the Treasury pursuant to a statutory formula based on the average yield of all outstanding marketable Treasury obligations of maturities of 15 or more years.

The Secretary of the Treasury (1) has determined, in accordance with the provisions of section 224, that the statutory maximum interest rate for the period beginning July 1, 2007, is 5 percent; and (2) has approved the establishment of the debenture interest rate by the Secretary of HUD at 5 percent for the 6-month period beginning July 1, 2007. This interest rate will be the rate borne by debentures issued with respect to any insured loan or mortgage (except for debentures issued pursuant to section 221(g)(4)) with insurance commitment or endorsement date (as applicable) within the latter 6 months of 2007.

For convenience of reference, HUD is publishing the following chart of debenture interest rates applicable to mortgages committed or endorsed since January 1, 1980:

Effective interest rate	on or after	prior to
9½	Jan. 1, 1980	July 1, 1980.
9⅞	July 1, 1980	Jan. 1, 1981.
11¾	Jan. 1, 1981	July 1, 1981.
12⅞	July 1, 1981	Jan. 1, 1982.
12¾	Jan. 1, 1982	Jan. 1, 1983.
10¼	Jan. 1, 1983	July 1, 1983.
10⅜	July 1, 1983	Jan. 1, 1984.
11½	Jan. 1, 1984	July 1, 1984.
13⅜	July 1, 1984	Jan. 1, 1985.
11⅝	Jan. 1, 1985	July 1, 1985.
11⅛	July 1, 1985	Jan. 1, 1986.
10¼	Jan. 1, 1986	July 1, 1986.
8¼	July 1, 1986	Jan. 1. 1987.
8	Jan. 1, 1987	July 1, 1987.
9	July 1, 1987	Jan. 1, 1988.
9⅛	Jan. 1, 1988	July 1, 1988.
9⅜	July 1, 1988	Jan. 1, 1989.
9¼	Jan. 1, 1989	July 1, 1989.
9	July 1, 1989	Jan. 1, 1990.
8⅛	Jan. 1, 1990	July 1, 1990.
9	July 1, 1990	Jan. 1, 1991.
8¾	Jan. 1, 1991	July 1, 1991.
8½	July 1, 1991	Jan. 1, 1992.
8	Jan. 1, 1992	July 1, 1992.
8	July 1, 1992	Jan. 1, 1993.
7¾	Jan. 1, 1993	July 1, 1993.
7	July 1, 1993	Jan. 1, 1994.
6⅝	Jan. 1, 1994	July 1, 1994.
7¾	July 1, 1994	Jan. 1, 1995.
8⅜	Jan. 1, 1995	July 1, 1995.
7¼	July 1, 1995	Jan. 1, 1996.
6½	Jan. 1, 1996	July 1, 1996.
7¼	July 1, 1996	Jan. 1, 1997.
6¾	Jan. 1, 1997	July 1, 1997.
7⅛	July 1, 1997	Jan. 1, 1998.
6⅜	Jan. 1, 1998	July 1, 1998.
6⅛	July 1, 1998	Jan. 1, 1999.
5½	Jan. 1, 1999	July 1, 1999.
6⅛	July 1, 1999	Jan. 1, 2000.
6½	Jan. 1, 2000	July 1, 2000.
6½	July 1, 2000	Jan. 1, 2001.
6	Jan. 1, 2001	July 1, 2001.
5⅞	July 1, 2001	Jan. 1, 2002.
5¼	Jan. 1, 2002	July 1, 2002.
5¾	July 1, 2002	Jan. 1, 2003.
5	Jan. 1, 2003	July 1, 2003.
4½	July 1, 2003	Jan. 1, 2004.
5⅛	Jan. 1, 2004	July 1, 2004.
5½	July 1, 2004	Jan. 1, 2005.
4⅞	Jan. 1, 2005	July 1, 2005.
4½	July 1, 2005	Jan. 1, 2006.
4⅞	Jan. 1, 2006	July 1, 2006.
5⅜	July 1, 2006	Jan. 1, 2007.
4¾	Jan. 1, 2007	July 1, 2007.
5	July 1, 2007	Jan. 1, 2008.

Section 215 of Division G, Title II of Pub. L. 108–199, enacted January 23, 2004 (HUD's 2004 Appropriations Act) amended section 224 of the Act, to change the debenture interest rate for purposes of calculating certain insurance claim payments made in cash. Therefore, for all claims paid in cash on mortgages insured under section 203 or 234 of the National Housing Act and endorsed for insurance after January 23, 2004, the debenture interest rate will be the monthly average yield, for the month in which the default on the mortgage occurred, on United States Treasury Securities adjusted to a constant maturity of 10 years, as found in Federal Reserve Statistical Release H–15. The Federal Housing Administration has codified this provision in HUD regulations at 24 CFR 203.405(b) and 24 CFR 203.479(b).

Section 221(g)(4) of the Act provides that debentures issued pursuant to that paragraph (with respect to the assignment of an insured mortgage to the Secretary) will bear interest at the ''going Federal rate'' in effect at the time the debentures are issued. The term ''going Federal rate'' is defined to mean the interest rate that the Secretary of the Treasury determines, pursuant to a statutory formula based on the average yield on all outstanding marketable Treasury obligations of 8- to 12-year maturities, for the 6-month periods of January through June and July through December of each year. Section 221(g)(4) is implemented in the HUD regulations at 24 CFR 221.255 and 24 CFR 221.790.

The Secretary of the Treasury has determined that the interest rate to be borne by debentures issued pursuant to section 221(g)(4) during the 6-month period beginning July 1, 2007, is 4¾ percent.

HUD expects to publish its next notice of change in debenture interest rates in January 2008.

The subject matter of this notice falls within the categorical exemption from HUD's environmental clearance procedures set forth in 24 CFR 50.19(c)(6). For that reason, no environmental finding has been prepared for this notice.

(Authority: Sections 211, 221, 224, National Housing Act, 12 U.S.C. 1715b, 1715l, 1715o; Section 7(d), Department of HUD Act, 42 U.S.C. 3535(d).)

Dated: July 26, 2007.

Brian D. Montgomery,

Assistant Secretary for Housing—Federal Housing Commissioner.

[FR Doc. E7–14821 Filed 7–31–07; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5130N6]

Privacy Act; Proposed New Systems of Records, Development Application Processing System (DAP/F24A)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Establish a new Privacy Act System of Records.

SUMMARY: HUD proposes to establish a new record system to add to its inventory of systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed new system of record is the Development Application Processing System (DAP) HUD/MFH–08. The DAP system is used for analyzing, processing, and tracking applications for FHA mortgage insurance for loans to purchase, refinance, or build multifamily housing and health care facilities.

DATES: *Effective Date:* The action will be effective without further notice on August 31, 2007 unless comments are received during or before this period that would result in a contrary determination.

Comments Due Date: August 31, 2007.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410. Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: The Departmental Privacy Act Officer, 451 Seventh Street SW., Room 4178, Washington, DC 20410, Telephone Number (202) 708–2374 or the System Owner, 451 Seventh Street SW., Room 6150, Washington, DC 20410, telephone number (410) 209–6549. (These are not a toll-free numbers.) Telecommunication device for hearing and speech-impaired individuals (TTY) is available at (800) 877–8339 (Federal Information Relay Service).

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act of 1974 (5 U.S.C. 552a(e)(4) and (11)) provide that the public be afforded a 30-day period in which to comment on the new system of records, and require published notice of the existence and character of the system of records.

The new system report was submitted to the Office of Management and Budget (OMB), the Senate Committee on Homeland Security and Governmental Affairs, and the House Committee on Oversight and Government Reform pursuant to paragraph 4c of Appendix 1 to OMB Circular No. A–130, ''Federal Responsibilities for Maintaining Records About Individuals,'' July 25, 1994 (59 FR 37914).

Authority: 5 U.S.C. 552a, 88 Stat. 1896; 42 U.S.C. 3535(d).

Dated: July 23, 2007.

Lisa Schlosser,

Chief Information Officer.

HUD/MFH–08

SYSTEM NAME:

Development Application Processing System (DAP/F24A).

SYSTEM LOCATION:

Charleston, West Virginia, and all HUD Field Offices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Mortgagees (Multifamily Map lenders)

CATEGORIES OF RECORDS IN THE SYSTEM:

Mortgagees name, Employee Identification Number, Tax Identification Number, Social Security Number, Project address.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sec. 113 of the Budget and Accounting Act of 1950 31 U.S.C. 66a. (Pub. L. 81–784).

PURPOSES:

The information is used to verify that the Mortgagees are approved Lenders by HUD.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, other routine uses are as follows:

(a) To the U.S. Treasury—for disbursements and adjustments; and,

(b) To the Internal Revenue Service—for reporting payments for mortgage interest, for reporting of discharge indebtedness and real estate taxes.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic files are stored on disc and back up files are stored on tape. The original documents (hard copy) are stored in each HUD office.

RETRIEVABILITY:

Information is retrieved via the Project number or the Project status.

SAFEGUARDS:

Records are stored in locked cabinets in rooms to which access is limited to those personnel who service the records. Background screening, limited authorizations and access, with access limited to authorized personnel and technical restraints employed with regard to accessing the records; access to automated systems by authorized users by passwords. Only individuals with rights to the Mortgage Credit Discipline can view this type of information.

RETENTION AND DISPOSAL:

Are in accordance with GSA schedules of retention and disposal. All manual files are locked in cabinets when not in use. Computerized files/records are retained for 6 weeks. Obsolete records are destroyed after 3 years. Manual files/records are sent to storage upon project receiving final endorsement to the storage facility in Tulsa, OK.

SYSTEM MANAGER(S) AND ADDRESS:

Acting Director, Multifamily Housing Development (System Owner), Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6150, Washington, DC 20410.

NOTIFICATION PROCEDURE:

For information, assistance, or inquiry about existence of records, contact the Privacy Act Officer, 451 Seventh Street, SW., Room 4178, Washington, DC 20410, in accordance with the procedures in 24 CFR part 16.

RECORD ACCESS PROCEDURES:

The Department's rules for providing access to records to the individual concerned appears in 24 CFR part 16. If additional information or assistance is required, contact the Privacy Act Officer at HUD, 451 Seventh Street, SW., Room 4178, Washington, DC 20410.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR part 16. If additional information is needed, contact:

(i) In relation to contesting contents of records, the Privacy Act Officer at HUD, 451 Seventh Street, SW., Room 4178, Washington, DC 20410; and,

(ii) In relation to appeals of initial denials, HUD, Departmental Privacy Appeals Officer, Office of General Counsel, 451 Seventh Street, SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

All data on the application for Multifamily Housing projects (HUD 92013) and other required HUD forms, drawings and narratives (Lender's submission package) is submitted to HUD Field Office.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. E7–14795 Filed 7–31–07; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5130–N–07]

Privacy Act; Proposed New Systems of Records, Single Family Mortgage Notes System (SFMNS, A80N)

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Establish a new Privacy Act System of Records.

SUMMARY: HUD proposes to establish a new record system to add to its inventory of systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The proposed new system of record is the Single Family Mortgage Notes System (SFMNS), HUD/HS–57. The SFMN system is used to track the mortgagors' remittances and the system's disbursements for protecting HUD's interest in the mortgaged properties. The system contains information about billing, applications, monthly payments to tax escrows, and interest and principal data.

DATES: *Effective Date:* This action shall be effective without further notice on August 31, 2007 unless comments are received during or before this period that would result in a contrary determination.

Comments Due Date: August 31, 2007.

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Rules Docket Clerk, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW., Room 10276, Washington, DC 20410–0500. Communications should refer to the above docket number and title. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address.

FOR FURTHER INFORMATION CONTACT: The Departmental Privacy Act Officer, 451 Seventh Street, SW., Room 4178, Washington, DC 20410, telephone number (202) 708–2374 or the System Owner, 451 Seventh Street, SW., Room 6232, Washington, DC 20410, telephone number (202) 402–3297. (These are not a toll-free numbers.) Telecommunication device for hearing and speech-impaired individuals (TTY) is available at (800) 877–8339 (Federal Information Relay Service).

SUPPLEMENTARY INFORMATION: Title 5 U.S.C. 552a(e)(4) and (11) provide that the public be afforded a 30-day period in which to comment on the new system of records, and require published notice of the existence and character of the system of records.

The new system report was submitted to the Office of Management and Budget (OMB), the Senate Committee on Homeland Security and Governmental Affairs, and the House Committee on Oversight and Government Reform pursuant to paragraph 4c of Appendix 1 to OMB Circular No. A–130, ''Federal Responsibilities for Maintaining Records About Individuals,'' July 25, 1994 (59 FR 37914).

Authority: 5 U.S.C. 552a, 88 Stat. 1896: 42 U.S.C. 3535(d) .

Dated: July 23, 2007.

Lisa Schlosser,

Chief Information Officer.

HUD/HS–57

SYSTEM NAME:

Single Family Mortgage Notes System (SFMNS) (A80N/NOTES).

SYSTEM LOCATION:

Charleston, West Virginia, and Tulsa, OK (Morris Griffin/First Madison Services).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Mortgagors (Secretary-Held Notes and Subordinate Mortgages).

CATEGORIES OF RECORDS IN THE SYSTEM:

Mortgagors' name, address, and social security number.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Sec. 113 of the Budget and Accounting Act of 1950 31 U.S.C. 66a. (Pub. L. 81–784).

PURPOSES:

The information is used to track the mortgagors' remittances and the system's disbursements for protecting HUD's interest in the mortgaged properties. This information is used by HUD to report to the IRS.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, other routine uses are as follows:

(a) To the U.S. Treasury—for disbursements and adjustments; and

(b) To the Internal Revenue Service—for reporting payments for mortgage interest, for reporting of discharge indebtedness and real estate taxes.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic files are stored on disc and back up files are stored on tape. The original documents (hard copy) are stored in Tulsa, Oklahoma.

RETRIEVABILITY:

Records may be retrieved by mortgagor name and/or social security number.

SAFEGUARDS:

Records are stored in locked cabinets in rooms to which access is limited to those personnel who service the records. Background screening, limited authorizations and access, with access limited to authorized personnel and technical restraints employed with regard to accessing the records; access to automated systems by authorized users by passwords.

RETENTION AND DISPOSAL:

Are in accordance with HUD Records Disposition Schedule 2225.6, Appendix 20.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Single Family Post Insurance Division (System Owner), Department of Housing and Urban Development, 451 Seventh Street, SW., Room 6232, Washington, DC 20410.

NOTIFICATION PROCEDURE:

For information assistance, or inquiry about existence of records, contact the Privacy Act Officer, 451 Seventh Street SW., Room 4178, Washington, DC 20410, in accordance with the procedures in 24 CFR part 16.

RECORD ACCESS PROCEDURES:

The Department's rules for providing access to records to the individual concerned, appears in 24 CFR part 16. If additional information or assistance is required, contact the Privacy Act Officer at HUD, 451 Seventh Street, SW., Room 4178, Washington, DC 20410.

CONTESTING RECORD PROCEDURES:

The procedures for requesting amendment or correction of records appear in 24 CFR part 16. If additional information is needed, contact:

(i) In relation to contesting contents of records, the Privacy Act Officer at HUD,

451 Seventh Street, SW., Room 4178, Washington, DC 20410; and,

(ii) In relation to appeals of initial denials, HUD, Departmental Privacy Appeals Officer, Office of General Counsel, 451 Seventh Street, SW., Washington, DC 20410.

RECORD SOURCE CATEGORIES:

The original information was transferred from the A43C System; new records are established using the legal instruments (*i.e.*, mortgage, deed, subordinate mortgage, etc.) received from the mortgagees.

EXEMPTIONS FROM CERTAIN PROVISIONS OF THE ACT:

None.

[FR Doc. E7–14813 Filed 7–31–07; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Laramie Plains National Wildlife Refuges, Wyoming

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of Availability; Request for Comments.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service, We) announces that the draft Comprehensive Conservation Plan (CCP) and Environmental Assessment (EA) for the Laramie Plains national wildlife refuges is available. The Laramie Plains national wildlife refuges include Bamforth National Wildlife Refuge (NWR), Hutton Lake NWR, and Mortenson Lake NWR. This draft CCP/EA describes how the Service intends to manage these refuges for the next 15 years. We request public comment.

DATES: To ensure consideration, we must receive your written comments on the draft CCP/EA by August 31, 2007.

ADDRESSES: Please provide written comments to Toni Griffin, Planning Team Leader, Division of Refuge Planning, Branch of Comprehensive Conservation Planning, Mountain-Prairie Region, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225–0486; via facsimile at 303–236–4792; or electronically to *toni_griffin@fws.gov*. A copy of the CCP/EA may be obtained by writing to U.S. Fish and Wildlife Service, Division of Refuge Planning, 134 Union Boulevard, Suite 300, Lakewood, Colorado 80228; or by download from *http://mountain-prairie.fws.gov/planning.*

FOR FURTHER INFORMATION CONTACT: Toni Griffin, 303–236–4378 or John Esperance, 303–236–4369.

SUPPLEMENTARY INFORMATION: The Laramie Plains national wildlife refuges include Bamforth National Wildlife Refuge (NWR), Hutton Lake NWR, and Mortenson Lake NWR and are managed by Service staff headquartered at the Arapaho NWR near Walden, Colorado. All three refuges are located within 15 miles of the town of Laramie, Wyoming.

The town of Laramie, Wyoming is positioned in a high plains basin ecosystem known as the Laramie Plains basin. Shallow depressions of the basin, within the relatively flat topography of the region, support wetland complexes that are unique to the area. These wetland complexes provide resting, nesting, and breeding areas for migratory birds in the semi-arid environment.

Bamforth NWR was established on January 29, 1932, by Executive Order 9321. Consisting of 1,166 acres, the refuge is located approximately 6 miles northwest of Laramie, Wyoming. The purpose of the refuge is to provide ''a refuge and breeding ground for birds and wild animals.'' The refuge is closed to public use.

Hutton Lake NWR was established on January 28, 1932, by Executive Order 5782. Consisting of 1,928 acres, the refuge is located approximately 10 miles southwest of Laramie, Wyoming. The purpose of the refuge is to provide ''a refuge and breeding ground for birds and wild animals.'' Current public use opportunities at the refuge include wildlife observation, wildlife photography, environmental education, and interpretation.

Mortenson Lake NWR was established in 1993 under the Endangered Species Act, to protect the Wyoming toad's last known population. The Wyoming toad was listed as an endangered species in 1984. The population at Mortenson Lake was found in 1987. The purpose of the refuge is ''to conserve fish or wildlife which are listed as endangered or threatened species.'' The refuge is closed to public use to prevent potential adverse impacts to the Wyoming toad.

This draft CCP/EA identifies and evaluates three alternatives for managing the refuges for the next 15 years. Alternative A, the No Action alternative, reflects the current management of the refuges. It provides the baseline against which to compare the other alternatives. Refuge habitats would continue to be managed on a minimal basis and opportunistic schedule that may maintain, or most likely would result in decline in, the diversity of vegetation and water quality and quantity in the wetlands. The Service would not develop any new management, research, restoration, education, or visitor services programs at the refuges. Refuge staff would continue to perform only limited research and no monitoring of refuge wildlife and habitats would occur. Public uses such as wildlife observation and wildlife photography would continue at present levels. Other priority public uses such as environmental education and interpretation would only be available on an informal basis. No new funding or staffing levels would occur and programs would continue to follow the same direction, emphasis, and intensity as they do at present.

Alternative B is the Service's proposed action and basis for the draft CCP. Management activities under alternative B would be increased. Upland habitats would be evaluated and managed for the benefit of migratory bird species. Monitoring and management of invasive species on the refuges would be increased. With additional staffing, the Service would collect in-depth baseline data for wildlife and habitats. Efforts would be increased in the operations and maintenance of natural resources on the refuges and to maintain and develop partnerships that promote wildlife and habitat research and management. An emphasis on adaptive management, including monitoring the effects of habitat management practices and use of the research results to direct ongoing management, would be a priority.

Under alternative C, refuge staff would rely on partnerships to achieve refuge goals and objectives. Refuge management activities would be increased and enhanced through the use of partnerships. Refuge staff would strive to accomplish refuge work through partnerships with others. An emphasis on adaptive management, including monitoring the effects of habitat management practices and use of the research results to direct ongoing management, would be a priority.

The proposed action (Alternative B) was selected because it best meets the purposes and goals of the refuges, as well as the mission and goals of the National Wildlife Refuge System. The proposed action will also benefit federally listed species, shore birds, migrating and nesting waterfowl, neotropical migrants and resident wildlife. Environmental education and partnerships will result in improved wildlife-dependent recreational opportunities. Cultural and historical

resources as well as federally listed species will be protected.

Opportunity for public input will be provided at a public meeting to be scheduled soon. The specific date and time for the public meeting is yet to be determined, but will be announced via local media and a planning update. All information provided voluntarily by mail, by phone, or at public meetings (e.g., names, addresses, letters of comment, input recorded during meetings) becomes part of the official public record. If requested under the Freedom of Information Act by a private citizen or organization, the Service may provide copies of such information. The environmental review of this project will be conducted in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 et seq.); NEPA Regulations (40 CFR parts 1500–1508); other appropriate Federal laws and regulations; Executive Order 12996; the National Wildlife Refuge System Improvement Act of 1997; and Service policies and procedures for compliance with those laws and regulations.

Dated: June 20, 2007.

James J. Slack,

Deputy Regional Director, Denver, Colorado.

[FR Doc. E7–14892 Filed 7–31–07; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Alere Riverside Avenue Development, City of Rialto, San Bernardino County, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and receipt of application.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce that Alere Property Group (Applicant) has applied to the Fish and Wildlife Service (Service) for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act (Act) of 1973, as amended. We are considering issuing a 5-year permit to the Applicant that would authorize take of the federally endangered Delhi Sands flower-loving fly (*Rhaphiomidas terminatus abdominalis*; ''DSF''). The proposed permit would authorize the take of individual DSF. The permit is needed by the Applicant because take of DSF could occur during the proposed construction of a commercial development and habitat restoration and management on an 18.42-acre site in the City of Rialto, San Bernardino County, California.

The permit application includes the proposed Habitat Conservation Plan (Plan) and associated Implementing Agreement that describe the proposed action and the measures that the Applicant will undertake to mitigate take of the DSF.

DATES: Written comments must be received on or before October 1, 2007.

ADDRESSES: Send written comments to Mr. Jim Bartel, Field Supervisor, Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, California 92011. You also may send comments by facsimile to (760) 918–0638.

FOR FURTHER INFORMATION CONTACT: Ms. Karen Goebel, Assistant Field Supervisor (see **ADDRESSES**) or call (760) 431–9440.

SUPPLEMENTARY INFORMATION:

Availability of Documents

You may obtain copies of these documents for review by contacting the above office. Documents also will be available for public inspection, by appointment, during normal business hours at the above address and at the San Bernardino County Libraries. Addresses for the San Bernardino County Libraries are: (1) 10145 Orchard Street, Bloomington, CA 92316; (2) 251 West First Street, Rialto, CA 92376; (3) 16860 Valencia Avenue, Fontana, CA 92335; and, (4) 22795 Barton Road, Grand Terrace, CA 92313.

Background

Section 9 of the Act and Federal regulations prohibit the ''take'' of fish and wildlife species listed as endangered or threatened. Take of federally listed fish and wildlife is defined under the Act to include ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'' The Service may, under limited circumstances, issue permits to authorize incidental take (i.e., take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). Regulations governing incidental take permits for threatened and endangered species are found in 50 CFR 17.32 and 17.22.

The Applicant is proposing development of commercial facilities on 12.88 acres of an 18.42-acre site in the City of Rialto, San Bernardino County, California. The site is located southwest of the intersection of Riverside and Jurupa Avenues in the City of Rialto, County of San Bernardino, California. The proposed project site is bordered by existing commercial facilities to the west and east, 6 acres of open space to the south and approximately 10 acres of open space to the north.

Based on focused surveys, the entire site is considered occupied by the DSF. The Service has determined that the proposed development would result in incidental take of the DSF. No other federally listed species are known to occupy the site.

To minimize and mitigate take of DSF on the project site, the Applicant proposes to set aside 5.54-acres of the 18.42 acres site as a permanent conservation area. The onsite conservation area would be restored and managed by the Riverside Land Conservancy, a non-profit land trust. In addition to the onsite DSF conservation area, the Applicant proposes to purchase credits towards conservation in-perpetuity of 4 acres of occupied DSF habitat at the Colton Dunes Conservation Bank in the City of Colton, San Bernardino County, California. The conservation bank collects fees that fund a management endowment to ensure the permanent management and monitoring of sensitive species and habitats, including the DSF.

The Service's Environmental Assessment considers the environmental consequences of four alternatives, including: (1) The Proposed Project Alternative, which consists of issuance of the incidental take permit and implementation of the Plan; (2) the Alternative Site Design or Corridor Alternative, which consists of an alternate configuration of DSF conservation on the project site and offsite conservation; (3) the Rialto HCP Alternative, which anticipates inclusion of the project in a proposed conservation effort throughout the City of Rialto; and (4) the No Action Alternative, which would result in no impacts to DSF and no conservation.

National Environmental Policy Act

Proposed permit issuance triggers the need for compliance with the National Environmental Policy Act (NEPA). Accordingly, a draft NEPA document has been prepared. The Service is the Lead Agency responsible for compliance under NEPA. As NEPA lead agency, the Service is providing notice of the availability of the Environmental Assessment for public review.

Public Review

The Service invites the public to review the Plan, Implementing Agreement and Environmental Assessment during a 60-day public comment period (see **DATES**). Before including your address, phone number,

e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

This notice is provided pursuant to section 10(a) of the Act and the regulations for implementing NEPA, as amended (40 CFR 1506.6). We will evaluate the application, associated documents, and comments submitted thereon to determine whether the application meets the requirements of NEPA regulations and section 10(a) of the Act. If we determine that those requirements are met, we will issue a permit to the Applicant for the incidental take of the DSF. We will make our final permit decision no sooner than 60 days from the date of this notice.

Dated: July 25, 2007.

Ken McDermond,

Deputy Manager, California/Nevada Operations Office, Sacramento, California.

[FR Doc. E7–14859 Filed 7–31–07; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Fisher Family Residence Construction Project, Mendocino County, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of Availability of Environmental Assessment (EA); Receipt of an Application for Incidental Take Permit.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce that Denise and Andy Fisher (applicant) have applied for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act (Act) of 1973, as amended. We are considering issuing an 80-year permit to the application that would authorize take of the federally endangered Point Arena mountain beaver (*Aplodontia rufa nigra;* ''PAMB'') and the federally endangered Behren's silverspot butterfly (*Speyeria zerene behrensii;* ''BSSB''). The proposed permit would authorize the take of 28 PAMB and 2 BSSB incidental to otherwise lawful activities. The applicant needs the permit because take of PAMB and BSSB would occur as a result of construction and occupation of a single family residence, and installation of related improvements such as fencing and landscaping, on a 24.25 acre parcel near Point Arena, Mendocino County, California. The permit application includes a proposed Habitat Conservation Plan (HCP) that describes the proposed action and the measures that the Applicant will undertake to minimize and mitigate take of PAMB and BSSB.

DATES: We must receive any written comments on or before October 1, 2007.

ADDRESSES: Send written comments to Ms. Amedee Brickey, ES Program Manager, Fish and Wildlife Service, 1655 Heindon Road, Arcata, California 95521. You also may send comments by facsimile to (707) 822–8411.

FOR FURTHER INFORMATION CONTACT: Ms. Amedee Brickey, (see **ADDRESSES**), (707) 822–7201.

SUPPLEMENTARY INFORMATION:

Availability of Documents

You may obtain copies of these documents for review by contacting the above office. Documents also will be available for public inspection, by appointment, during normal business hours at the above address.

Background

Section 9 of the Act and Federal regulations prohibit the ''take'' of fish and wildlife species listed as endangered or threatened. Take of federally listed fish and wildlife is defined under the Act to include ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'' We may, under limited circumstances, issue permits to authorize incidental take (i.e., take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity). Regulations governing incidental take permits for threatened and endangered species are found in 50 CFR 17.32 and 17.22.

The Applicant proposes to construct and permanently occupy a 1,493 square foot single-family residence on a 24.25 acre parcel in Mendocino County, California. In addition to the construction of the residence, the applicant proposes to construct a driveway and a fenced livestock pasture, install power, water and septic utilities, and plant vegetation.

Construction and occupation of the single-family residence would directly impact the PAMB by removing 0.39 acres of occupied PAMB habitat, and 10.25 acres of potential BSSB habitat on the 24.25-acre parcel. The proposed development would result in the take of 28 PAMB and two BSSB.

To mitigate and offset the take of PAMB and BSSN, the applicant proposes to implement seasonal disturbance restrictions, and to dedicate two on-site conservation areas totaling 9.75 acres to be managed and preserved in perpetuity.

Our Environmental Assessment considers the environmental consequences of three alternatives, including: (1) The Proposed Project Alternative that would result in the development of the proposed project, the issuance of an ITP and the implementation of the measures in the HCP, including conservation areas; (2) an Alternative Project Layout Alternative that would result in the development of fewer acres, would not take any listed species, and would not include conservation areas; and (3) the No Action Alternative that would result in no development of the proposed project, would not take any listed species and would not include conservation areas.

National Environmental Policy Act

Proposed permit issuance triggers the need for compliance with the National Environmental Policy Act (NEPA). Accordingly, a draft NEPA document has been prepared. We are the Lead Agency responsible for compliance under NEPA. As the NEPA lead agency, we provide notice of the availability and are making available for public review the EA.

Public Review

We invite the public to review the HCP and EA during a 60-day public comment period (see **DATES**). Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

We provide this notice pursuant to section 10(a) of the Act and the regulations for implementing NEPA, as amended (40 CFR 1506.6). We will evaluate the application, associated documents, and comments submitted thereon to determine whether the application meets the requirements of NEPA regulations and section 10(a) of the Act. If we determine that those requirements are met, we will issue a permit to the Applicant for the

incidental take of PAMB and BSSB. We will make our final permit decision no sooner than 60 days from the date of this notice.

Dated: July 25, 2007.

Ken McDermond,

Deputy Manager, California/Nevada Operations Office, Sacramento, California.

[FR Doc. E7–14888 Filed 7–31–07; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

National Park Service

60-Day Notice of Intention To Request Clearance of Collection of Information; Opportunity for Public Comment

AGENCY: Department of the Interior, National Park Service.

ACTION: Notice and request for comments.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3507 *et seq.*) and 5 CFR part 1320, the National Park Service (NPS) invites public comments on a revision of a currently approved information collection (OMB #1024–0038).

DATES: Public comments on the proposed Information Collection Request (ICR) will be accepted on or before October 1, 2007.

ADDRESSES: *Send Comments To:* John W. Renaud, Project Coordinator, Historic Preservation Grants, Heritage Assistance Programs, NPS, 1849 C St., NW., (2256), Washington, DC 20240; via fax at 202/371–1961, or via e-mail at *John_Renaud@nps.gov.* Also, please send a copy of your comments to Leonard Stowe, Information Collection Clearance Officer, NPS, 1849 C St., NW., (2605), Washington, DC 20240, or by e-mail at *Leonard_Stowe@nps.gov.* All responses to this notice will be summarized and included in the request for the Office of Management and Budget (OMB) approval. All comments will become a matter of public record.

FOR FURTHER INFORMATION CONTACT: John W. Renaud, Project Coordinator, Historic Preservation Grants, Heritage Assistance Programs, NPS, 1849 C St., NW. (2256), Washington, DC 20240; or via fax at 202/371–1961, or via e-mail at *John_Renaud@nps.gov,* or via telephone at 202/354–2066. You are entitled to a copy of the entire ICR package free-of-charge.

SUPPLEMENTARY INFORMATION:

Title: Procedures for State, Tribal, and Local Government Historic Preservation Programs; 36 CFR 61.

Bureau Form Number(s): None.

OBM Number: 1024–0038.

Expiration Date: November 30, 2007.

Type of Request: Revision of a currently approved collection of information.

Description of Need: This set of information collections has an impact on State, tribal, and local governments that wish to participate formally in the National Historic Preservation Partnership (NHPP) Program, and State and tribal governments that wish to apply for Historic Preservation Fund (HPF) grants. The NPS uses the information collection to ensure compliance with the National Historic Preservation Act, as amended (16 U.S.C. 470 *et seq.*), as well as the government-wide grant requirements that OBM has issued and the Department of the Interior implements through 43 CFR part 12. This information collection also produces performance data that NPS uses to assess its progress in meeting goals set in Departmental and NPS strategic plans created pursuant to the 1993 Government Performance and Results Act, as amended. This request for OMB approval includes local government burden for information collections associated with various aspects of the Certified Local Government (CLG) program; State government burden for information collections related to the CLG program, the program-specific aspects of the Historic Preservation Fund grants to States, maintenance of a State inventory of historic and prehistoric properties, tracking State Historic Preservation Office historic preservation consultation with Federal agencies, reporting on other State historic preservation accomplishments, and the State role in the State Program Review Process; and tribal government burden for information collections related to the program-specific aspects of HPF grants to Tribal Historic Preservation Officers/Offices (THPOs).

This request includes information collections related to HPF grants to States and to THPOs. NPS is seeking a revision to reflect the increased number of partners participating in the NHPP, and consequently, in the previously approved information collections. In addition, a revision is needed because some information collections had not been recognized as such during preparation for earlier OMB approvals. Section 101(b) of the National Historic Preservation Act, as amended, (16 U.S.C. 470a(b)), specifies the role of States in the NHPP Program. Section 101(c), and section 301 of the Act (16 U.S.C. section 103(c), 470a(c), 16 U.S.C. 470c(c), and 16 U.S.C. 470w), specify the role of local governments in the NHPP program. Section 101(d) of the Act (16 U.S.C. 470a(d) specifies the role of tribes in the NHPP Program. Section 108 of the Act (16 U.S.C. 470h) created the HPF to support activities that carry out the purposes of the Act. Section 101(e)(1) of the Act (16 U.S.C. 470a(e)) directs the Secretary of the Interior through the NPS to ''administer a program of matching grants to the States for the purposes of carrying out'' the Act. Similarly, sections 101(d) and 101(e) of the Act direct a program of grants to THPOs for carrying out their responsibilities under the Act. Each year Congress directs the NPS to use part of the annual appropriation from the HPF for the State grant program and the tribal grant program. The purpose of both the HPF State grants program and the HPF THPO grants program is to assist States and tribes in carrying out their statutory role in the national historic preservation program. HPF grants to States and THPOs are program grants; i.e., each State/THPO selects its own HPF-eligible activities and projects. Each HPF grant to a State/THPO has two years of fund availability. At the end of the first year, NPS employs a ''Use or Lose'' policy to ensure efficient and effective use of the grant funds. All 59 States, territories, and the District of Columbia participate in the NHPP Program. Almost 1,600 local governments have become Certified Local Governments (CLGs) in order to participate in the NHPP program. Approximately 54 local governments become CLGs each year. Fifty-seven Federally-recognized tribes have joined formally the NHPP and have established THPOs and tribal historic preservation offices. Typically, each year five to seven tribes join the partnership. NPS developed the information collections associated with 36 CFR Part 61 in consultation with State, Tribal, and local government partners. The obligation to respond is required to provide information to evaluate whether or not State governments meet minimum standards and requirements for participation in the National Historic Preservation Program; and to meet government-wide requirements for Federal grant programs.

Comments are invited on: (1) The practical utility of the information being gathered; (2) the accuracy of the burden hour estimate; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden to respondents, including use of automated information collection techniques or other forms of information technology. Before including your

address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Frequency of collection: Annually.

Description of Respondents: State, tribal, and local governments that wish to participate formally in the National Historic Preservation Program and who wish to apply for Historic Preservation Fund grant assistance.

Estimated average number of respondents/record keepers: The net number of partners participating in this set of information collections annually is 59 States, 57 Tribes, and 1,554 CLGs.

Estimated average number of responses: NPS estimates that there are 34,539 responses per year. This is the gross number of responses for all of the elements included in this set of information collections.

Estimated average number of State HPF grant-related applicant responses: 118 per year.

Estimated average gross number of State HPF grant-related grantee responses: 400 per year.

Estimated average gross number of State HPF grant-related responses for successful Applicants/Grantees: 518 per year.

Estimated average number of THPO HPF grant-related Applicant responses: 57 per year.

Estimated average gross number of THPO HPF grant-related grantee responses: 171 per year.

Estimated average gross number of THPO HPF application plus grant-related responses: 228 per year.

Estimated average number of State and local CLG program related responses per State/CLG: 42 per year.

Estimated average gross number State and local CLG program related responses for all States/CLGs: 2,897 per year.

Estimated average minimum number of State inventory responses per State: 78 per year.

Estimated average gross minimum number of State inventory responses for all States: 4,602 per year.

Estimated average minimum number of State consultation on Federal projects responses per State: 445 per year.

Estimated average gross minimum number of State consultation of Federal projects responses for all States: 26,255 per year.

Estimated average number of other State performance reports per State: 1 per year.

Estimated average gross number of other State performance reports for all States: 25 per year.

Estimated average minimum number of State Program Reviews per State: 1 per year.

Estimated average gross minimum number of State Program Reviews for all States: 14 per year.

Estimated average gross number of responses for all non-grant collections: 33,793 per year.

Frequency of Response: The frequency of response varies depending upon the activity. In the CLG program, States and local governments participate once for the certification process, once per year for the monitoring of each CLG, once every four years for the evaluation of each CLG, and once a year on a voluntary basis for other performance reporting. Each State adds property records to its inventory and tracks the progress of consultation with Federal agencies as the information becomes available. Each State reports once a year on a voluntary basis for other performance reporting. The National Historic Preservation Act requires that each State undergo a State Program Review every four years. For the program-specific aspects of the HPF grants to State program, the estimated number of responses includes a ''Cumulative Products Table'' of projected performance in summary format, an ''Organization Chart'' showing the availability of appropriately qualified staff, and a (major) ''Anticipated Activities List''. During the grant cycle, grantees seek NPS approval once for a subgrant (via a project notification) and associated final project report. Each year, every State submits an ''End of Year Report'' that includes the Cumulative Products Table (which compares actual to proposed performance), a ''Sources of Nonfederal matching Share Report,'' a ''Project/Activity Database Report,'' an ''Unexpended Carryover Funds Table and Carryover Statement,'' and a ''Significant Preservation Accomplishments Summary.'' For the program-specific aspects of the HPF grants to THPOs program, the estimated number of responses includes a grant application scope of work, a ''Grants Product Summary Table,'' an unexpended funds carry-over statement, and a ''THPO Annual Report'' (a narrative summary of important accomplishments).

Automated Data Collection: NPS has made available to States for completion on-line all of the forms for the HPF State Grants program.

Estimate average time burden per respondent: NPS estimated that the total public (State plus local) burden for the Certified Local Government (CLG) program averages 36 hours per CLG for the certification, monitoring, and evaluation of each CLG and 45 minutes for reporting of other CLG accomplishments. NPS estimates that the total public (State) burden averages 10 minutes per Federal agency project tracked, 45 minutes per inventory record, 2 hours per reporting on other State accomplishments, and 90 hours per State Program Review. NPS estimates that the total public burden for collection not directly tied to grants is 129 hours per respondent. NPS estimates that the public burden for the HPF-supported State grant program collections of information will average 11 hours per application and 19 hours per grant per year for all of the grant-related collections. The combined total public burden for the HPF State grant program-related information collections would average 31 hours per successful applicant/grantee. NPS estimates that the public burden for the HPF-supported THPO grant program collections of information will average 7 hours per application and 14 hours per grant per year for all of the grant-related collections. The combined total public burden for the HPF THPO grant program-related information collections would average 21 hours per successful applicant/grantee. These burden estimates are a one-year average for the two-year grants. The combined total public burden for the 36 CFR Part 61-related information collections would average 182 hours per partner. These estimates of burden include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and reviewing the collection of information.

Estimated average time burden hours per State HPF grant-related applicant response: 11 hours.

Estimated average burden hours per State HPF grant-related Grantee response: 20 hours.

Estimated total annual average burden hours per State HPF grant-related respondent: 31 hours.

Estimated total annual average burden hours for all State HPF grant-related responses: 1,568 hours.

Estimated average burden hours per THPO HPF grant-related Applicant response: 7 hours.

Estimated average burden hours per THPO HPF grant-related Grantee response: 14 hours.

Estimated average annual burden hours per THPO HPF grant-related Applicant/Grantee for all responses: 21 hours.

Estimated total annual average burden hours for all THPO HPF grant-related respondents: 1,217 hours.

Estimated average burden hours in the CLG program per response: 50 minutes.

Estimated average burden hours in the State inventory program per response: 40 minutes.

Estimated average burden hours in the Federal agency consultation tracking program per response: 10 minutes.

Estimated average burden hours in other performance reporting per response: 2 hours.

Estimated average burden hours in the State Program Review program per response: 90 hours.

Estimated average annual burden hours per partner for all non grant-related responses: 432 hours.

Estimated annual burden on all respondents for all non grant related responses: 33,565 hours.

Estimated total annual reporting burden: 36,351 hours per year.

Dated: July 25, 2007.

Leonard E. Stowe,

NPS, Information Collection Clearance Officer.

[FR Doc. 07–3740 Filed 7–31–07; 8:45 am]

BILLING CODE 4310–EN–M

DEPARTMENT OF THE INTERIOR

National Park Service

60-day Notice of Intention To Request Clearance of Collection of Information; Opportunity for Public Comment

AGENCY: Department of the Interior, National Park Service.

ACTION: Notice and request for comments.

SUMMARY: Under the paperwork Reduction Act of 1995 and 5 CFR part 1320, Reporting and Recordkeeping Requirements, the National Park Service (NPS) invites public comments on an extension of a currently approved information collection (OMB #1024–0037).

DATES: Public comments on the proposed Information Collection Request (ICR) will be accepted on or before October 1, 2007.

ADDRESSES: Send comments to: Francis P. McManamon, Manager, Archeology Program, National Park Service, 1849 C Street, NW. (2275), Washington, DC 20240. Phone: 202/354–2123; Fax: 202/371–5102; or by e-mail at *fp_mcmanamon@nps.gov.* Also, you may send comments to Leonard Stowe, NPS Information Collection Clearance Officer, 1849 Street, NW. (2605), Washington, DC 20240, or by e-mail at *leonard_stowe@nps.gov.* All responses to this notice will be summarized and included in the request for the Office of Management and Budget (OMB) approval. All comments will become a matter of public record.

FOR FURTHER INFORMATION CONTACT: Karen Mudar, Archeology Program, National Park Service, 1849 C Street, NW. (2275), Washington, DC 20240. Phone: 202/354–2103; Fax: 202/371–5102; or by e-mail at *karen_mudar@nps.gov.* You are entitled to a copy of the entire ICR package free of charge.

SUPPLEMENTARY INFORMATION:

Title: Archeology Permits and Reports—43 CFR parts 3 and 7.

Form Number(s): DI–1926 (permit application), DI–1991 (permit form).

OMB Number: 1024–0037.

Expiration Date: January 31, 2008.

Type of Request: Extension of a currently approved information collection.

Description of Need: Section 4 of the Archeological Resources Protection Act (ARPA) of 1979 (16 U.S.C. 470cc), and Section 3 of the Antiquities Act (AA) of 1906 (16 U.S.C. 432), authorize any individual or institution to apply to Federal land managing agencies to scientifically excavate or remove archeological resources from public or Indian lands. 43 CFR part 7 for ARPA, and 43 CFR part 3 for the AA, ensure that the resources are scientifically excavated or removed and deposited, along with associated records, in a suitable repository for preservation. Section 13 of ARPA (16 U.S.C. 47011) requires that the Secretary of the Interior report annually to the Congress on archeological activities conducted pursuant to the Act. The information collected is reported periodically to Congress and is used for land management purposes. The obligation to respond is required to obtain or retain benefits.

Comments Are Invited on: (1) The practical utility of the information being gathered; (2) the accuracy of the burden hour estimate; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden to respondents, including use of automated information collection techniques or other forms of information technology. Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Frequency of Collection: On occasion.

Description of Respondents: Respondents are those individuals or organizations wishing to excavate or remove archeological resources from public or Indian lands.

Estimated Average Number of Respondents: 700 per year.

Estimated Average Number of Responses: 2,100 per year.

Frequency of Response: 3 per respondent.

Estimated Average Time Burden per Respondent: 2.5 hours per respondent.

Estimated Total Annual Reporting Burden: 1,750 hours per year.

Dated: July 12, 2007.

Leonard E. Stowe,

NPS, Information Collection Clearance Officer.

[FR Doc. 07–3741 Filed 7–31–07; 8:45 am]

BILLING CODE 4312–53–M

DEPARTMENT OF THE INTERIOR

National Park Service

Big Cypress National Preserve Off-Road Vehicle Advisory Committee; Notice of Establishment

AGENCY: National Park Service, Interior.

ACTION: Notice of establishment.

SUMMARY: The Secretary of the Interior is giving notice of the establishment of the Big Cypress National Preserve Off-Road Vehicle Advisory Committee to offer recommendations, alternatives and possible solutions to management of off-road vehicles at Big Cypress National Preserve.

FOR FURTHER INFORMATION CONTACT: Karen Gustin, Superintendent, Big Cypress National Preserve, 33100 Tamiami Trail E, Ochopee, Florida 34141; 239–695–1103.

SUPPLEMENTARY INFORMATION: The Big Cypress National Preserve Off-Road Vehicle Advisory Committee has been established as directed in the *Off-Road Vehicle Management Plan, 2000.* This plan guides the National Park Service in its management of recreational off-road vehicle (ORV) use in Big Cypress National Preserve, and tiers off of the Preserve's 1991 General Management

Plan. The National Park Service agreed to prepare an ORV management plan as part of a settlement agreement negotiated in 1995 between the Florida Biodiversity Project and several Federal agencies and bureaus. The agreement settled a lawsuit which alleged failure by the agencies to comply with Federal statutes, including the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act.

The Off-Road Vehicle Management Plan, 2000 (p. 29) states ''Under the proposed action, the National Park Service would establish an advisory committee of concerned citizens to examine issues and make recommendations regarding the management of ORVs in the Preserve. The establishment of the committee would meet the legal requirements of the 1972 Federal Advisory Committee Act (FACA) (Pub. L. 92–463, 1972, as amended). The advisory committee would provide access to the extensive knowledge available in the public arena and would offer advice to the National Park Service in the decision-making process in a manner consistent with FACA. This committee would be an element of the adaptive management approach that would be used to develop best management practices for ORV use.''

As part of the ORV management plan, NPS committed to establishing the ORV Advisory Committee. In addition, the establishment of the Committee fulfills the agency's policy of civic engagement. It is envisioned that this committee will strengthen the relationship that the NPS has with its partners and communities. The Committee will be comprised of individuals that represent (1) Sportsmen/ORV users; (2) landowners; (3) academia; (4) environmental advocates; (5) the state government, and (6) Tribes.

Certification: I hereby certify that the administrative establishment of the Big Cypress Off-Road Vehicle Advisory Committee is necessary and in the public interest in connection with the performance of duties imposed on the Department of the Interior by the Act of August 25, 1916, 16 U.S.C. 1 *et seq.*, and other statutes relating to the administration of the National Park System.

Dated: June 14, 2007.

Dirk Kempthorne,

Secretary of the Interior.

[FR Doc. E7–14890 Filed 7–31–07; 8:45 am]

BILLING CODE 4310–V6–P

DEPARTMENT OF INTERIOR

National Park Service

General Management Plan, Draft Environmental Impact Statement, Saguaro National Park, AZ

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of availability of Draft General Management Plan/ Environmental Impact Statement, Saguaro National Park.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service announces the availability of a Draft Environmental Impact Statement and General Management Plan for Saguaro National Park, Arizona.

DATES: The Draft Environmental Impact Statement and General Management Plan will remain available for public review for 60 days after publication of this notice by the Environmental Protection Agency. Public meetings will be announced in the local media.

ADDRESSES: Information will be available for public review and comment online at *http://parkplanning.nps.gov/parkHome.cfm?parkId=96.* Copies of the Draft Environmental Impact Statement and General Management Plan are available from the Superintendent Sarah Craighead, Saguaro National Park, Arizona, 3693 South Old Spanish Trail, Tucson, AZ 85730–5601, (520) 733–5101. Public reading copies of the document will be available for review at the following locations:

Office of the Superintendent, Saguaro National Park, 3693 South Old Spanish Trail, Tucson, AZ 85730–5601.

Planning and Environmental Quality, Intermountain Regional Office—Denver, National Park Service, 12795 W. Alameda Parkway, Lakewood, CO 80225, *Telephone:* (303) 987–6671.

Office of Public Affairs, National Park Service, Department of the Interior, 18th and C Streets, NW., Washington, DC 20240, *Telephone:* (202) 208–6843.

FOR FURTHER INFORMATION CONTACT: Superintendent Sarah Craighead, Saguaro National Park, at the above address and telephone number.

SUPPLEMENTARY INFORMATION: If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to Superintendent Sarah Craighead, Draft General Management Plan/ Environmental Impact Statement, Saguaro National Park, Arizona, 3693 South Old Spanish Trail, Tucson, AZ 85730–5601. You may also comment via the Internet at *http://parkplanning.nps.gov/.* Please include your name and return address in your Internet message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling Superintendent Sarah Craighead at 520–733–5107. Finally, you may hand-deliver comments to the Saguaro National Park visitor center or the Intermountain Region Office—Denver, 12795 W. Alameda Parkway, Lakewood, CO 80225.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

This general management plan will guide the management of Saguaro National Park for the next 15 to 20 years. The general management plan considers three alternatives—a no-action and two action alternatives, including the National Park Service preferred alternative. Alternative 1, the no-action alternative, is a continuation of current management trends and serves as a basis of comparison with the action alternatives. Alternative 2, the preferred alternative, would emphasize protecting ecological processes and biological diversity by connecting wildlife and plan habitats with habitat corridors. The concept was developed to help protect biological and ecological diversity from being compromised by habitat fragmentation. Alternative 3 would emphasize providing a wider range of opportunities for visitors compatible with the preservation of park resources and wilderness characteristics. The concept was developed because the public wanted the park to expand programs and opportunities for a growing diverse visitor population.

The draft environmental impact statement assesses impacts to cultural resources (archeological resources, historic structures, cultural landscapes, ethnographic resources, and museum collections); natural resources (soils, soundscape, vegetation, wildlife, and threatened, endangered, and candidate species and species of special concern); visitor understanding and experience;

remoteness; the park's socio-economic environment; and park operations.

Dated: July 19, 2007.

Michael D. Snyder,

Director, Intermountain Region, National Park Service.

[FR Doc. 07–3742 Filed 7–31–07; 8:45 am]

BILLING CODE 4312–52–M

DEPARTMENT OF THE INTERIOR

National Park Service

Ellis Island Development Concept Plan, Final Environmental Impact Statement, Statue of Liberty National Monument and Ellis Island, New York and New Jersey

AGENCY: National Park Service, Department of the Interior.

ACTION: Notice of Availability of a Record of Decision on the Final Environmental Impact Statement for Ellis Island Development Concept Plan, Statue of Liberty National Monument and Ellis Island.

SUMMARY: Pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C), the National Park Service announces the availability of the Record of Decision for the Final Environmental Impact Statement for the Ellis Island Development Concept Plan, Statue of Liberty National Monument and Ellis Island, New York and New Jersey. On May 14, 2007, the Director, Northeast Region approved the Record of Decision for this undertaking. As soon as practicable, the National Park Service will begin to implement the selected Alternative (i.e., the preferred alternative in the FEIS issued on April 6, 2007). The National Park Service will work with its nonprofit partner for the project, Save Ellis Island, Inc to develop the Ellis Island Institute as the primary adaptive reuse of the Island's remaining abandoned buildings. The Institute will provide cultural, interpretive, and educational programs and activities related to the park's historic themes. An associated small conference facility and overnight accommodations will be developed, financed and managed by a professional hospitality business partner working with the nonprofit partner. The facility would host meetings, retreats, and workshops that would primarily focus upon issues such as immigration, world migration, public health, culture and ethnic diversity. In accordance with the National Park Service's Partnership Construction Process, additional market analysis and feasibility studies will be completed to test and confirm the economic and programmatic viability of the project. The primary purpose of this undertaking, having evaluated the full range of foreseeable environmental consequences of three (3) alternative management strategies presented in the FEIS, is to rehabilitate and adaptively reuse 30 deteriorating buildings on Ellis Island, and provide limited vehicular service and emergency access, while preserving cultural resource values and enhancing visitor appreciation of the immigration function and history pertaining to Ellis Island.

The Record of Decision includes a statement of the decision made, synopses of other alternatives considered, the basis for the decision, a finding on impairment of park resources and values, a listing of measures to minimize environmental harm, and an overview of public involvement in the decision-making process.

FOR FURTHER INFORMATION CONTACT: Superintendent, Statue of Liberty National Monument and Ellis Island, Ellis Island Receiving Office, Jersey City, NJ 07305. (212) 366–3206 (Ext. 100), *Cynthia_garrett@nps.gov.*

SUPPLEMENTARY INFORMATION: Copies of the Record of Decision may be obtained from the contact listed above or online at *http://www.nps.gov/elis/.*

Dated: May 14, 2007.

Linda Canzanelli,

Acting Regional Director, Northeast Region, National Park Service.

[FR Doc. 07–3739 Filed 7–31–07; 8:45 am]

BILLING CODE 4310–GE–M

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–873–875, 877–880, and 882 (Review)]

Steel Concrete Reinforcing Bar From Belarus, China, Indonesia, Korea, Latvia, Moldova, Poland, and Ukraine

Determinations

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty orders on steel concrete reinforcing bar from Belarus,[2] China, Indonesia, Latvia,[3] Moldova,[4] Poland,[5] and Ukraine [6] would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. The Commission further determines that revocation of the antidumping duty order on steel concrete reinforcing bar from Korea would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[7]

Background

The Commission instituted these reviews on August 1, 2006 (71 FR 43523) and determined on November 6, 2006 that it would conduct full reviews (71 FR 66974, November 17, 2006). Notice of the scheduling of the Commission's reviews and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** on December 6, 2006 (71 FR 70786). The hearing was held in Washington, DC, on May 10, 2007, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these reviews to the Secretary of Commerce on July 26, 2007. The views of the Commission are contained in USITC Publication 3933 (July 2007), entitled *Steel Concrete Reinforcing Bar from Belarus, China, Indonesia, Korea, Latvia, Moldova, Poland, and Ukraine: Investigation Nos. 731–TA–873–875, 877–880, and 882 (Review).*

Issued: July 26, 2007.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E7–14809 Filed 7–31–07; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in section 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Chairman Daniel R. Pearson and Commissioner Deanna Tanner Okun dissenting with respect to Belarus.

[3] Chairman Daniel R. Pearson, Vice Chairman Shara L. Aranoff, and Commissioner Deanna Tanner Okun dissenting with respect to Latvia.

[4] Chairman Daniel R. Pearson and Commissioner Deanna Tanner Okun dissenting with respect to Moldova.

[5] Chairman Daniel R. Pearson, Vice Chairman Shara L. Aranoff, and Commissioner Deanna Tanner Okun dissenting with respect to Poland.

[6] Chairman Daniel R. Pearson dissenting with respect to Ukraine.

[7] Commissioners Charlotte R. Lane and Dean A. Pinkert dissenting with respect to Korea.

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–582]

In the Matter of Certain Hydraulic Excavators and Components Thereof; Notice of Commission Determination Not to Review the Initial Determination Contained in Order No. 45

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (''ALJ'') initial determination (''ID'') contained in Order No. 45.

FOR FURTHER INFORMATION CONTACT: Jonathan J. Engler, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3112. Copies of the ALJ's IDs and all other non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: On August 29, 2006, the Commission instituted this investigation, based on a complaint filed by Caterpillar Inc. (''Caterpillar'') of Peoria, Illinois. The complaint alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain hydraulic excavators and components thereof by reason of infringement of U.S. Trademark Registration No. 2,140,606, U.S. Trademark Registration No. 2,421,077, U.S. Trademark Registration No. 2,140,605, and U.S. Trademark Registration No. 2,448,848. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337. The complainants requested that the Commission issue a general exclusion order and cease and desist orders. The complaint named twenty (20) firms as respondents. Two respondents, Barkley Industries LLC and Frontera Equipment Sales, have been found in default. Thirteen have been terminated as a result of settlement agreements.

On April 17, 2007, Caterpillar filed a motion for summary determination on certain issues, including Caterpillar's satisfaction of the domestic industry requirement and affirmative defenses raised by the Respondents. On April 27, 2007, Alex Lyon & Son Sales Managers, Hoss Equipment Co., World Tractor and Equipment Company, LLC, Worldwide Machinery, Inc. and Yoder & Frey Auctioneers (collectively, the ''respondents'') filed an opposition to the motion and on May 3, 2007, the Commission Investigative Staff filed a response to the motion, opposing it in part and supporting it in part. The ALJ in an ID (Order No. 44) granted Caterpillar's motion with respect to the domestic industry requirement and the respondents' affirmative defenses of unclean hands, violation of public policy, trademark abandonment and antitrust violations, denied the motion with respect to the respondents' affirmative defenses of laches, acquiescence and estoppel, and left certain other issues unresolved. The Commission determined not to review the ID.

On June 20, the ALJ issued Order No. 45, resolving the several issues that were still before him, having not been addressed in Order No. 44. Specifically, Order No. 45 denied the respondents' motion for summary determination, and denied, in part, the complainant's motion for summary determination. Order No. 45 also contained an ID, granting in part the complainant's motion for summary determination. On June 27, 2007, the respondents moved for a ''clarification'' by the Commission as to whether that portion of Order 45 in which the ALJ denies the respondents' motion for summary determination is part of the ID. To the extent that it is part of the ID, the respondents petitioned for review of the ID. Caterpillar opposed the respondents' motion and petition for review.

The Commission finds that the ALJ's denial of the respondents' motion for summary determination is not part of the ID and therefore not before the Commission. The Commission further finds that any motion for clarification belongs before the ALJ, not the Commission. The respondents' petition for review of the ID and motion for clarification are therefore denied as improperly filed.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

By order of the Commission.
Issued: July 26, 2007.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E7–14810 Filed 7–31–07; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–611]

In the Matter of Certain Magnifying Loupe Products and Components Thereof; Notice of Investigation

AGENCY: U.S. International Trade Commission

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on June 26, 2007 under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of General Scientific Corp. of Ann Arbor, Michigan. A supplement to the complaint was filed on July 18, 2007. The complaint, as supplemented, alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain magnifying loupes and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 5,446,507, 6,513,929, and 6,704,141. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a permanent exclusion order and a permanent cease and desist order.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will

need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: David H. Hollander, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2746.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2006).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on July 24, 2007, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain magnifying loupe products and components thereof by reason of infringement of claim 8 of U.S. Patent No. 5,446,507, claim 1 of U.S. Patent No. 6,513,929, or claims 1–5 or 10 of U.S. Patent No. 6,704,141, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—General Scientific Corp., 77 Enterprise Drive, Ann Arbor, MI 48103.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

SheerVision, Inc., 4030 Palos Verdes Drive North, Ste., 104, Rolling Hills Estates, CA 90274.

Nanjing JinJiahe I/E Co. Ltd., 1–46 Tianpu Road, Pukou Economy Development Zone, Nanjing, Jiangsu, China.

(c) The Commission investigative attorney, party to this investigation, is David H. Hollander, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Charles E. Bullock is designated as the presiding administrative law judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of a limited exclusion order or cease and desist order or both directed against the respondents.

By order of the Commission.

Issued: July 26, 2007.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. E7–14808 Filed 7–31–07; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Settlement Pursuant to Comprehensive Environmental Response, Compensation and Liability Act

Notice is hereby given that on July 11, 2007, a proposed settlement in *United States* v. *Alcan Aluminum Corp., et al.,* Civil No. 03–765, was lodged with the United States District Court for the Northern District of New York.

In this action, the United States asserted a claim against Alcan Aluminum Corp. under section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. 9607(a), for recovery of response costs incurred regarding the Quanta Resources Superfund Site in Syracuse, New York. The proposed consent decree embodies an agreement with Alcan to pay $2,011,832 of response costs. The decree provides Alcan with an covenant to sue under section 107(a) of CERCLA.

The Department of Justice will received for a period of thirty (30) days from the date of this publication comments relating to the settlement. Comments should be addressed to the Assistant Attorney General, Environmental and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–76121, and should refer to *U.S.* v. *Alcan Aluminum Corp., et al.,* D.J. Ref. 90–11–3–848/2.

The settlement may be examined at the Office of the United States Attorney, Northern District of New York, James Foley Building, 445 Broadway, Albany, New York 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 settlement may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the settlement 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 $4.25 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Ellen Mahan,

Deputy Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 07–3749 Filed 7–31–07; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on July 26, 2007, a proposed Consent Decree in *United States* v. *Commonwealth Edison Co., et al.*, Case No. 07–CV–03799

(''*Commonwealth Edison*''), was lodged with the United States District Court for the Northern District of Illinois.

In *Commonwealth Edison*, the United States is seeking recovery of approximately $4.5 million in response costs incurred in connection with a removal action in 2002 at the Johns Manville Superfund Site, Site 2 (the ''Site''), in Waukegan, Illinois. The proposed Consent Decree involves the four defendants in the case—the Commonwealth Edison Company; Johns Manville; Midwest Generation, LLC; and the City of Waukegan (collectively, the ''Settling Defendants'')—as well as the Department of Defense (''DOD''). Under the proposed Consent Decree, the Settling Defendants would pay $3.014 million, and DOD would pay $741,000. In exchange, the Settling Defendants would receive contribution protection and a covenant by the United States not to sue them for response costs incurred in connection with the Site. DOD would receive contribution protection and a covenant by the United States Environmental Protection Agency not to take administrative action against it for response costs incurred in connection with the Site.

For a period of 30 days from the date of this publication, the Department of Justice will receive comments relating to the proposed Consent Decree. Comments should either be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Commonwealth Edison Co., et al.*, D.J. Ref. 90–11–3–08425. Comments should either be e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, Washington, DC 20044–7611.

The proposed Consent Decree may be examined at the Office of the United States Attorney, 219 South Dearborn Street, Chicago, IL 60604–1700, and at the U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, IL 60604–3590. During the public comment period, the proposed Consent Decree may also be examined on the following Department of Justice Web site: *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed 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 e-mailing or faxing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*, fax number (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 $6.25 (25 cents per page reproduction cost) payable to the United States Treasury. If a request for a copy of the proposed Consent Decree is made by fax or e-mail, please forward a check in the aforementioned amount to the Consent Decree Library at the address noted above.

William Brighton,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 07–3737 Filed 7–31–07; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Pursuant To the Comprehensive Environmental Response Compensation and Liability Act

Notice is hereby given that a proposed consent decree in *United States* v. *Delavan, Inc.,* Civil Action No. 07–331, was lodged on July 25, 2007 with the United States District Court of the Southern District of Iowa. The United States filed this action pursuant to the Comprehensive Environmental Response, Compensation and Liability Act seeking clean up of groundwater contamination and recovery of costs incurred at the Southern Plume of the Railroad Avenue Site in West Des Moines, Iowa.

The Consent Decree resolves the United States' claims by requiring the defendant Delavan, Inc. to perform the clean up, at a cost of approximately $500,000 and to reimburse the United States for its future costs.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be address to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Delavan, Inc.,* DOJ Ref. #90–11–2–09081.

The proposed consent decree may be examined at the office of the United States Attorney, U.S. Courthouse Annex, Suite #286, 110 East Court Avenue, Des Moines, Iowa 50309–2053, and at the Region VII Office of the Environmental Protection Agency, 901 N. 5th Street, Kansas City, KS 66101. During the public comment period, the proposed consent decree may also be examined on the Department of Justice Web site, at *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed 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 number (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 $32.65 (or $11.00, for a copy that omits the exhibits and signature pages) (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

W. Benjamin Fisherow,

Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 07–3750 Filed 7–31–07; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of the Consent Decree Under the Pipeline Safety Act

Notice is hereby given that on July 26, 2007, a proposed Consent Decree in *United States* v. *El Paso Natural Gas Co.* (''EPNG''), Civil Action No. 1:07–cv–715, was lodged with the United States Court for the District of New Mexico.

The proposed Consent Decree resolves EPNG's violations of specific regulations promulgated under the Pipeline Safety Act, 49 U.S.C. section 60120. The Complaint filed concurrently with the Consent Decree alleges the following violations by EPNG: Violation of 49 CFR 192.475 by transporting corrosive gas on Pipelines 1103 and 1107; violation of 49 CFR 192.477 by failing to monitor the lines when corrosive gas is being transported on lines 1107 and 1103; and violation of 49 CFR 192.453 by failing to have personnel qualified in corrosion control methods. Under the terms of the Consent Decree, EPNG will pay a $15.5 million penalty, and implement injunctive relief on its 10,000 miles of pipeline system valued to cost at least $86 million. EPNG agrees to, among other things, modify its pipelines to enable in-line inspection tools to be used on its system; conduct sampling, monitoring, and inspections on its system; and provide training for its corrosion control specialists and corrosion engineers.

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 of the Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov,* or mailed to the, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *EPNG,* D.J. Ref. 90–5–1–1–08184.

The Consent Decree may be examined at the Office of the United States Attorney, Federal Office Building, 201 Third Street, NW., Suite 900, Albuquerque, New Mexico 87102, and at United States Department of Transportation Docket Operations facility, West Building, Room W–12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. During the public comment period, the Consent Decree may also be examined on the following Department of Justice, Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.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 $28.00 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Thomas Mariani,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resource Division.

[FR Doc. 07–3751 Filed 7–31–07; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 C.F.R. 50.7, notice is hereby given that a proposed consent decree in *United States* v. *Kenrock, Inc., John Doe, and Frank Lisa,* Case No. 3:05–CV–0057 AS, was lodge with the United States District Court for the Northern District of Indiana on July 23, 2007. 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 resolves these allegations by requiring the Defendants to restore the impacted areas and to pay a civil penalty. 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 Clifford D. Johnson, Assistant United States Attorney, 204 S. Main Street, Room M–01, South Bend, Indiana 46601 and refer to *United States of America* v. *Kenrock, Inc., John Doe, and Frank Lisa,* Case No. 3:05–CV–0057 AS.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the Northern District of Indiana, South Bend Division, 204 S. Main Street, South Bend, IN 46601. In addition, the proposed Consent Decree may be viewed on the World Wide Web at *http://www.usdoj.gov/enrd/open.html.*

Scott Schachter,

Assistant Chief, Environmental Defense Section, Environment & Natural Resources Division.

[FR Doc. 07–3748 Filed 7–31–07; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Oil Pollution Act (''OPA'')

Notice is hereby given that on July 20, 2007, a proposed Consent Decree in *United States* v. *Texmo Oil Company Jobbers, Inc.*, Civil Action No. 2:07–cv–01401–DKD (D. Ariz.), was lodged with the United States District Court for the District of Arizona. The proposed Consent Decree resolves the United States' claim against Texmo Oil Company Jobbers, Inc. (''Texmo''), for natural resources damages under the Oil Pollution Act, 33 U.S.C. Sections 2701–2761, relating to a spill of approximately 7,700 gallons of diesel fuel into the Bill Williams River National Wildlife Refuge in Arizona. The Consent Decree requires Texmo to pay to $1,217,382.91 to the United States for damages for injuries to natural resources that resulted from the spill.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the proposed Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States* v. *Texmo Oil Company Jobbers, Inc.*, D.J. Ref. 90–5–1–1–09082.

The proposed Consent Decree may be examined at the Office of the Solicitor, Phoenix Field Office, U.S. Department of the Interior, 401 W. Washington Street SPC 44, Suite 404, Phoenix, AZ 85003–2151. During the public comment period, the Consent Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the proposed 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 no. (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $4.25 (25 cents per page reproduction cost) payable to the ''U.S. Treasury'' or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Henry S. Friedman,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 07–3752 Filed 7–31–07; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Archer's Trading Company; Revocation of Registration

On February 6, 2006, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Archer's Trading Company (Respondent), of Mechanicsville, Virginia. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, 003001ATY, as a distributor of List I chemicals, on the ground that its ''continued registration is inconsistent with the public interest.'' Show Cause Order at 1. The Show Cause Order also proposed the denial of any pending applications for renewal or modification of Respondent's registration. *Id.*

The Show Cause Order specifically alleged that Respondent distributed List I chemicals to gas stations and convenience stores, which DEA has found are non-traditional retailers of

these products for legitimate therapeutic demand. *Id.* at 2–3. The Show Cause Order alleged that during the period 2001 through 2003, Respondent ''sold over-threshold amounts of pseudoephedrine to an unregistered individual [who] was subsequently convicted of the federal offense of unlawful distribution of listed chemicals.'' *Id.* at 2. The Show Cause Order also alleged that DEA investigators audited Respondent's handling of List I chemical products and found that it ''was unable to account for nearly 3,800 bottles of 60-count combination ephedrine'' products and that there were ''numerous discrepancies in the firm's sales receipts.'' *Id.*

The Show Cause Order further alleged that ''sometime in October–November 2004, [Respondent] moved its listed chemicals to an unapproved location in Ashland, Virginia.'' *Id.* at 3. Relatedly, the Show Cause Order alleged that Respondent violated Federal law by distributing products out of the Ashland location. *Id.* The Show Cause Order also alleged that Respondent had failed to report a theft of listed chemicals that had occurred at the Ashland location. *Id.*

On February 13, 2006, the Show Cause Order was served on Respondent's counsel by certified mail, return receipt requested. On March 13, 2006, Respondent, through its counsel, requested a hearing. The matter was assigned to Administrative Law (ALJ) Judge Mary Ellen Bittner. On November 2, 2006, however, Respondent submitted a letter withdrawing its request for a hearing and waiving its right to a hearing. Accordingly, on November 8, 2006, the ALJ terminated the proceeding.

On or about June 11, 2007, the investigative file was forwarded to me for final agency action. Based on Respondent's letter waiving his right to a hearing, I therefore enter this Final Order without a hearing based on relevant material contained in the investigative file, *see* 21 CFR 1301.43(e), and make the following findings.

Findings

Respondent is the holder of DEA Certificate of Registration, 003001ATY, which authorizes it to distribute the List I chemicals pseudoephedrine, ephedrine and phenylpropanolamine, at the registered location of 10247 Finlandia Lane, Mechanicsville, Virginia. The expiration date of Respondent's registration was June 30, 2004. On May 24, 2004, however, Respondent submitted a renewal application. I therefore find that Respondent's registration has remained in effect pending the issuance of this Final Order. *See* 5 U.S.C. 558(c).

Both pseudoephedrine and ephedrine currently have therapeutic uses. *See, e.g., Tri-County Bait Distributors,* 71 FR 52160, 52161 (2006).[1] Both chemicals are, however, regulated under the Controlled Substances Act because they are precursor chemicals which are easily extracted from non-prescription products and used in the illicit manufacture of methamphetamine, a Schedule II controlled substance. *See* 21 U.S.C. 802(34); 21 CFR 1308.12(d).

Methamphetamine ''is a powerful and addictive central nervous system stimulant.'' *T. Young Associates, Inc.,* 71 FR 60567 (2006) (other citations omitted). As noted in numerous DEA final orders, the illegal manufacture and abuse of methamphetamine pose a grave threat to this country. *See id.* Methamphetamine abuse has destroyed numerous lives and families. *Id.* Moreover, because of the toxic nature of the chemicals used in making the drug, illicit methamphetamine laboratories cause serious environmental harms. *Id.*

Respondent is owned and operated by Mr. Archer Carr Satterfield, Jr. Respondent distributes dry goods, cakes, pies, and over-the-counter medicines (including those containing listed chemicals) to gas stations, convenience stores and small grocery stores in central Virginia. List I chemicals account for between 15 and 20 percent of Respondent's business. As of February 2004, the business was located at Mr. Satterfield's private residence in Mechanicsville, Virginia.

On June 10, 2003, two DEA Diversion Investigators (DIs) went to Respondent's registered location to conduct a regulatory inspection. As part of the inspection, the DIs conducted an audit of Respondent's handling of six combination ephedrine products during the period June 1, 2002, through June 10, 2003. Notwithstanding that the DIs used zero as the initial inventory for each of the audited products, they found that Respondent had large shortages in five of the products.

For example, with respect to the sixty-count bottles of Mini Thins, Respondent was short 144,792 dosage units or 2413 bottles. As for the six-count packets of Mini Thins, Respondent was short 12,660 dosage units or 2,110 packets.

With respect to the sixty-count bottles of Biotek Ephedrine, Respondent was short 80,640 dosage units or 1344 bottles. As for the six-count packets of Biotek Ephedrine, Respondent was short 8,856 dosage units or 1476 packets. Because zero was used as the starting inventory for each of the products (and thus any product actually on hand on the beginning date would not be counted), the actual shortages were likely greater than those calculated by the DIs.

During the audit, the DIs also found that a substantial number of Respondent's sale invoices were incomplete. Some of the invoices lacked the purchaser's address information including its street and city. Others lacked information regarding the quantity and product size.

During this inspection, Mr. Satterfield told the DIs that he was suspicious of the activities of one of his customer's, Fasil Mitha, the owner of Trio's Market/California Imports. Mr. Satterfield further related that Mitha had told him that he ''sells to customers off the shelf.'' Upon reviewing Respondent's sales invoices, the DIs determined that Respondent has sold nearly 47,000 dosage units of combination ephedrine products to Mitha between November 20, 2002, and June 4, 2003. This would amount to approximately 782 sixty-count bottles during a six-and-a-half month period.[2]

During the audit period, Respondent also sold large quantities to a store identified as Market #14, in Richmond, Virginia. More specifically, Respondent sold this entity 50,554 dosage units between August 13, 2002, and May 22, 2003. This would amount to approximately 842 sixty-count bottles.

Sometime in either October or November 2004, Mr. Satterfield notified the DEA Richmond office that he had moved his business from his residence in Mechanicsville, Virginia, to a new location at 11262 Elmont Road, Ashland, Virginia. Mr. Satterfield requested that DEA visit his new location and approve his request for modification.

As part of the process, Mr. Satterfield was asked to provide a complete customer list. Mr. Satterfield submitted a customer list, but it was missing address and phone number information

[1] The FDA is, however, currently proposing to remove combination ephedrine-guaifenesin products from its over-the-counter (OTC) drug monograph and to declare them not safe and effective for OTC use. *See* 70 FR 40232 (2005). While Respondent also sought authority to handle phenylpropanolamine, there is no evidence in the file that it actually handled the product.

[2] According to the investigative file, Mitha subsequently pled guilty to violating 21 U.S.C. § 841(c)(2), which makes it a criminal offense to knowingly ''possess[ ] or distribute[ ] a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by'' the CSA. Mitha was sentenced to 135 months in prison.

for nine of his customers. He also failed to provide the address, phone number, social security number and date of birth for one of his employees.

The DIs instructed Mr. Satterfield that he could not store listed chemicals at his new location until his request for the modification was approved. Mr. Satterfield stated that he would keep his List I products at his Mechanicsville location.

Subsequently, in March 2005, the DIs obtained an incident report from the Hanover County Sheriff's Department pertaining to a theft that had occurred at the Ashland property on the night of November 1–2, 2004. According to the report, at approximately midnight, Mr. Satterfield had parked his delivery truck at his Ashland property. When Mr. Satterfield returned to the property the following morning, both the truck and a trailer that he stored merchandise in had been broken into.

Mr. Satterfield reported that approximately $4,609 in merchandise had been stolen. Among the stolen items were various OTC drug products including listed chemical products. Mr. Satterfield expressed to the responding officer his concern for the consequences were DEA to find out about the theft because the products were not locked in a secure place. Mr. Satterfield further told the officer that he would never get a license if DEA found out about the theft. Mr. Satterfield did not report the theft to this Agency.

On June 22, 2005, two DIs went to Respondent's Ashland facility. During the visit, the DIs found that substantial quantities of various List I chemical products were stored in the building and were on the delivery truck. Mr. Satterfield told the DIs that the products that were on the delivery truck were going to be offloaded and stored in the building that evening.

Discussion

Section 304(a) of the Controlled Substances Act provides that a registration to distribute a List I chemical ''may be suspended or revoked * * * upon a finding that the registrant * * * has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4). In making this determination, Congress directed that I consider the following factors:

(1) Maintenance by the applicant of effective controls against diversion of listed chemicals into other than legitimate channels;

(2) Compliance by the applicant with applicable Federal, State, and local law;

(3) Any prior conviction record of the applicant under Federal or State laws relating to controlled substances or to chemicals controlled under Federal or State law;

(4) Any past experience of the applicant in the manufacture and distribution of chemicals; and

(5) Such other factors as are relevant to and consistent with the public health and safety.

Id. § 823(h).

''These factors are considered in the disjunctive.'' *Joy's Ideas*, 70 FR 33195, 33197 (2005). I may rely on any one or a combination of factors, and may give each factor the weight I deem appropriate in determining whether a registration should be revoked or an application for a renewal or modification of a registration should be denied. *See, e.g., David M. Starr*, 71 FR 39367, 39368 (2006); *Energy Outlet*, 64 FR 14269 (1999). Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA*, 419 F.3d 477, 482 (6th Cir. 2005); *Morall* v. *DEA*, 412 F.3d 165, 173–74 (D.C. Cir. 2005). In this case, I conclude that factors one, two, four, and five establish that Respondent's continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 823(h). Accordingly, Respondent's registration will be revoked and its pending applications for renewal and modification of its registration will be denied.

Factor One—Maintenance of Effective Controls Against Diversion

Under DEA's regulations, a List I chemical distributor is required to ''provide effective controls and procedures to guard against theft and diversion of List I chemicals.'' 21 CFR 1309.71(a). The regulations further provide that ''[i]n evaluating the effectiveness of security controls and procedures, the Administrator shall consider * * * [t]he adequacy of the registrant's or applicant's systems for monitoring the receipt, distribution, and disposition of List I chemicals in its operations.'' *Id.* 1309.71(b)(8).

''[M]aintaining proper records is * * * an essential part of providing effective controls against diversion.'' *John J. Fotinopoulos*, 72 FR 24602, 24605 (2007). Here, the investigative file establishes that many of Respondent's sales invoices were missing necessary information for monitoring the distribution and disposition of List I products. More specifically, Respondent's invoices were frequently missing critical information including the street address and the city that its customers were located in. Moreover, the invoices also typically lacked information regarding the size of the List I products.

Beyond that, the accountability audit found substantial shortages in five of the List I products which Respondent distributed. As found above, Respondent was short 144,792 dosage units or 2413 bottles of sixty-count Mini-Thins; it was also short 12,660 dosage units or 2,110 six-count packets of the product. Moreover, Respondent was short 80,640 dosage units or 1344 sixty-count bottles of Biotek Ephedrine; it was also short 8,856 dosage units or 1476 six-count packets of the product. Finally, because the DIs assigned a value of zero for the opening inventory for each product, the actual amount of the shortages may well have been even larger.

Accordingly, I conclude that Respondent does not maintain effective controls against diversion and that this finding provides reason alone to conclude that its continued registration ''is inconsistent with the public interest.'' 21 U.S.C. 823(h).

Factors Two and Four—Respondent's Compliance With Applicable Laws and Its Experience in the Distribution of Listed Chemicals

The investigative file also establishes that Respondent failed to comply with Federal law in two other respects. First, Respondent clearly was distributing listed chemical products out of its Ashland facility which did not have a registration. Second, Respondent failed to report the November 2, 2004 theft of listed chemical products as required by 21 U.S.C. 830(b)(1)(C).

Under Federal law, a registration is location specific. *See* 21 U.S.C. 822(e) (''A separate registration shall be required at each principal place of business * * * where the applicant * * * distributes * * * list I chemicals.''); *see also* 21 CFR 1309.23(a). Moreover, Federal law clearly provides that a registrant is ''authorized to possess [or] distribute'' a listed chemical only ''to the extent authorized by their registration and in conformity with the other provisions of this subchapter.'' 21 U.S.C. 822(b).

Under DEA regulations, a request for a modification is treated as a new application. *See* 21 CFR 1309.61 (a ''request for modification shall be handled in the same manner as an application for registration,'' and, if approved, ''the Administrator shall issue a new certificate of registration''). As I recently explained, a request for modification does not authorize a registrant to engage in listed chemical activities at a new location until the modification is approved and the new certificate of registration is issued. *See Fotinopoulos*, 72 FR at 24606. *Cf.*

Orlando Wholesale, L.L.C., 71 FR 71555, 71557 (2006) (applicant's change of address following pre-registration inspection renders application moot).

Here, Mr. Satterfield was specifically told that he could not store listed chemicals at the Ashland facility until his request for modification was approved. Moreover, Mr. Satterfield told investigators that he would store Respondent's listed chemicals products at his Mechanicsville location. Mr. Satterfield nonetheless stored listed chemicals at the Ashland facility both in the building and in a truck which he parked there and distributed listed chemicals from this location. 21 U.S.C. 822(b) & (e). This violated Federal law. Moreover, based on the date of the theft (which occurred on November 2, 2004), as well as the DIs' finding that during the June 22, 2005 visit, substantial quantities of List I products were being kept at the Ashland location, it appears that Mr. Satterfield repeatedly violated Federal law.

The evidence also establishes that Respondent failed to report to DEA the theft of listed chemicals that occurred on November 2, 2004. Under 21 U.S.C. 830(b)(1)(C), a registrant must report ''any unusual or excessive loss or disappearance of a listed chemical under the control of the regulated person.''

According to the responding officer, Mr. Satterfield failed to report the theft because he was concerned that if the Agency found out, it would not grant him a registration for his new location. Mr. Satterfield thus not only violated Federal law, making matters worse, he did so intentionally.

Finally, the evidence establishes that Respondent sold extraordinary quantities of products to at least two stores, and that the owner of one of the stores, Mr. Mitha, subsequently plead guilty to violating 21 U.S.C. 841(c)(2). As found in *T. Young Associates*, 71 FR at 60572, and numerous other cases, non-traditional retailers (such as those supplied by Respondent) sell only small amounts of listed chemical products to meet legitimate demand. On average, these stores sell only $12.58 per month of combination ephedrine products to meet legitimate demand for these products as a bronchodilator. *Id.*

The evidence establishes that in a six-and-a-half month period, Respondent sold the equivalent of 782 sixty-count bottles of combination-ephedrine products to Mr. Mitha. While the record does not establish the retail price Mr. Mitha sold the products at, in other cases DEA has found that smaller size bottles (48 count) sold for approximately $5.99 to 6.99 each. *See Wild West Wholesale*, 72 FR 4042, 4043 (2007). Respondent's sales to Mr. Mitha's store so exceeded legitimate demand that it is clear that Respondent's products were diverted into the illicit manufacture of methamphetamine, a fact confirmed by Mr. Mitha's guilty plea.[3] The same is also true of Respondent's sales to Market #14.

Respondent's violations of Federal law and its experience in distributing listed chemical products thus provide further grounds to conclude that its continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 823(h).

Factor Five—Such Other Factors as Are Relevant To and Consistent With Public Health and Safety

The illicit manufacture and abuse of methamphetamine have had pernicious effects on families and communities throughout the nation. Cutting off the supply source of methamphetamine traffickers is of critical importance in protecting the American people from the devastation wreaked by this drug.

While listed chemical products containing pseudoephedrine and ephedrine are currently recognized as having legitimate medical uses, DEA orders establish that convenience stores and gas-stations constitute the non-traditional retail market for legitimate consumers of products containing these chemicals. *See, e.g., Tri-County Bait Distributors*, 71 FR at 52161–62; *D & S Sales*, 71 FR at 37609; *Branex, Inc.*, 69 FR 8682, 8690–92 (2004). DEA has further found that there is a substantial risk of diversion of List I chemicals into the illicit manufacture of methamphetamine when these products are sold by non-traditional retailers. *See, e.g., Joy's Ideas*, 70 FR at 33199 (finding that the risk of diversion was ''real'' and ''substantial''); *Jay Enterprises, Inc.*, 70 FR 24620, 24621 (2005) (noting ''heightened risk of diversion'' if application to distribute to non-traditional retailers was granted).

Accordingly, ''[w]hile there are no specific prohibitions under the Controlled Substances Act regarding the sale of listed chemical products to [gas stations and convenience stores], DEA has nevertheless found that [these entities] constitute sources for the diversion of listed chemical products.'' *Joey Enterprises, Inc.*, 70 FR 76866, 76867 (2005). *See also TNT Distributors*, 70 FR 12729, 12730 (2005) (special agent testified that ''80 to 90 percent of ephedrine and pseudoephedrine being used [in Tennessee] to manufacture methamphetamine was being obtained from convenience stores'').[4] The risk of diversion is especially great where, as here, a registrant cannot account for large quantities of the products it handles.

Moreover, the record establishes that Respondent sold extraordinary quantities of combination ephedrine products to several stores including one whose owner subsequently pled guilty to distributing a listed chemical knowing or having reasonable cause to believe that the chemical would be used to illegally manufacture a controlled substance. *See* 21 U.S.C. 841(c)(2). Thus, the record supports a finding that Respondent's products were diverted. This factor thus provides additional support for the conclusion that Respondent's continued registration ''is inconsistent with the public interest.'' *Id.* § 823(h).

In sum, as found above under factor one, the evidence supports a finding that Respondent did not maintain adequate records and an audit found that it could not account for several hundred thousand dosage units of combination ephedrine products. Moreover, while Respondent and its owner have no record of relevant criminal convictions, *see* 21 U.S.C. 823(h)(3), the evidence nonetheless establishes that Respondent violated federal law by: (1) Distributing listed chemicals from a facility which was not registered and likely did so for months, and, (2) failing to report to DEA the theft of listed chemicals from its non-approved location. Finally, the evidence supports a finding that a substantial

[3] Even if Mr. Satterfield lacked either actual or constructive knowledge that Mr. Mitha was diverting the products, his state of mind is irrelevant. As I have previously noted, the public interest standard does not require the Government to ''prove that a Registrant has acted with any particular *mens rea.* Indeed, the diversion of List I chemicals into the illicit manufacture of methamphetamine poses the same threat to public health and safety whether a registrant sells the products knowing they will be diverted, sells them with a reckless disregard for the diversion, or sells them being totally unaware that the products were being diverted.'' *T. Young*, 71 FR at 60572 (footnote omitted) (citing *D & S Sales*, 71 FR 37607, 37610–12 (2006), and *Joy's Ideas*, 70 FR 33195, 33198 (2005)).

[4] *See OTC Distribution Co.*, 68 FR 70538, 70541 (2003) (noting ''over 20 different seizures of [gray market distributor's] pseudoephedrine product at clandestine sites,'' and that in eight-month period distributor's product ''was seized at clandestine laboratories in eight states, with over 2 million dosage units seized in Oklahoma alone.''); *MDI Pharmaceuticals*, 68 FR 4233, 4236 (2003) (finding that ''pseudoephedrine products distributed by [gray market distributor] have been uncovered at numerous clandestine methamphetamine settings throughout the United States and/or discovered in the possession of individuals apparently involved in the illicit manufacture of methamphetamine'').

portion of Respondent's products were diverted. Accordingly, I therefore conclude that Respondent's continued registration ''is inconsistent with the public interest.'' *Id.* § 823(h).

Order

Accordingly, pursuant to the authority vested in me by 21 U.S.C. 823(h) & 824(a), as well as 28 CFR 0.100(b) & 0.104, I order that DEA Certificate of Registration, 003001ATY, issued to Archer's Trading Company be, and it hereby is, revoked. I further order that Archer Trading Company's pending applications for modification and renewal of its registration be, and they hereby are, denied. This order is effective August 31, 2007.

Dated: July 20, 2007.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E7–14815 Filed 7–31–07; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 05–33]

Holloway Distributing; Revocation of Registration

On May 25, 2005, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Holloway Distributing, Inc. (Respondent), of Puxico, Missouri. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, 003219HIY, and the denial of Respondent's pending application for renewal of its registration, on the ground that its continued registration ''is inconsistent with the public interest.'' Show Cause Order at 1.

More specifically, the Show Cause Order alleged that Respondent distributed list I chemical products containing pseudoephedrine, a precursor chemical used in the illicit manufacture of methamphetamine, a schedule II controlled substance, to convenience stores, gas stations, liquor and video stores, and bait and tackle shops in various parts of Missouri, the State which has repeatedly ranked first in the nation in the number of clandestine methamphetamine lab seizures. *Id.* at 2. The Show Cause Order alleged that these establishments constitute the non-traditional market for consumers who purchase pseudoephedrine products for legitimate uses. *Id.* at 7. The Show Cause Order further alleged that Respondent's ''sale of pseudoephedrine products is inconsistent with the known legitimate market and known end-user demand for products of this type.'' *Id.*

The Show Cause Order also alleged that in March 2004, DEA investigators conducted verifications of several entities which Respondent identified as its customers. *Id.* at 3–4. According to the allegations, DEA investigators determined that several of Respondent's customers were purchasing additional list I chemical products from other distributors and also selling other products such as starting fluid and lantern fuel which are used in the illicit manufacture of methamphetamine. *Id.*

The Show Cause Order next alleged that in March 2004, as part of a regulatory investigation of Respondent, DEA investigators conducted an accountability audit of five list I chemical products. *Id.* at 5. The Show Cause Order alleged that there were either overages or shortages for each product, and that DEA investigators found that Respondent had ''failed to notify the agency of a significant loss of List I chemical products as required by 21 U.S.C. 830(b)(1)(C) and 21 CFR 1310.05(a)(3).'' *Id.*

Finally, the Show Cause Order alleged that between November 7, 2003, and April 1, 2004, Respondent sold pseudoephedrine products on numerous occasions to one Keith Frankum, notwithstanding that Frankum had presented a sales tax exempt certificate which indicated that his business address was a local storage facility and was vague when asked about the nature of his business. *Id.* at 5–6. According to the allegations, notwithstanding that local law enforcement authorities had told one of Respondent's employees that Frankum's brother was ''a meth cook,'' and that its employees ''referred to [Frankum] as 'the drug guy' whenever he arrived at Holloway to make a purchase,'' Respondent made additional sales of pseudoephedrine products to him. *Id.* at 6. The Show Cause Order further alleged that in early April 2004, Frankum was arrested and during a search incident to the arrest, was found to be in possession of twenty boxes of pseudoephedrine products sold by Respondent, an invoice from Respondent, and a handwritten note which read: ''Be careful when leaving here!'' *Id.* at 5. According to the allegations, Frankum subsequently told DEA investigators that he sold pseudoephedrine ''to several repeat customers'' and that it ''was a big seller because it was used to make drugs.'' *Id.* at 6. The Show Cause Order also alleged that Frankum admitted that he had a prior arrest for possession of methamphetamine and that he had done ''a lot of meth'' five years earlier. *Id.* The Show Cause Order further alleged that Respondent never reported to DEA its sales to Frankum. *Id.* at 5.

On June 24, 2005, Respondent, through its counsel, requested a hearing. The matter was assigned to Administrative Law Judge (ALJ) Gail A. Randall, who conducted a hearing in Arlington, Virginia, on February 7, 2006, and in Cape Girardeau, Missouri, on February 22–23, 2006. During the hearing, both parties called witnesses to testify and introduced documentary evidence. Following the hearing, both parties submitted briefs containing proposed findings of fact, conclusions of law and argument.

On December 19, 2006, the ALJ submitted her recommended decision (hereinafter, ALJ). In her decision, the ALJ concluded that the Government had ''initially * * * met its burden of proof * * * by demonstrating that the Respondent made 'grossly excessive sales' of listed chemical products between October 1, 2003, and March 23, 2004.'' ALJ at 40 (citing FOF 26). The ALJ also acknowledged DEA precedent holding that a registrant's grossly excessive sales support a finding that its products were diverted and that its continued registration would be inconsistent with the public interest. *Id.* at 40–41.

The ALJ concluded, however, that Respondent's continued registration would not be inconsistent with the public interest for two reasons. *Id.* at 41. First, the ALJ noted that Respondent had ''demonstrated its willingness and its ability to develop and implement changes in its business processes consistent with the [agency's] recommendations.'' *Id.* Second, the ALJ relied on Missouri's recently enacted restrictions on pseudoephedrine sales. According to the ALJ, the statute showed that ''the State will be monitoring the gelcap and liquid pseudoephedrine products, if any, found in the methamphetamine labs,'' and that ''[s]uch heightened scrutiny leads to the conclusion that, if the products of the Respondent, as well as other distributors of List I chemical products in Missouri, are found in illicit methamphetamine laboratories, the State will close the legislative loophole afforded these limited products.'' *Id.* The ALJ reasoned that ''[u]ntil such time as the problem is substantiated * * * the possibility of * * * Respondent's products being diverted [should] not be relied upon to revoke'' its registration. *Id.* The ALJ therefore recommended that I not revoke

Respondent's registration and not deny its pending application for renewal.

On January 5, 2007, the Government filed exceptions to the ALJ's decision. On February 1, 2007, the ALJ forwarded the record to me for final agency action. Having reviewed the record as a whole, I hereby issue this decision and final order. I adopt the ALJ's findings of fact except as noted herein. I reject, however, the ALJ's conclusions of law with respect to factors one, two, four and five. I further reject the ALJ's ultimate conclusion that Respondent's continued registration ''would not be inconsistent with the public interest.'' *Id.* Accordingly, I also reject the ALJ's recommendation that Respondent's registration should not be revoked and its pending renewal application should not be denied. I make the following findings.

Findings of Fact

Respondent is a Missouri Corporation which is located at 210 East Owen Avenue, Puxico, Missouri. ALJ Ex. 2. Respondent is co-owned by Mr. Terry Holloway and his wife, Debbie Holloway. Tr. 720. Mr. Holloway is Respondent's president. *Id.* Respondent is a wholesale distributor of approximately 10,000 products including groceries, restaurant foods, candy, cigarettes, and tobacco. *Id.* at 724.

Respondent, which has been registered since 1998, currently holds DEA Certificate of Registration, 003219HIY, which authorizes it to distribute list I chemicals. Gov. Ex. 1 & 2. Based on Respondent's submission of a timely renewal application in September 2004, Respondent's registration has remained in effect pending the final order in this matter. Gov. Ex. 2.

Methamphetamine and the Market for List I Chemicals

Pseudoephedrine is lawfully marketed under the Food, Drug and Cosmetic Act as a decongestant. Gov. Ex. 4, at 4. Pseudoephedrine is, however, also regulated as a list I chemical under the Controlled Substances Act (CSA) because it is easily extracted from non-prescription drug products and used in the illicit manufacture of methamphetamine, a schedule II controlled substance. *See* 21 U.S.C. 802(34); 21 CFR 1308.12(d).

Methamphetamine ''is a powerful and addictive central nervous system stimulant.'' *T. Young Associates, Inc.*, 71 FR 60567 (2006) (other citations omitted). As noted in numerous DEA final orders, the illegal manufacture and abuse of methamphetamine pose a grave threat to this country. *See id.* Methamphetamine abuse has destroyed numerous lives and families. *Id.* Moreover, because of the toxic nature of the chemicals used in making the drug, illicit methamphetamine laboratories cause serious environmental harms. *Id.*

The illicit manufacture and abuse of methamphetamine is an extraordinarily serious problem in Missouri. According to the record, during the years 2001 through 2004, Missouri repeatedly ranked first in the number of law enforcement seizures of methamphetamine laboratories. *See* Gov. Ex. 3, at 4. More specifically, in 2001, law enforcement authorities seized 2,181 labs; in 2003, 2,885 labs; and in 2004, 2,782 labs. *Id.* Moreover, while legislation enacted by Missouri in June 2005 (which made pseudoephedrine and ephedrine in tablet-form a schedule V controlled substance and limited its sale to pharmacies), appears to have led to a substantial reduction in the number of meth. lab seizures, law enforcement authorities still seized 745 labs in the latter half of 2005. *See* Gov. Ex. 28.

The Missouri statute, however, exempts pseudoephedrine in liquid and liquid-filled gel caps. *See* Mo. Rev. Stat. 195.017.17; Tr. 309–11. Thus, in Missouri, these products can be sold by non-pharmacies. According to the record, ''[w]hile the vast majority of clandestine laboratories seized have utilized tableted pseudoephedrine and ephedrine products, gel-caps and liquid dosage form products can easily serve as a source of precursor material for the production of methamphetamine.'' Gov. Ex. 4, at 8. Furthermore, DEA studies show that pseudoephedrine ''can be easily extracted'' from liquid and gel cap products by using reagents and solvents which are ''readily available at hardware and auto parts stores in the U.S.'' *Id.; see also* Gov. Ex. 6 (discussing study by DEA chemist who was able to extract pseudoephedrine from gel caps and obtain a 68 percent yield using equipment typically found in meth. labs). The record further establishes that in those States (including Missouri) which have exempted gel cap and liquid form listed chemical products, traffickers are using exempted products to make meth. *See* Gov. Ex. 5, at 13–14; Gov. Ex. 6, Gov. Ex. 7, Tr. 321–22.

The Government also established that there is both a traditional and non-traditional market for pseudoephedrine. According to Jonathan Robbin, who has testified as an expert in statistical analysis of demographic, economic, geographic, survey and sales data in numerous DEA proceedings and several criminal and civil trials, over 97 percent of all non-prescription drug products are sold by drug stores, pharmacies, supermarkets, large discount merchandisers, and electronic shopping and mail order houses. Tr. 173. Mr. Robbin further testified that sales of non-prescription drugs by convenience stores (including both those that sell and do not sell gasoline), ''account for only 2.2% of the overall sales of all convenience stores that handle the line and only 0.7% of the total sales of all convenience stores.'' Gov. Ex. 8, at 5. Based on his study of U.S. Government Economic Census data, survey data obtained by the National Association of Convenience Stores, and commercially available point-of-transaction data, Mr. Robbin further stated that only about 1.2 percent of all non-prescription drug products are sold at convenience stores, Tr. 173, and cold remedies (including pseudoephedrine products) ''are [a] * * * much smaller'' portion of this. *Id.* at 174; Gov. Ex. 8, at 5. Mr. Robbin thus explained that convenience stores ''definitely constitute a 'nontraditional market' for the sale of [OTC] non-prescription drug pseudoephedrine'' products. Gov. Ex. 8, at 5.

Mr. Robbin further testified that ''the normal expected retail sale of pseudoephedrine (Hcl) tablets in a convenience store may range between $0 and $40 per month[,] with an average of $19.85 per month,'' and that the expected sales range of Actifed tablets in a convenience store ranges between $0 and $20 [per month], with an average of $ 8.68.'' *Id.* at 8; Tr. 176. Mr. Robbin explained that ''[a] monthly retail sale of $60 of pseudoephedrine (Hcl) * * * would be expected to occur less than one in 1,000 times in random sampling,'' and [a] monthly retail sale of $100 a month of pseudoephedrine (Hcl) or of $50 of Actifed tablets would be expected to occur about once in a million times in random sampling.'' Mr. Robbin also stated that gas stations without convenience stores, liquor stores, sporting goods stores, bait shops, video stores, gift stores, and head shops sell only ''trace amounts'' of these products. Gov. Ex. 8, at 8.

DEA investigators provided Mr. Robbin with a list of 1,371 transactions in which Respondent distributed either Select Brand [s]udafed or [a]ctifed during the period from October 1, 2003, through March 23, 2004. *Id.* at 12. The products were sold to 94 stores which included convenience stores, gas stations and liquor stores. *Id.* According to the data, Respondent distributed 3,129 packages of Select Brand [s]udafed, each containing 24 tablets, and 5,858 packages of Select Brand

[a]ctifed, each also containing 24 tablets. Gov. Ex. 8, at 12–13.

Based on information obtained from Thomson Micromedex's Red Book, Mr. Robbin initially calculated an implied retail sales value of $4.58 for Respondent's sudafed product and $4.34 for the actifed product. *Id.* at 12. Based on these values, Mr. Robbin then tabulated the imputed monthly sales of these products by Respondent's customers and calculated the probability that the sales were to meet legitimate consumer demand for the products. *See* Gov. Ex. 9, at B1–B10. Mr. Robbin found that ten of the seventy-five stores selling the sudafed had sold ten times the expected amount, and another five stores sold five to ten times expectation. Gov. Ex. 8, at 14. With respect to the actifed product, ''49 of the 71 stores (69.01%)'' sold amounts which Mr. Robbin described as ''extraordinarily excessive when compared to normal expectations.'' *Id.* at 15.

Respondent did not, however, sell name brand Sudafed and Actifed, but rather, a generic brand. The evidence established that the suggested retail price (SRP) of these products was $1.83 for the generic sudafed and $2.81 for the generic actifed although Respondent did not produce any evidence establishing that its customers actually sold the product at the SRP.[1] *See* Gov. Ex. 16, at 7, Gov. Ex. 23, at 2.

The Government therefore entered as a rebuttal exhibit a new tabulation of the average monthly sales by Respondent's customers. *See* Gov. Ex. 29. According to this table, three stores were selling the sudafed products at ten times expectation; another eight stores were selling the product at five to seven times expectation. *Id.* at B7.

The data for the stores selling actifed was even more pronounced. This tabulation showed that one store was selling at over fifty times expectation, seven stores were selling at twenty-five to fifty times expectation, eleven stores were selling at ten to twenty-five times expectation, and another eleven stores were selling at five to ten times expectation. *Id.* at B10–B12.

In his testimony, Mr. Robbin acknowledged that reducing the estimated retail price by half would ''certainly put more stores into the insignificant range.'' Tr. 279. Mr. Robbin, however, further testified that it would ''still leave a great many stores in the significant range.'' *Id.* Mr. Robbin also stated that even if he reduced the estimated retail ''price in half,'' he would still conclude that Respondent's sales were ''excessive.'' *Id.* at 254.

Mr. Robbin further testified that he ''rule[d] out [the] location [of Respondent's customers] as being a factor in the degree of sales.'' *Id.* at 183. According to Mr. Robbin, wherever [people] live in Missouri,'' there is a ''a major pharmacy [or] chain pharmacy'' within ''a half an hour drive time.'' *Id.* at 181. While acknowledging that a convenience store might be a five to ten minute drive, Mr. Robbin reiterated that ''ninety-seven percent'' of shoppers ''buy their non-prescription drugs in pharmacies and supermarkets.'' *Id.* According to Mr. Robbin's testimony, ''non-prescription drugs are bad sellers in convenience stores. They are given very little shelf space, and * * * are classed among the impulse goods, meaning that nobody goes to a convenience store, or few people do, to buy them specifically.'' *Id.* at 182. Mr. Robbin thus ''rule[d] out location as being a factor in the degree of sales,'' because while location might influence sales fifty percent either way (depending upon whether the store was in a rural or urban area), the differences between the expected sales range and Respondent's actual sales were ''vastly greater than fifty percent.'' *Id.* at 183–84.

The ALJ found credible the testimony of Mr. Terry Holloway (Respondent's President and co-owner) that Doniphan, Missouri, a town in Respondent's market, is forty miles from a store in the traditional market. ALJ at 9–10. Mr. Holloway also testified that Doniphan was a town of 3,000 people and had ''a lot of attractions'' such as a river, which apparently is popular with canoeists, and campgrounds. Tr. 727. Mr. Robbin's conclusion that Respondent's customers had engaged in excessive sales was based, however, on sales that occurred in the October to March time frame, a period in which it does not seem likely that tourists would be flocking to Doniphan to go camping or canoeing. But in any event, Mr. Holloway's testimony does no more than call into question Mr. Robbin's conclusion regarding a few stores.[2] Neither it nor the ALJ's observation that ''in some instances * * * Respondent sold list I chemical products in quantities much lower than expected,'' ALJ at 12 (FOF 27), refutes Mr. Robbin's ultimate finding that Respondent ''provides services to retailers outside the traditional market for [OTC] drug products and frequently has sold products containing pseudoephedrine (hcl) in extraordinary excess of normal or traditional demand.'' Gov. Ex. 8, at 17–18.

The DEA Investigation of Respondent

In September 2003, a Diversion Investigator (DI) in the St. Louis Field Division was advised by a DEA Special Agent with the Cape Girardeau field office that Southeastern Missouri Drug Task Force officers were concerned that pseudoephedrine products being found in clandestine meth. labs had come from Respondent's customers. Tr. 348, 354–55. In particular, the Special Agent told the DI that ''some of [Respondent's] customers were selling case quantities * * * out the back door'' of their stores. *Id.* at 355. The DI advised his Group Supervisor of the report and Respondent was scheduled for a regulatory investigation. *Id.* at 348–49.

On March 23, 2004, the DI visited Respondent's registered location and conducted an inspection. Gov. Ex. 13. As part of the inspection, the DI conducted an accountability audit of five highly diverted list I chemical products including three products which contain 30 mg. of pseudoephedrine hydrochloride per tablet (Select Brand sudafed, Select Brand Sinus Allergy, and Contac Sever Cold & Flu Max Strength) and two products which contain 60 mg. of pseudoephedrine tablet (Select Brand Antihistamine Nasal Decongestant (actifed) and BC Allergy Sinus Headache). Gov. Ex. 21; Tr. 389. Accordingly, in the presence of one Respondent's employees, the DI inventoried these products. Gov. Ex. 21.

The DI then proceeded to audit Respondent's handling of the products during the period beginning on October 1, 2003, through the close of business on March 23, 2004, and recorded the results on a chart.[3] Gov. Ex. 22. Initially, the DI concluded that one of the products, Select Brand pseudoephedrine had an overage. *Id.* at 1. The DI also determined that Respondent had shortages in each of the remaining products. *Id.* Most significantly, Respondent was short 105 boxes of Select Brand Antihistamine Nasal Decongestant. *Id.* Respondent was also short five boxes of Select Brand Sinus Allergy, two boxes of Contac

[1] Indeed, there is evidence that some of Respondent's customers sold it for even higher prices than that used by Mr. Robbin. See Tr. 412.

[2] Mr. Holloway also testified that Fisk, Missouri, another town in Respondent's market, was located fifteen miles from a store in a traditional market. Tr. 729. Beyond the fact that fifteen miles on rural roads does not seem to be an excessively long drive, Mr. Robbin's analysis lists only one store as being located in Fisk. *See Generally* Gov. Ex. 29. Respondent's evidence thus does not provide reason to question Mr. Robbin's conclusion that numerous other stores had engaged in excessive sales of pseudoephedrine products.

[3] The DI established the beginning count based on Respondent's computer records. Tr. 392.

Severe Cold and Flu, and one box of BC Allergy Sinus. *Id.*

The first chart did not, however, include Respondent's manual adjustments to inventory because Respondent had not properly documented them. Tr. 394–95. Nonetheless, the DI gave Respondent the ''benefit of the doubt that [the] manual adjustments * * * were * * * correct'' and prepared a second chart. *Id.* Respondent gave two explanations for the adjustments: (1) That the sudafed and actifed products were stored next to each other on the shelf and that an employee could have recorded one product when he had actually pulled the other product for distribution, and (2) that some products were bound together so that six boxes of a product might have been recorded as one box. *Id.* at 396.

According to the second computation chart, Respondent still had shortages of each product. The most significant shortage (Select Brand [a]ctifed) had been reduced from 105 boxes to one. Gov. Ex. 22, at 2; Tr. 397–98. Another product, Select Brand [p]seudoephedrine, had gone from an overage of thirteen boxes to a shortage of thirteen boxes.[4] Gov. Ex. 22, at 2.

Following the initial on-site inspection, the DI visited seven of Respondent's customers including several convenience stores, a liquor store, a video store, and a gas station. Tr. 403–04; Gov. Ex. 25. The first store the DI visited was Millie's, a Citgo gas station located in Wappapello, Missouri. There, the DI found that the store was selling not only listed chemicals products it obtained from Respondent, but also Pro Active ephedrine products that were carried by another supplier. Tr. 405–06.

The DI next visited Green's Grocery in Doniphan, Missouri. *Id.* at 406. There, the DI also found that the store was selling Pro Active ephedrine products. *Id.* The DI interviewed Green's owner, who told her that twice a week, it purchased twelve boxes of twenty-four Select Brand [s]udafed from Respondent, and that it also purchased 72 boxes of 40 count Pro Active Ephedrine Multi-Action. *Id.* The DI also found that Green's was selling lantern fuel and starting fluid, two products which are used in the illicit manufacture of methamphetamine. *Id.* at 409.

The DI next went to Bart's Package Store, which is also located in Doniphan, Missouri. *Id.* at 410. There, the store owner told the DI that he purchased twelve boxes of Select Brand Pseudoephedrine (24 count) and twelve boxes of Select Brand Antihistamine (24 count) from Respondent every three weeks and sold the products for $7 a box. *Id.* at 412.[5] The DI also found that Bart's sold starting fluid and lantern fuel. *Id.* at 416. According to the father of the owner, initially Bart's had purchased three cans of starting fluid but was then ordering ten cases a week to meet demand. *Id.* at 417–18.

The DI then visited the Country Junction, a convenience store which is also located in Doniphan. *Id.* at 419. There, the DI found that the store was not only purchasing Select Brand sudafed from Respondent, it was also buying Pro Active Multi-Action Ephedrine from another distributor. *Id.* at 419–20.

Next, the DI visited JB's Grocery, in Neelyville. *Id.* at 422. Here again, the DI found that the store was purchasing listed chemical products from both Respondent and another supplier. *Id.* at 423. The store was also selling starting fluid and lantern fuel.[6] *Id.*

On April 5, 2004, after discussing the results of the investigation with her supervisor, the DI called Mr. Marvin Wheeler, who had served as Respondent's contact person during the inspection. *Id.* at 521. The DI told Mr. Wheeler that the office had decided that a ''verbal warning'' would suffice to address Respondent's failure to report the significant loss of list I chemical products, based on the products that were missing during the audit. *Id.* at 521, 531–32. As for Respondent's lack of documentation for its inventory adjustments, the DI ''suggested that they develop a standard procedure to * * * investigate [a] shortage or surplus and document it thoroughly.'' *Id.* at 532.

Later that day, the DI received a telephone call from the same Cape Girardeau based Special Agent informing her that one Keith Frankum had been stopped by local law enforcement officers after leaving Respondent's premises. *Id.* at 356, 435–36. During the stop, which had occurred on April 1, 2004, the authorities found twenty boxes of pseudoephedrine products, an invoice documenting that Respondent had sold the products to Frankum, and a handwritten note which stated: ''Be Careful Leaving here!!'' Gov. Ex. 23. The investigation determined that the note had been written by Jennifer Holloway, the daughter of Respondent's owners who then worked in the customer service department.[7] Tr. 438.

The DI subsequently determined that Frankum had purchased a total of 92 boxes of listed chemical products (58 boxes of Select Brand actifed (24 count) and 34 boxes of Select Brand pseudoephedrine (24 count) on five separate occasions beginning on November 7, 2003, and ending on April 1, 2004. *Id.* at 453–54. According to the testimony of Jane Brotherton, Frankum had called Respondent and specifically asked whether it carried Sudafed and Actifed. *Id.* at 541. Notwithstanding that Frankum's question made her suspicious, *id.*, Frankum was subsequently allowed to purchase these products upon his presentation of a Missouri Retail Sales License which indicated that the location of his business was a storage unit located in Dexter, Missouri. *Id.* at 543; *see also* Resp. Ex. 10.

During Frankum's first visit to Respondent, Ms. Brotherton asked him what type of business he had. Tr. 457. Frankum was vague. *Id.; see also id.* at 548 (testimony of Ms. Brotherton regarding Frankum's third visit; ''there was never any reference to opening up a business''). Moreover, Frankum paid cash for each purchase. *Id.* at 457 & 545; *see also* Resp. Ex. 11, at 1–5.

Even after two other employees who live in Dexter confirmed to Ms. Brotherton that the address given by Frankum was a storage unit, Respondent made additional sales of listed chemical products to him. Tr. 544–47. Moreover, two weeks after Frankum's first purchase, a local police official told Ms. Brotherton that ''Frankum's brother was a meth cook.'' *Id.* at 459, 505. While Ms. Brotherton related this information to other employees, *id.* at 459, she

[4] There were no adjustments to the inventories of the Contac Severe Cold & Flu and BC Allergy Sinus products. *See* Gov. Ex. 22, at 1–2. After adjustments, the shortage in the remaining product, Select Brand Sinus Allergy was reduced by two boxes. *Id.*

[5] According to the DI, several other DEA investigations had found that Bart's had purchased large quantities of listed chemical products from other distributors in the period circa 2000. Tr. 414–15. Most significantly, Bart's had purchased ''over 6 million dosage units from Heartland Distributing for $563,234,'' during a three year period. *Id.* at 415. The DI testified, however, that she did not know whether Bart's had purchased listed chemical products from Respondent during this period. *Id.* at 416. While this testimony is not directly probative of Respondent's conduct, it does support what DEA has found in numerous cases—that non-traditional retailers of listed chemical products are frequently conduits for diversion.

[6] The record indicates that JB's had purchased large quantities of pseudoephedrine from another distributor several years earlier. Tr. 424.

[7] The ALJ also found that ''the record contains no evidence that Jennifer Holloway knew Mr. Frankum, and it is unclear why she passed to note to him.'' ALJ at 21 (FOF 62). According to her mother, when asked why she passed the note, she ''didn't really know.'' Tr. 702. Ultimately, it is not necessary to determine Ms. Holloway's motive to resolve the issues in this case.

apparently never told Respondent's owners about this or any of the sales. *Id.* at 559–60.

Some of Respondent's employees who worked in the customer service department referred to Frankum as ''the drug guy.'' *Id.* at 460; *see also* at 564 (testimony of Jane Brotherton; ''I'm sure the girls that worked up front probably [referred to Frankum as 'the drug guy'] in conversation.''). While Frankum was suspicious enough to prompt Ms. Brotherton to call the local police after his numerous visits, *see* Resp. Ex. 9, Respondent sold listed chemical products to him up until his arrest.

Respondent did not, however, report any of these sales to DEA. Tr. 491. Moreover, during the March 2004 inspection, the DI ''specifically asked [Respondent's liaison] about intelligence information.'' Tr. 491. Even then, Respondent did not mention the sales to the DI. *Id.*

After his arrest, DEA personnel interviewed Frankum. *Id.* at 451–52. Frankum admitted that he had previously been arrested for assault and possession of methamphetamine and stated that ''he did a lot of meth about five years ago.'' *Id.* at 451. Respondent told investigators that he sold the pseudoephedrine products to five main customers, whom he learned of ''through word of mouth''; that pseudoephedrine was a big seller ''because it was used to make drugs''; that ''[h]e didn't think anyone purchased the product for allergies or sinus problems''; and that ''[h]e knew that some of his customers likely used [the] pseudoephedrine that he sold them to make methamphetamine.'' *Id.* at 452–53. Frankum subsequently pled guilty to possession of a methamphetamine precursor drug with intent to manufacture amphetamine, methamphetamine or any of their analogs, a felony offense under Missouri law, and was sentenced to three years of imprisonment. Resp. Ex. 13, at 1.

Upon investigating the circumstances of Respondent's sales to Frankum, DEA investigators re-evaluated their initial position regarding its continued registration and requested that it surrender its registration. Tr. 483–86. Respondent's owner initially agreed to but then changed his mind. *Id.* at 484–85. This proceeding was then initiated.

Respondent's Remedial Measures and Its Policies

The ALJ found that Respondent undertook several corrective actions to prevent diversion following the DEA inspection. These measures included instructing its employees on their obligation to report diversion committed by another employee, Resp. Ex. 18, and the issuance of a written policy which announced that the company was ''limiting the quantity of [Select Brand Sudafed] tablets to 10 each per order and * * * Actifed to 10 each per order.'' Resp. Ex. 20. The policy further stated that employees should ''[a]lso take notice [of] the attached list of items and regulate the quantity of items ordered from it also.'' *Id.* Finally, the policy instructed Respondent's employees to ''[p]lease report any suspicious orders to a manager or Dalton McKnight,'' *id.*, who the company had appointed as its DEA compliance officer. Tr. 480–81. According to the testimony of Respondent's President, the company voluntarily reduced the quantity of products that could be purchased per transaction because he did not ''want to see [the young generation] messed up in this stuff.'' *Id.* at 741.[8]

The ALJ further found that Respondent had reduced the number of listed chemical products it carried from thirty to eighteen and had started a daily inventory of the products. ALJ at 23 (citing Tr. 871–72). Respondent constructed a special cage in which its listed chemical products would be stored under lock; it also limited access to the cage to only three or four supervisory employees. Tr. 881–82. Respondent also adopted the suggestion of the DI that a supervisor fill the listed chemical product orders and created a separate ''pick ticket,'' a document which is used to fill orders and place them on the appropriate truck. *Id.* at 882. Finally, Respondent also issued a memorandum instructing its employees on the proper documenting of all transactions. *See* Resp. Ex. 21.

As found above, the customer verifications indicated that Respondent's customers were also purchasing listed chemical products from other distributors. During his testimony, the Government asked Mr. Holloway whether he aware that J.B.'s Store was purchasing listed chemicals from another distributor. Tr. 774. Mr. Holloway answered that ''none of us would have know[n] that.'' *Id.* at 774–75. Mr. Holloway then added: ''[o]ur salesmen [are] trained to be aware of that. They, you know, you don't get nosy in people's business.'' *Id.* at 775.

The Government then asked Mr. Holloway whether he had ''ever asked any of [his] customer accounts whether they were purchasing listed chemical products from other suppliers?'' *Id.* Mr. Holloway answered: ''[I]n the wholesale world, that's kind of a no-no. If you want [to be] throw[n] out the door * * * if you want your competitor to take [the business], well get too nosy and that's what happens.'' *Id.* When pressed by the Government as to whether his answer was ''no,'' Mr. Holloway explained: ''If the salesman don't want that account, he can go ask personal questions like that and he can lose them.'' *Id.* at 776. Mr. Holloway then added: ''[t]he answer is I taught them, [d]on't lose customers.'' *Id.*

Discussion

Section 304(a) of the Controlled Substances Act provides that a registration to distribute a list I chemical ''may be suspended or revoked * * * upon a finding that the registrant * * * has committed such acts as would render his registration under section 823 of this title inconsistent with the public interest as determined under such section.'' 21 U.S.C. 824(a)(4). In making this determination, Congress directed that I consider the following factors:

(1) Maintenance by the applicant of effective controls against diversion of listed chemicals into other than legitimate channels;

(2) compliance by the applicant with applicable Federal, State, and local law;

(3) any prior conviction record of the applicant under Federal or State laws relating to controlled substances or to chemicals controlled under Federal or State law;

(4) any past experience of the applicant in the manufacture and distribution of chemicals; and

(5) such other factors as are relevant to and consistent with the public health and safety.

Id. § 823(h).

''These factors are considered in the disjunctive.'' *Joy's Ideas,* 70 FR 33195, 33197 (2005). I may rely on any one or a combination of factors, and may give each factor the weight I deem appropriate in determining whether a registration should be revoked or an application for a modification of a registration should be denied. *See, e.g., David M. Starr,* 71 FR 39367, 39368 (2006); *Energy Outlet,* 64 FR 14269 (1999). Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA*, 419 F.3d 477, 482 (6th Cir. 2005); *Morall* v. *DEA*, 412 F.3d 165, 173–74 (D.C. Cir. 2005).

Based on factors one, two, four and five, I conclude that the Government has

[8] The ALJ also found that Respondent had ''stopped selling Mini-thins in 1999 or 2000,'' another frequently diverted listed chemical product, because the Holloways ''knew it was going to things it shouldn't be going [to],'' ALJ at 23 (quoting Tr. 734), more specifically, the illicit manufacture of methamphetamine. Tr. 734. When asked by his counsel how he learned to this, Mr. Holloway testified: ''you go to the coffee shop, you can learn about everything. It don't mean it always true, but basically, just through hearsay.'' *Id.*

proved that Respondent's continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 823(h). Moreover, having considered the evidence regarding the corrective actions taken by Respondent, I conclude that while some of these measures do adequately address the Agency's concerns, in other respects, they are insufficient to protect the public from the continued diversion of listed chemicals into the illicit manufacture of methamphetamine. Finally, I find wholly unpersuasive—and contrary to the public interest—the ALJ's suggestion that until the diversion of gel caps and liquid pseudoephedrine products is substantiated, I not rely on this ''possibility'' to revoke Respondent's registration. Accordingly, Respondent's registration will be revoked and its pending application will be denied.

Factor One—Maintenance of Effective Controls Against Diversion

As the ALJ noted, DEA precedents establish that this factor encompasses a variety of considerations. ALJ at 31. These include the adequacy of security, the adequacy of record keeping and reporting, the conduct of the registrant and its employees, and the occurrence of diversion. *See Rick's Picks*, 72 FR 18275, 18278 (2007), *John J. Fotinopoulos*, 72 FR 24602, 24605 (2007), *D & S Sales*, 71 FR 37607, 37610 (2006); *Joy's Ideas*, 70 FR 33195, 33197–98 (2005).

As the ALJ found, Respondent constructed a special cage for storing listed chemical products and limited the number of persons with access to it. ALJ at 31. Moreover, the Government did not dispute whether other aspects of Respondent's physical arrangements were adequate. I thus conclude that Respondent provides adequate physical security for its products.

Respondent's recordkeeping is another matter. As the record establishes, the accountability audits showed that there were discrepancies with respect to each of the five audited products. Furthermore, even after the audit took into account Respondent's manual adjustments—which were not supported by appropriate documentation—there were still shortages.[9] While some of the shortages involved small amounts as an absolute matter, they were significant on a percentage basis.

Under DEA regulations, a registrant must have adequate ''systems for monitoring the receipt, distribution, and disposition of List I chemicals in its operations.'' 21 CFR 1309.71(b)(8). Respondent's lack of documentation for its inventory adjustments supports a finding that its recordkeeping and accountability controls were inadequate. Respondent did, however, implement several changes to its monitoring and record keeping practices. Were there no other evidence of Respondent's inadequate controls, Respondent's corrective actions might well support its being allowed to maintain its registration. There is, however, such evidence.

Jonathan Robbin, the Government's expert witness testified that Respondent's customers are non-traditional retailers of pseudoephedrine products and that the normal expected sales range of these products at Respondent's customers is ''between $ 0 and $ 40 per month[,] with an average of $ 19.85 for pseudoephedrine (HCL) and between $ 0 and $ 20 per month, with an average of $ 8.68'' for its actifed product. Mr. Robbin further testified that ''[a] monthly retail sale of $ 60 of pseudoephedrine (HCL) would be expected to occur less than one in 1,000 times in random sampling,'' and ''[a] monthly retail sale of $ 100 a month of pseudoephedrine (HCL) or of $ 50 of Actifed tablets would be expected to occur about one in a million times in random sampling.'' Gov. Ex. 8, at 8.

Moreover, the Government entered into evidence a rebuttal exhibit prepared by Mr. Robbin which showed that even using Respondent's suggested retail price for Select Brand Sudafed and Actifed,[10] Respondent's customers were still selling these products in extraordinary quantities. More specifically, three stores were selling its sudafed product at ten times expectation; another eight stores were selling the product at five to seven times expectation. As for its actifed product, one store was selling it at over fifty times expectation, seven stores were selling it at twenty-five to fifty times expectation, eleven stores were selling it at ten to twenty-five times expectation, and another eleven stores were selling it at five to ten times expectation.

Respondent attempts to discredit Mr. Robbin's findings by arguing that one of the towns in Respondent's market (Doniphan) is forty miles from a store in the traditional market. This testimony only calls into question Mr. Robbin's findings with respect to the stores in Doniphan. It does not impeach his findings with respect to the other stores or his ultimate finding that Respondent ''frequently has sold products containing pseudoephedrine * * * in extraordinary excess of normal or traditional demand.'' Gov. Ex. 8, at 17–18. Because of the statistical improbability that these sales were to meet legitimate demand, I conclude that a preponderance of the evidence establishes that a substantial portion of Respondent's products have been diverted. *See T. Young*, 71 FR at 60572; see also *D & S Sales*, 71 FR at 37611 (finding diversion occurred ''[g]iven the near impossibility that * * * sales were the result of legitimate demand''); *Joy's Ideas*, 70 FR at 33198 (finding diversion occurred in the absence of ''a plausible explanation in the record for this deviation from the expected norm'').

The ALJ acknowledged that the Government had proved that Respondent had engaged in '' 'grossly excessive sales' of listed chemical products,'' and that ''[i]n the past, this pattern of sales has supported a finding'' of diversion and that Respondent's continued registration ''would be adverse to the public interest.'' ALJ at 40–41. The ALJ noted, however, that ''Respondent ha[d] demonstrated its willingness and its ability to * * * implement changes in its business processes.'' *Id.* In this regard, the ALJ had earlier noted that Respondent had ''voluntarily lowered the maximum number of listed chemical products to be sold per transaction.'' *Id.* at 32.

Respondent's action does not impress me. As the record indicates, Respondent lowered the number of boxes per order from twelve to ten. Tr. 645–46, 653 (testimony of Marvin Wheeler). Moreover, Respondent did not limit the number of times a customer could order in a month; indeed, the record indicates that its customers were allowed to purchase the products twice a week. *Id.* at 654 (testimony of Marvin Wheeler); *see also id.* at 484 (testimony of DI). Even using Respondent's suggested retail price for these products, Respondent's policy would allow a customer to obtain a quantity of products which would sell for approximately $225 per month (actifed) and $146 per month for its sudafed product, amounts which are far in

[9] As found above, one of the manual adjustments was for 105 boxes of Select Brand antihistamine. I do not find Respondent's justification for the discrepancy to be persuasive. For example, if employees were mistakenly pulling this product from the shelf rather than the adjoinign product (Select Brand sudafed), given that both products were audited, one would think that there would be a substantial and corresponding overage in the audit of the actifed. The audit report indicates that there was ony a thirteen box overage on the initial count of the actifed and that after applying Respondent's adjustments, there was a shortage. *See* Gov. Ex. 22, at 1–2

[10] As explained above, Respondent did not produce any evidence that its customers actually sold the products at the suggested retail prices. Indeed, Mr. Holloway testified that under Missouri law, Respondent could not tell its customers what price to sell the products for. TR 783.

excess of the normal expected retail sales by a non-traditional retailer to meet legitimate demand. In short, Respondent's sales limit is not a consequential reform of its business practices and would not prevent diversion.[11] I therefore hold that Respondent does not maintain effective controls against diversion.

Respondent's controls against diversion are inadequate for an additional reason, which the ALJ completely ignored. The record establishes that several of Respondent's customers were receiving listed chemical products from other sources. Yet notwithstanding the potential for diversion of listed chemical products, *see* Tr. 734, Respondent's President and co-owner testified that he had never inquired of his customers as to whether they were purchasing listed chemical products from other distributors. *Id.* at 775–76. Moreover, Mr. Holloway expressed the view that it was inappropriate for his salesmen to ask the firm's customers whether they were purchasing products from other distributors. According to Mr. Holloway, ''[i]f you want [to be] throw[n] out the door * * * if you want your competitor to take [the business], well get too nosy and that's what happens.'' *Id.* at 776. Mr. Holloway further explained that ''[i]f the salesman don't want that account, he can go ask personal questions like that and he can lose them.'' *Id.* Mr. Holloway then stated that he had ''taught'' his sales force, ''[d]on't lose customers.'' *Id.*

Respondent's policy—which is fairly characterized as ''see no evil, hear no evil''—is fundamentally inconsistent with the obligations of a DEA registrant. *See, e.g., D & S Sales*, 71 FR at 37610. As noted in numerous DEA orders, selling amounts below the 1,000 gram threshold that triggers reporting requirements, *see* 21 CFR 1310.04(f), does not create a safe harbor which allows a registrant to distribute listed chemical products in disregard for the ultimate disposition of those products. *See Rick's Picks, L.L.C.*, 72 FR 18275, 18278 (2007); *D & S Sales*, 71 FR 37607, 37609, 37611–12 (2006); *see also United States* v. *Kim*, 449 F.3d 933, 939 (2006). Rather, a registrant has an affirmative duty to protect against diversion by knowing its customers and the nature of their list I chemical sales. Under Federal law, a registrant cannot sell listed chemical products to a customer when it has ''reasonable cause to believe'' the products will be diverted. 21 U.S.C. 841(c)(2). A registrant cannot avoid the requirements of Federal law by instructing its sales force to ask no questions of its customers and thereby be deliberately ignorant of diversion.

I therefore conclude that notwithstanding the corrective measures it has implemented, Respondent still does not maintain effective controls against diversion. Furthermore, this factor, by itself, establishes that Respondent's continued registration is inconsistent with the public interest and provides reason alone to revoke Respondent's registration.

Factor Two and Four—Respondent's Compliance with Applicable Laws and its Past Experience in the Distribution of Listed Chemicals

Under this factor, the ALJ discussed Respondent's failure to report to DEA its transactions with Mr. Frankum notwithstanding their suspicious nature. *See* ALJ at 34. The ALJ did not, however, make any finding as to whether Respondent had in fact violated federal law because it reported the transactions to local authorities rather than DEA. *See id.*

The Government offers no argument as to why Respondent's failure to report these transactions to DEA violated federal law. *See* Gov. Proposed Findings and Conclusions of Law at 44. In any event, the real issue is not Respondent's failure to report the transactions but its repeated sales to Mr. Frankum given the information it had obtained.

It is a violation of federal law for ''[a]ny person [to] knowing or intentionally * * * distribute[] a listed chemical * * * having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by'' the CSA. 21 U.S.C. 841(c)(2). Moreover, ''[t]here is no quantity threshold exempting a merchant from criminal liability under § 841(c)(2).'' *Kim,* 449 F.3d at 941.

The record clearly establishes that Respondent's employees with requisite authority had knowledge of facts which created ''reasonable cause to believe'' that the pseudoephedrine products it sold to Frankum would be used to manufacture methamphetamine. *United States* v. *Kaur*, 382 F.3d 1155, 1158 (9th Cir. 2004) (defining standard as whether defendant actually ''knew, or knew facts that would have made a reasonable person aware, that the pseudoephedrine would be used to make methamphetamine'').

As found above, when Frankum first contacted Respondent, he specifically asked Ms. Brotherton whether the firm sold Actifed and Sudafed. Moreover, when Frankum visited Respondent, the sales tax certificate which he presented gave a storage unit as his business's address and when interviewed, Frankum was vague about the nature of his business. Furthermore, Frankum did not complete a credit application, but rather paid cash for his purchases. *See* U.S. Dept. of Justice, *Report to the U.S. Attorney General by the Suspicious Order Task Force,* Appendix A (1999).

The record further establishes that within two weeks of Frankum's first visit, Officer Clark informed Ms. Brotherton that Frankum's brother was a ''meth cook.'' Tr. 459, 505. Moreover, Respondent's employees referred to Frankum as ''the drug guy.'' *Id.* at 460. Finally, Ms. Brotherton testified that even during Frankum's third visit, ''there was never any reference to opening up a business.'' *Id.* at 548.

I thus conclude that Respondent knowingly distributed listed chemical products to Frankum having reasonable cause to believe that the products would be used to manufacture methamphetamine. While the information Ms. Brotherton initially obtained may not have risen to the level of ''reasonable cause,'' having been told by law enforcement authorities that Frankum's brother was ''a meth cook,'' and Frankum's continued vagueness about the nature of his business, did establish reasonable cause.[12] Furthermore, Respondent does not contend that the acts of Ms. Brotherton or the other employees involved in the transactions were unauthorized or were not undertaken for the corporation's benefit. *See, e.g., United States* v. *Basic Construction Co.,* 711 F.2d 570, 573 (4th Cir. 1983); *United States* v. *Cincotta*, 689 F.2d 238, 241–42 (1st Cir. 1982); *see also United States* v. *Bank of New England*, 821 F.2d 844, 856 (1st Cir. 1987) (''[T]he knowledge obtained by corporate employees acting within the

[11] It is acknowledged that this discussion involves products in tablet form that Respondent can no longer distribute under Missouri law. However, once the Government proved that Respondent's products have been diverted, the burden of proof shifted to Respondent to show that its controls were adequate. *See Gregory D. Owens,* 67 FR 50461, 50464 (2002); *Thomas Johnston*, 45 FR 72311 (1980). Furthermore, this hearing took place eight months after Missouri changed its law.

Respondent's memorandum instituting the sales limit vaguely instructed its employees to ''take notice to the attached list of items and regulate the quantity of items ordered from it also.'' Resp. Ex. 20, at 1. It is thus far from clear what limits Respondent has imposed on its sales of gelcap and liquid products. It was, however, Respondent's burden to show that its controls were adequate and that the sales limits it imposed would prevent diversion of its gel cap and liquid products. This it failed to do.

[12] To establish a violation of this provision, the Government is not required to prove that the products were actually used to manufacture methamphetamine. *See United States* v. *Johal,* 428 F.3d 823, 828 (9th Cir. 2005); *United States* v. *Prather*, 205 F.3d 1265, 1269–70 (11th Cir. 2000).

scope of their employment is imputed to the corporation.''). Accordingly, the violations involving the Frankum sales are properly charged to Respondent.

I acknowledge that Ms. Brotherton reported the Frankum sales to local authorities and that Frankum was eventually arrested and pled guilty to the state law offense of possession of a methamphetamine precursor with intent to manufacture. But Respondent should never have sold listed chemicals to Frankum in the first place. I thus find that Respondent violated federal law at least three times when it sold pseudoephedrine products to Frankum. While I acknowledge that Respondent appears to have implemented a training program that addresses the Frankum incidents, I nonetheless conclude that Respondent's record of compliance with applicable laws and its experience in distributing listed chemicals support a finding that its continued registration is inconsistent with the public interest.[13]

Factor Five—Other Factors Relevant to and Consistent with the Public Health and Safety

The illicit manufacture and abuse of methamphetamine have had pernicious effects on families and communities throughout the nation. This is especially so in Missouri which, notwithstanding the State's enactment of a law restricting the sale of certain pseudoephedrine products, still has an extraordinarily serious problem with illicit methamphetamine production and its abuse. *See* Gov. Ex. 28. As the record demonstrates, while the Missouri law has led to a substantial reduction in the number of meth. lab seizures, law enforcement authorities still seized 745 illegal labs in the latter half of 2005. The illicit production of methamphetamine thus remains a grave threat to public health and safety in Missouri. Cutting off the supply source of methamphetamine traffickers is of critical importance in protecting the citizens of Missouri and adjoining States from the devastation wreaked by this drug.

While listed chemical products containing pseudoephedrine have legitimate medical uses, both DEA orders and the record here establish that convenience stores and gas-stations constitute the non-traditional retail market for legitimate consumers of products containing these chemicals. *See, e.g., Tri-County Bait Distributors,* 71 FR 52160, 52161–62 (2006); *D & S Sales,* 71 FR at 37609; *Branex, Inc.,* 69 FR 8682, 8690–92 (2004). DEA has further found that there is a substantial risk of diversion of list I chemicals into the illicit manufacture of methamphetamine when these products are sold by non-traditional retailers. *See, e.g., Joy's Ideas,* 70 FR at 33199 (finding that the risk of diversion was ''real'' and ''substantial''); *Jay Enterprises, Inc.,* 70 FR 24620, 24621 (2005) (noting ''heightened risk of diversion'' if application to distribute to non-traditional retailers was granted).

Accordingly, ''[w]hile there are no specific prohibitions under the Controlled Substances Act regarding the sale of listed chemical products to [gas stations and convenience stores], DEA has nevertheless found that [these entities] constitute sources for the diversion of listed chemical products.'' *Joey Enterprises, Inc.,* 70 FR 76866, 76867 (2005). *See also TNT Distributors,* 70 FR 12729, 12730 (2005) (special agent testified that ''80 to 90 percent of ephedrine and pseudoephedrine being used [in Tennessee] to manufacture methamphetamine was being obtained from convenience stores'').[14] Here, the record establishes that several of the stores that Respondent supplied had previously been found to be purchasing extraordinary quantities of listed chemicals. *See* Tr. 414–15, 424–25 (discussing purchases of Bart's and JB's).

Moreover, as found above under factor one, the evidence supports a finding that Respondent supplied numerous non-traditional retailers with listed chemical products and that it sold extraordinary quantities of these products to a substantial number of these establishments. The evidence thus also establishes that a substantial portion of Respondent's products have been diverted.[15]

The ALJ also noted that Respondent's List I chemical sales are a ''minute percentage of [its] total business,'' and stand in ''contrast to other revocation cases, where * * * List I chemicals products have represented a significant portion of business.'' ALJ at 39 (citations omitted). Be that as it may, even where List I products are a ''minute percentage'' of a registrant's total business, a substantial amount of products can still be diverted, especially where, as here, a registrant lacks effective controls to prevent diversion. *See* discussion of factor one.

Finally, while the ALJ acknowledged that some methamphetamine traffickers ''have already begun to circumvent the new [Missouri] law'' by using liquid and gelcap forms of pseudoephedrine, ALJ at 39, the ALJ concluded that the law ''drastically reduce[s] the potential for diversion and harm to public safety.'' *Id.* at 40. The ALJ further explained that ''the State will be monitoring the gelcap and liquid pseudoephedrine products, if any, found in the methamphetamine labs. Such heightened scrutiny leads to the conclusion that, if the products of the Respondent, as well as other distributors of List I chemical products in Missouri, are found in illicit methamphetamine laboratories, the State will close the legislative loophole afforded these limited products.'' *Id.* at 41. The ALJ then reasoned that ''[u]ntil such time as the problem is substantiated * * * I recommend that the possibility of the Respondent's products being diverted not be relied upon to revoke * * * Respondent's Certificate of Registration.'' *Id.*

In *T. Young Associates,* an Order published before the issuance of the recommended decision in this matter, I rejected a similar argument. *See* 71 FR at 60573. There, I noted several studies (including those by the Washington State Patrol and McNeil Consumer and Specialty Pharmaceuticals) which show ''that methamphetamine can be produced from List I chemicals sold as liquid-filled gelcaps and liquids.'' *Id.* (citing DEA, *Microgram Bulletin* 96–97, 102 (June 2005)). Here, the record likewise establishes that pseudoephedrine ''can be easily extracted'' from gelcaps and liquid products using ''readily available'' reagents and solvents. Gov. Ex. 4, at 8.

Contrary to the ALJ's understanding, the diversion of gelcap and liquid forms of pseudoephedrine into the illicit manufacture of methamphetamine has already been ''substantiated.'' *See* Gov. Ex. 7, Tr. 87–88, 91 Moreover, as I noted

[13] I acknowledge that Respondent has not been convicted of a criminal offense. The actual conduct of Respondent, however, outweighs the fact that it has not been charged and convicted of a criminal offense.

[14] *See OTC Distribution Co.,* 68 FR 70538, 70541 (2003) (noting ''over 20 different seizures of [gray market distributor's] pseudoephedrine product at clandestine sites,'' and that in eight-month period distributor's product ''was seized at clandestine laboratories in eight states, with over 2 million dosage units seized in Oklahoma alone.''); *MDI Pharmaceuticals,* 68 FR 4233, 4236 (2003) (finding that ''pseudoephedrine products distributed by [gray market distributor] have been uncovered at numerous clandestine methamphetamine settings throughout the United States and/or discovered in the possession of individuals apparently involved in the illicit manufacture of methamphetamine'').

[15] While the ALJ concluded ''that diversion is the only conceivable explanation'' for Respondent's excessive sales, she further reasoned that Respondent may have been less likely to detect these sales because of its large customer base. ALJ at 38–39. Respondent itself did not make this argument and thus it need not be considered. In any event, DEA case law establishes that a registration can be revoked even when a registrant was ''an unknowing and unintentional contributor to [the] methamphetamine problem.'' *Joy's Ideas,* 70 FR at 33198. *See also T. Young,* 71 FR at 60572.

in *T. Young*, ''experience has taught DEA that in the aftermath of every major piece of legislation addressing the illicit manufacture of methamphetamine, traffickers have quickly found ways to circumvent the restrictions.'' 71 FR at 60573; *see also* Tr. 63–64. This Agency is not required to wait until the diversion of gelcap and liquid forms of pseudoephedrine reaches epidemic proportions before acting to protect the public interest. Therefore, I reject the ALJ's finding that factor five supports the continuation of Respondent's registration.[16]

In conclusion, the record establishes that Respondent's products have been diverted. While Respondent has taken corrective actions, these measures are still not adequate to protect against the diversion of its products. Furthermore, Respondent violated federal law by knowingly distributing listed chemical products when it had reasonable cause to believe that the products would be used to manufacture methamphetamine. Finally, studies show that pseudoephedrine can be easily extracted from gelcap and liquid forms of pseudoephedrine and anecdotal evidence establishes that methamphetamine traffickers are already using these products. Factor five does not require that DEA wait until the diversion of these products becomes widespread before acting to protect the public interest. Therefore, I conclude that Respondent's continued registration is ''inconsistent with the public interest.'' 21 U.S.C. 823(h).

Order

Accordingly, pursuant to the authority vested in me by 21 U.S.C. 823(h) & 824(a), as well as 28 CFR 0.100(b) 7 0.104, I order that DEA Certificate of Registration, 003219HIY, issued to Holloway Distributing, Inc., be, and it hereby is, revoked. I further order that the pending application of Holloway Distributing, Inc., for renewal of its registration, be, and it hereby is, denied. This order is effective August 31, 2007.

Dated: July 20, 2007.

Michele M. Leonhart,

Deputy Administrator.

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[16] In her analysis of factor five, the ALJ concluded that the Government had not proved that ''Respondent's continued distribution of liquid and gelcap forms of List I chemical products poses a threat to the public health and safety.'' ALJ at 40. The ALJ erred, however, because she applied the wrong legal standard.

As I have previously explained, the Government is not required to prove that Respondent's conduct poses a threat to public health and safety to obtain an adverse finding under factor five. *See T. Young,* 71 FR at 60572 n.13. Rather, the statutory text directs the consideration of ''such other factors as are relevant to and consistent with the public health and safety.'' 21 U.S.C. § 823(h)(5). This standard thus grants the Attorney General broader discretion than that which applies in the case of other registrants such as practitioners. *See id.* § 823(f)(5) (directing consideration of ''[s]uch other conduct which may threaten the public health and safety'').

Accordingly, while proof of a threat to public health and safety clearly satisfies the standard of subsection 823(h)(5), it is not required. Distributing a product, which studies show can be easily used to make methamphetamine, clearly satisfies this standard even in the absence of evidence showing widespread diversion of the products.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 07–23]

Newcare Home Health Services; Revocation of Registration

On February 21, 2007, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Newcare Home Health Services (Respondent), of Baltimore, Maryland. The Show Cause Order proposed the revocation of Respondent's DEA Certificate of Registration, BN3795892, as a retail pharmacy, on the ground that the Maryland State Board of Pharmacy had suspended Respondent's state pharmacy license.[1] *See id.*

On or about February 23, 2007, the Show Cause Order was served on Respondent. On March 9, 2007, Respondent, through its counsel, requested a hearing. The matter was assigned to Administrative Law Judge (ALJ) Gail Randall, who, on March 15, 2007, ordered the parties to file pre-hearing statements.

On March 19, 2007, the Government moved for summary disposition and to stay the filing of pre-hearing statements. The basis for the Government's motion was that on January 5, 2007, the Maryland Board of Pharmacy had summarily suspended Respondent's state pharmacy and distributor permits. Mot. for Summ. Disp. at 2. In support of its motion, the Government attached a copy of the Maryland Board's Order for Summary Suspension. Upon receipt of the motion, the ALJ granted the Government's motion to stay the proceeding and ordered Respondent to reply to the motion for summary disposition. See Order Staying Proceedings at 1–2.

On March 29, 2007, Respondent submitted its reply. Respondent acknowledged that summary disposition would be appropriate but asked the ALJ ''to stay all proceedings * * * while the criminal prosecution of [its] owners proceeds through the U.S. District Court.'' Resp.'s Reply at 1. Respondent further argued that ''[i]f the outcome of the criminal case is favorable to [its] owners, then the posture and merits of this matter * * * will be substantially different than if one or more convictions are obtained.'' *Id.* at 2. Respondent further stated that it had appealed the State Board's suspension of its pharmacy license and had ''asked the Board to defer any hearing on the appeal until the criminal case concludes.'' *Id.* Respondent further stated that it would agree to the suspension of its registration in the interim. *Id.*

On April 3, 2007, the ALJ issued her recommended decision. Noting that state authority is ''a prerequisite to DEA registration,'' the ALJ held that Respondent was not entitled to maintain its registration because there was no dispute that Respondent currently lacks ''authority to handle controlled substances in the jurisdiction where it seeks to maintain its DEA registration.'' ALJ at 4. The ALJ also denied Respondent's request for a stay. The ALJ thus granted the Government's motion for summary disposition, lifted her stay order, and denied Respondent's request for a continued stay of the proceeding. The ALJ also recommended that Respondent's registration be revoked and forwarded the record to me for final agency action.

Having considered the record as a whole, I adopt the ALJ's decision and recommended order in its entirety. As the ALJ found, Respondent does not currently possess authority under the laws of Maryland to handle controlled substances.

Under the Controlled Substances Act (CSA), ''a practitioner must be currently authorized to handle controlled substances in 'the jurisdiction in which [it] practices' in order to maintain its DEA registration.'' *Bourne Pharmacy, Inc.*, 72 FR 18273, 18274 (2007) (quoting 21 U.S.C. 802(21)). *See also* 21 U.S.C. 802(21) (''[t]he term 'practitioner' means a * * * pharmacy * * * licensed, registered, or otherwise permitted, by * * * the jurisdiction in which [it]

[1] The Show Cause Order also alleged that Respondent had committed acts which rendered its registration ''inconsistent with the public interest.'' Show Cause Order at 1 (citing 21 U.S.C. 823(f) & 824(a)(4)). More specifically, the Show Cause Order alleged that Respondent ''illegally distributed vast quantities of hydrocodone and other controlled substances'' by filling prescriptions that were issued over the internet and which were issued by physicians who did not establish ''a doctor-patient relationship with the customers.'' Id. In light of the disposition of this case, a more detailed recitation of the allegations of the Show Cause Order is not necessary.

practices * * * to * * * dispense * * * a controlled substance in the course of professional practice''). *See also id.* 823(f) (''The Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which [it] practices.'').

State authority is thus an essential prerequisite to maintaining a DEA registration.[2] Moreover, this Agency has repeatedly revoked the DEA registrations of those registrants who no longer hold state authority to handle controlled substances, regardless of whether that authority has been revoked or suspended pending further proceedings. *See Bourne Pharmacy*, 72 FR at 18274; *The Medicine Shoppe*, 71 FR 42878, 42879 (2006); Rx *Network of South Florida, LLC*, 69 FR 62093 (2004); *Wingfield Drugs, Inc.*, 52 FR 27070 (1987). Because Respondent is not currently authorized to handle controlled substances in the State in which it engages in the practice of pharmacy, it is not entitled to maintain its DEA registration.[3] Therefore, its registration will be revoked and any pending applications for renewal or modification of its registration will be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b) and 0.104, I hereby order that DEA Certificate of Registration, BN3795892, issued to Newcare Home Health Services, be and it hereby is, revoked. I further order that any pending applications for renewal or modification of such registration be, and they hereby are, denied. This order is effective August 31, 2007.

Dated: July 20, 2007.

Michele M. Leonhart,

Deputy Administrator.

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[2] The ALJ properly rejected Respondent's request for a stay. It is not DEA's policy to stay proceedings under section 304 while registrants litigate in other forums. *See Bourne Pharmacy, Inc.*, 72 FR 18273 (2007); *Oakland Medical Pharmacy*, 71 FR 50100 (2006); *Kennard Kobrin, M.D.*, 70 FR 33199 (2005). As the ALJ explained, Respondent can always apply for a new registration if it prevails in the pending state administrative proceeding.

[3] Based on this Agency's records, I find that Respondent is the holder of DEA Certificate of Registration, BN3795892, which does not expire until October 31, 2008.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Alan H. Olefsky, M.D.; Denial of Application

On May 25, 2005, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause to Alan H. Olefsky, M.D. (Respondent), of Chicago, Illinois. The Show Cause Order proposed to revoke Respondent's DEA Certificate of Registration, BO3661104, as a practitioner, and to deny any pending applications for renewal or modification of his registration, on the ground that the Illinois Department of Financial and Professional Regulation had suspended his state medical license and state controlled substance license. Show Cause Order at 1. The Show Cause Order thus alleged that Respondent was not authorized to handle controlled substances in the State where he was registered and was thus not entitled to maintain his registration. *Id.* (citing 21 U.S.C. 824(a)(3)).

The Show Cause Order also alleged that Respondent had committed acts which rendered his registration inconsistent with the public interest. *Id.* (citing 21 U.S.C. 824(a)(4)). More specifically, the Show Cause Order alleged that from December 2002 through October 2004, Respondent had ''issued false prescriptions for controlled substances in the names of'' three individuals, and that the prescriptions were for his ''personal use.'' *Id.* The Show Cause Order also notified Respondent of his right to request a hearing on the allegations.

On June 8, 2005, the Show Cause Order was served on Respondent by certified mail as evidenced by the signed return receipt card. Neither Respondent, nor anyone purporting to represent him, requested a hearing on the allegations within the time period set forth in 21 CFR 1301.43(a) and the Show Cause Order.

The matter was held in abeyance after the State restored Respondent's medical license. On March 30, 2007, the State again suspended Respondent's medical license. Accordingly, on May 10, 2007, the investigative file was forwarded to my Office for final agency action.

As an initial matter, I find that because Respondent did not request a hearing within thirty days of receipt of the Show Cause order he has waived his right to hearing. *See* 21 CFR 1301.43(d). I therefore enter this Final Order without a hearing based on relevant material in the investigative file and make the following findings.

Findings

Respondent was the holder of DEA Certificate of Registration, BO3661104, which authorized him to handle schedule II through V controlled substances as a practitioner. Respondent's registration expired on December 31, 2004. According to the investigative file, Respondent did not submit a renewal application until February 24, 2005, nearly two months after his registration expired. Accordingly, I find that Respondent's renewal application was not timely submitted and his registration expired on December 31, 2004. *See* 5 U.S.C. 558(c) (requiring submission of a ''timely and sufficient application for a renewal'' in order for a registration to be continued until the Agency makes a ''final determin[ation]'' on the application). I further find, however, that Respondent does have an application pending before the agency.

According to the investigative file, on February 18, 2005, the Illinois Department of Financial and Professional Regulation summarily suspended Respondent's state medical license and controlled substance registrations. In support of the suspension, the State alleged, *inter alia*, that ''Respondent issued false prescriptions for controlled substances under other names for personal use.'' Pet. For Temp. Susp. 1. The petition was supported by the sworn affidavit of Larry G. McClain, M.D., the Chief Medical Coordinator of the Illinois Department of Financial and Professional Regulation. In his affidavit, Dr. McClain averred that ''the Department has learned that Respondent has repeatedly issued false prescriptions for Xanax, Dilaudid and Viagra. He calls in these prescriptions in the names of [M.G., V.G. and T.C.] He obtains these prescriptions for personal use and pays cash to remain untraceable.'' Dr. McClain further averred that ''Respondent was arrested for a DUI in June of 2004 and * * * has an extensive criminal history.''

In September 2006, Respondent and the State entered into a consent order under which his medical license was restored based on his having entered a treatment program and an Aftercare Agreement. Consent Order at 2. In the order, ''Respondent admit[ted] the allegations raised by the Department.'' *Id.* The consent order, which became effective on November 21, 2006, placed Respondent on ''Indefinite Probation,'' and also imposed various conditions including that he comply with the terms

of an Aftercare Agreement and abstain from the use of alcohol and ''mood altering and/or psychoactive drugs'' except as ''prescribed by a primary care and/or treating physician.'' *Id.* at 3.

Thereafter, on March 30, 2007, the State again imposed a summary suspension of Respondent's medical license, which remains in effect. *See* Notice of Temporary Suspension. In the Complaint, the State alleged that in January 2007, Respondent had been hospitalized with ''a blood alcohol level of 327.'' Complaint at 2. The State also alleged that in February 2007, Respondent had been admitted to Rush Behavioral Care to be treated for ''alcohol dependence.'' *Id.* The State further alleged that in February 2007, Respondent had applied for a new state Controlled Substance Registration. *Id.* Finally, the Complaint alleged that Respondent had failed to comply with the conditions of Consent Order.[1]

There is no evidence in the file that the State has granted Respondent a new Controlled Substance Registration. Moreover, the State's summary suspension further ordered Respondent to ''immediately surrender all indicia of licensure to the Department.'' March 30, 2007 Summary Suspension Order at 1–2. I therefore find that Respondent does not hold a current Illinois Controlled Substance Registration.

Discussion

Section 303(f) of the Controlled Substances Act provides that ''[t]he Attorney General shall register practitioners * * * to dispense * * * controlled substances in schedule II, III, IV, or V, if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.'' 21 U.S.C. 823(f). Section 303(f) further provides that ''[t]he Attorney General may deny an application for such registration if he determines that the issuance of such registration would be inconsistent with the public interest.'' *Id.* In making the public interest determination, the Act requires the consideration of the following factors:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id.

''[T]hese factors are * * * considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). I ''may rely on any one or a combination of factors, and may give each factor the weight [I] deem[ ] appropriate in determining whether a registration should be revoked.'' *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA*, 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall* v. *DEA*, 412 F.3d 165, 173–74 (D.C. Cir. 2005).

In this case, I conclude that there are two independent grounds for denying Respondent's application. First, Respondent is not currently authorized under Illinois law to handle controlled substances and thus does not meet an essential requirement for a registration under the CSA. Second, Respondent's experience in dispensing controlled substances and his record of compliance with applicable laws make clear that granting him a registration would be inconsistent with the public interest.

Respondent's Lack of State Authority

Under the Controlled Substances Act (CSA), a practitioner must be currently authorized to handle controlled substances in ''the jurisdiction in which he practices'' in order to maintain a DEA registration. *See* 21 U.S.C. 802(21) (''[t]he term 'practitioner' means a physician * * * licensed, registered, or otherwise permitted, by * * * the jurisdiction in which he practices * * * to distribute, dispense, [or] administer * * * a controlled substance in the course of professional practice''). *See also id.* 823(f) (''The Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.''). Relatedly, DEA has held repeatedly that the CSA requires the revocation of a registration issued to a practitioner who no longer possesses authority under state law to handle controlled substances. *See Sheran Arden Yeates,* 71 FR 39130, 39131 (2006); *Dominick A. Ricci,* 58 FR 51104, 51105 (1993); *Bobby Watts,* 53 FR 11919, 11920 (1988). *See also* 21 U.S.C. 824(a)(3) (authorizing the revocation of a registration ''upon a finding that the registrant * * * has had his State license or registration suspended [or] revoked * * * and is no longer authorized by State law to engage in the * * * distribution [or] dispensing of controlled substances'').

Here, the investigative file establishes that Respondent's Illinois controlled substance registrations were suspended pursuant to the State's February 18, 2005 order. Moreover, there is no evidence that the State has issued a new controlled substance registration to him, and in any event, the State's March 30, 2007 order directed him to ''immediately surrender all indicia of licensure to the Department.'' Therefore, Respondent is without authority to handle controlled substances in Illinois, the State in which he seeks registration. Respondent thus does not meet an essential prerequisite for a new DEA registration and his application will be denied on that basis. See 21 U.S.C. 823(f).

The Public Interest Analysis

Because the State's summary suspension is not a final order, review of Respondent's application under the public interest factors is also warranted. Here, Dr. McClain's affidavit establishes that Respondent ''repeatedly issued false prescriptions'' in the names of other persons for Xanax (alprazolam), a schedule IV controlled substance, *see* 21 CFR 1308.14(c), and Dilaudid (hydromorphone), a schedule II controlled substance. *See id.* 1308.12(b)(1). Respondent then filled the prescriptions and personally abused the drugs. Respondent admitted to this conduct in the Consent Order. I thus find that Respondent violated Federal law. *See* 21 U.S.C. 843(a)(3) (rendering it ''unlawful for any person knowingly or intentionally * * * to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge'').

Moreover, as noted above, this is not the first time that Respondent has engaged in such criminal behavior. *See Olesky,* 57 FR at 928–29. Accordingly, Respondent's experience in dispensing controlled substances and his record of compliance with Federal law amply demonstrate that granting his application for registration would be ''inconsistent with the public interest.'' 21 U.S.C. 823(f). Therefore, even if the State were to restore his medical license and grant him a new state controlled substance registration, I would still deny his application.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f), as well as 28 CFR 0.100(b) & 0.104, I order that the application of Alan H. Olefksy, M.D., for a DEA Certificate of Registration as a

[1] I also take official notice of the fact that on January 9, 1992, the Administrator of this Agency ordered the revocation of Respondent's registration based on his having presented fraudulent prescriptions for Percocet and Halcion to a pharmacy. *See Alan H. Olefsky*, 57 FR 928, 929 (1992).

practitioner be, and it hereby is, denied. This order is effective August 31, 2007.

Dated: July 20, 2007.

Michele M. Leonhart,

Deputy Administrator.

[FR Doc. E7–14820 Filed 7–31–07; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Application No. D–11324]

Withdrawal of the Notice of Proposed Exemption Involving Deutsche Bank AG (DB); Located in Germany, With Affiliates in New York, NY and Other Locations

In the **Federal Register** dated February 13, 2007, (72 FR 6747), the Department of Labor (the Department) published a notice of pendency (the Notice) of a proposed exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 and from certain taxes imposed by the Internal Revenue Code of 1986. The Notice concerned an application filed on behalf of DB and its affiliates (the Applicants) which would have amended and superseded Prohibited Transaction Exemption 2003–24 (PTE 2003–24) (68 FR 48637, August 14, 2003, as corrected, 68 FR 55993, September 29, 2003) with respect to the Applicants.

By e-mail dated June 19, 2007, the Applicants requested that the application for exemption be withdrawn. Accordingly, the Department has determined to withdraw the above-cited Notice.

FOR FURTHER INFORMATION CONTACT: Angelena C. Le Blanc of the Department, telephone (202) 693–8540. (This is not a toll-free number.)

Signed at Washington, DC, this 27th day of July 2007.

Ivan L. Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. E7–14880 Filed 7–31–07; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Prohibited Transaction Exemption 2007–10 Through 2007–13; Grant of Individual Exemptions involving; D–11393 & D–11394, (PTE 2007–10), Paul Niednagel IRAs and Lynne Niednagel IRAs (Collectively, the IRAs); D–11406, (PTE 2007–11), The Revlon Employees Savings, Investment and Profit Sharing Plan (the Plan); L–11365, (PTE 2007–12), American Maritime Officers Safety & Education Plan (the S&E Plan); and L–11382, (PTE 2007–13), Sheet Metal Workers Local Union 17 Insurance Fund (the Fund)

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code).

A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

Paul Niednagel IRAs and Lynne Niednagel IRAs (collectively, the IRAs), Located in Laguna Niguel, California

[Prohibited Transaction Exemption 2007–10; Exemption Application Numbers: D–11393 and D–11394]

Exemption

The sanctions resulting from the application of section 4975 of the Code, by reason of sections 4975(c)(1)(D) and (E) of the Code, shall not apply to the purchase (the Purchase) by the respective IRAs [1] of Paul and Lynne Niednagel (the Account Holders) of certain ownership interests (the Units) from Pacific Island Investment Partners, LLC. (Pacific Island) (the issuer of the Units), an entity which is indirectly controlled by Daniel and Stephen Niednagel (the Principals), both of whom are lineal descendents of the Account Holders and therefore disqualified persons with respect to the IRAs, provided that the following conditions are satisfied:

Conditions

(a) The Purchase of the Units by each IRA is for cash;

(b) The price paid by each IRA to purchase a Unit ($10,000) is identical to the price paid by other Pacific Island investors to acquire a Unit;

(c) The terms and conditions of each Purchase are at least as favorable as those available in an arm's length transaction with an unrelated third party;

(d) Each IRA does not pay any commissions or other expenses in connection with each Purchase; and

(e) Each IRA does not acquire Units if, after acquisition, the aggregate fair market value of the Units would exceed 25% of the fair market value of such IRA.

[1] Because each IRA has only one participant, there is no jurisdiction under 29 CFR § 2510.3–3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

Temporary Nature of Exemption

This grant of exemption is temporary and becomes effective on the date of publication of the grant of the final exemption in the **Federal Register**. The exemption will expire on the date which is five (5) years from the date of the grant of the exemption.

Written Comments

In the Notice of Proposed Exemption (the Notice), the Department of Labor (the Department) invited all interested persons to submit written comments on the proposed exemption within thirty (30) days of the date of the publication of the Notice in the **Federal Register** on June 1, 2007. All comments were due by July 1, 2007.

During the comment period, the Department received one written comment concerning the Notice; this comment was submitted by one of the Account Holders, Mr. Paul Niednagel. In his comment, Mr. Niednagel informed the Department that Condition (a) of the Notice (located at the first column on page 30638 of the June 1, 2007 issue of the **Federal Register**), which proposed that the cash purchase of the Units by each IRA be undertaken as a ''one-time transaction'', could not be satisfied by the Account Holders because of the limited quantity of Units of Pacific Island available for sale to investors at any given point in time. Accordingly, Mr. Niednagel proposed that Condition (a) be modified to remove the language stipulating that the Purchase of the Units occur as a one-time transaction. In addition, Mr. Niednagel proposed that the exemption be further modified to permit the Account Holders to purchase the Units incrementally over the course of a five year term, beginning from the date of the grant of an exemption for the proposed transaction. Mr. Niednagel stated that permitting the Account Holders to purchase the Units over such an extended period would be consistent with the availability of such Units for acquisition by investors.

After giving full consideration to the entire record, including the written comments provided by Mr. Niednagel, the Department has determined to grant the exemption, subject to the modification of certain conditions initially contained in the Notice. While retaining the language contained in Condition (a) of the Notice stipulating that ''the Purchase of the Units by each IRA is for cash,'' the Department has decided to adopt Mr. Niednagel's comments by: (1) Deleting from the final exemption the requirement that the Purchase occur as a ''one-time transaction'', and (2) adding language to the exemption which stipulates that the Department's grant of relief for the Purchase of the Units is temporary in nature, and shall expire five years from the date of publication of the grant of exemption in the **Federal Register**.

In addition, Condition (e) of the Notice (located at the first column of page 30638 of the June 1, 2007 issue of the **Federal Register**) stated that ''[t]he IRA assets invested in the Units do not exceed 25% of the total assets of each IRA at the time of the Purchase.'' For purposes of clarification, the Department has determined to modify Condition (e) to read as follows: ''Each IRA does not acquire Units if, after acquisition, the aggregate fair market value of the Units would exceed 25% of the fair market value of such IRA.''

The complete application file for this exemption, encompassing all supplemental submissions received by the Department (including the written comment received by the Account Holder, Mr. Niednagel), is made available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, Room N–1513, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, interested persons should also refer to the notice of proposed exemption published on June 1, 2007 at 72 FR 30637 (as corrected by a notice of technical correction published on June 7, 2007 at 72 FR 31610).

FOR FURTHER INFORMATION CONTACT: Mr. Mark Judge of the Department, telephone (202) 693–8339. (This is not a toll-free number.)

The Revlon Employees Savings, Investment and Profit Sharing Plan (the Plan) Located in New York, NY

[Prohibited Transaction Exemption No. 2007–11; [Application No. D–11406]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply, effective December 18, 2006, to (1) The acquisition of certain stock rights (Stock Right(s)) by the Plan in connection with a Stock Rights offering by Revlon, Inc. (Revlon), a holding company that wholly owns Revlon Consumer Products Corporation (RCPC), a party in interest with respect to the Plan; (2) the holding of the Stock Rights by the Plan during the subscription period of the Stock Rights offering; and (3) the disposition or exercise of the Stock Rights by the Plan, provided that the following conditions were met:

(a) The Stock Rights were acquired pursuant to Plan provisions for individually-directed investment of such accounts;

(b) The Plan's receipt of the Stock Rights occurred in connection with a Stock Rights offering made available on the same terms to all shareholders of common stock of Revlon;

(c) All decisions regarding the holding and disposition of the Stock Rights by the Plan were made, in accordance with the Plan provisions for individually-directed investment of participant accounts, by the individual Plan participants whose accounts in the Plan received Stock Rights in connection with the Stock Rights offering;

(d) The Plan's acquisition of the Stock Rights resulted from an independent act of Revlon as a corporate entity, and all holders of the Stock Rights, including the Plan, were treated in the same manner with respect to the acquisition; and

(e) The Plan received the same proportionate number of Stock Rights as other owners of Class A common stock.

Effective Date: This exemption is effective as of December 18, 2006.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice of Proposed Exemption published on April 30, 2007 at 72 FR 21303.

FOR FURTHER INFORMATION CONTACT: Khalif Ford of the Department, telephone (202) 693–8540 (this is not a toll-free number).

American Maritime Officers Safety & Education Plan (the S&E Plan) Located in Dania Beach, Florida and Toledo, Ohio

[Prohibited Transaction Exemption No. 2007–12; Exemption Application No. L–11365]

Exemption

The restrictions of sections 406(a)(1)(C), and 406(a)(1)(D) of the Act shall not apply to the S&E Plan, doing business as the STAR Center, entering into an agreement with Kongsberg Maritime Simulator Inc. (Kongsberg), a party in interest, to provide certain services (the Services) to Kongsberg at the Dania Beach, Florida facility (the Facility) involving hydrodynamic and geographic modeling and training, provided that the following conditions are met:

(a) The S&E Plan will charge and will be paid for the Services at the rates approved by the Board of Trustees of the S&E Plan (the Trustees) for similar services provided to unrelated third parties;

(b) The terms of the arrangement between the S&E Plan and Kongsberg are at least as favorable to the S&E Plan as those obtainable in an arm's length transaction with an unrelated party;

(c) An independent auditor will perform annual audits of the S&E Plan to identify and reconcile any recordkeeping discrepancies involving the Services; and

(d) The S&E Plan will maintain, for a period of six (6) years, the records necessary to determine whether the conditions of this exemption have been met.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the Notice of Proposed Exemption (the Notice) published on April 30, 2007, at 72 FR 21305.

The Department received one comment with regard to the Notice. The commenter, the applicant, requested that the Department modify certain language contained in the Notice. Specifically, on page 21305 of the Notice, the operative language states the following:

''The restrictions of sections 406(a)(1)(C) and 406(a)(1)(D) of the Act shall not apply to the S&E Plan's, doing business as STAR Center, entering into an agreement with Kongsberg Maritime Simulator Inc. (Kongsberg), a party in interest, to provide certain services (the Services) to Kongsberg at the Dania Beach, Florida facility (the Facility) involving hydrodynamic and geographic modeling and training required in connection with Kongsberg's contract with the U.S. Navy, provided that the following conditions are met:''

The applicant requests that the services described in the Notice not be limited to services provided in connection with the U.S. Navy contract. The applicant represents that the additional services that the applicant is requesting would be identical to those described in the Notice. The applicant further represents that the modification would be beneficial to the S&E Plan because the STAR Center would provide the services at prices that would be charged to an unrelated third party.

After due consideration, the Department has adopted the commenter's request and accordingly, has modified the operative language to read as follows:

''The restrictions of sections 406(a)(1)(C), 406(a)(1)(D) of the Act shall not apply to the S&E Plan, doing business as the STAR Center, entering into an agreement with Kongsberg Maritime Simulator Inc. (Kongsberg), a party in interest, to provide certain services (the Services) to Kongsberg at the Dania Beach, Florida facility (the Facility) involving hydrodynamic and geographic modeling and training, provided that the following conditions were met:''

The Department hereby grants the exemption and incorporates the modification described above.

FOR FURTHER INFORMATION CONTACT: Khalif Ford of the Department, telephone (202) 693–8562 (this is not a toll-free number).

Sheet Metal Workers Local Union 17 Insurance Fund (the Fund), Located in Boston, Massachusetts

[Prohibited Transaction Exemption 2007–13; Exemption Application Number: L–11382]

Exemption

The restrictions of sections 406(a) and 406(b)(1) and (b)(2) of the Act shall not apply to the purchase (the Purchase) by the Fund of a business condominium unit (Unit No. 1) from the Sheet Metal Workers International Association Local 17 Building Association, Inc. (the Building Corporation), a party in interest with respect to the Fund, provided that the following conditions are satisfied:

Conditions

(a) The terms and conditions of the transaction are no less favorable to the Fund than those which the Fund would receive in an arm's length transaction with an unrelated party;

(b) The Purchase of Unit No. 1 by the Fund is a one-time transaction for cash;

(c) The Fund will not pay any sales commissions, fees, or other similar expenses to any party as a result of the proposed transaction;

(d) The Fund will purchase Unit No. 1 from the Building Corporation for the lesser of (1) $800,000 or (2) the fair market value of the Property as determined on the date of the purchase by a qualified, independent appraiser;

(e) The proposed transaction will be consummated only after a qualified, independent fiduciary, acting on behalf of the Fund, negotiates the relevant terms and conditions of the transaction and determines that proceeding with the transaction would be in the interest of the Fund; and

(f) The independent fiduciary monitors the transaction on behalf of the Fund to ensure compliance with the agreed upon terms.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on June 1, 2007 at 72 FR 30635.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Judge of the Department, telephone (202) 693–8339. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of this exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 27th day of July, 2007.

Ivan Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. E7–14881 Filed 7–31–07; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Technical Study Panel on the Utilization of Belt Air and the Composition and Fire Retardant Properties of Belt Materials in Underground Coal Mining

AGENCY: Mine Safety and Health Administration (MSHA), Labor.

ACTION: Notice of meeting, public comment deadline.

SUMMARY: This notice informs interested persons of the fifth meeting of the Technical Study Panel (Panel) on the Utilization of Belt Air and the Composition and Fire Retardant Properties of Belt Materials in Underground Coal Mining. The public is invited to attend. This notice also informs interested persons of the deadline for submission of public comments to the Panel.

DATES: Comments must be received by MSHA on or before August 15, 2007. The meeting will be held on September 17–19, 2007. The meeting will start at 9 a.m. each day and conclude by 5 p.m.

ADDRESSES: Comments must be clearly identified with ''Technical Study Panel on the Utilization of Belt Air'' and may be sent to MSHA by any of the following methods:

(1) *Telefax:* (202) 693–9441. Include ''Technical Study Panel on the Utilization of Belt Air'' in the subject line.

(2) *Regular Mail:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939.

(3) *Hand Delivery or Courier:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939. Stop by the 21st floor and sign in at the receptionist's desk.

The meeting location is the Sheraton Reston Hotel, 11810 Sunrise Valley Drive, Reston, Virginia 20191 (*Telephone:* (703–620–9000).

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations, and Variances, Mine Safety and Health Administration, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939; *silvey.patricia@dol.gov* (internet e-mail), 202–693–9440 (voice), or 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION: The Panel was created under section 11 of the Mine Improvement and New Emergency Response (MINER) Act of 2006 (Pub. L. 109–236). The purpose of the Panel is to provide independent scientific and engineering review and recommendations concerning the utilization of belt air and the composition and fire retardant properties of belt materials in underground coal mining. In December 2007, the Panel must submit a report to the Secretaries of Labor and Health and Human Services, the Senate Committee on Health, Education, Labor and Pensions, and the House Committee on Education and the Workforce. The first meeting of the Panel was held in Washington, DC on January 9–10, 2007. The second meeting of the Panel was held in Coraopolis, Pennsylvania on March 28–30, 2007. The third meeting of the Panel was held in Salt Lake City, Utah on May 16–17, 2007. The fourth meeting of the Panel was held in Birmingham, Alabama on June 20–21, 2007.

The agenda for the fifth meeting will include:

(1) Delivery of subcommittee recommendations to the Panel for discussion;

(2) Panel deliberation and voting on the recommendations; and

(3) Preparation of the Panel's report.

The public is invited to attend. However, unlike the previous meetings, no public input will be taken during this meeting due to the work process. All public comment must be received by MSHA no later than August 15, 2007 in order for the Panel to have adequate time to review submitted material.

MSHA will incorporate all written submissions into the official record, which includes the transcript, and will make them available to the public.

The public may inspect the official record of the meetings at the MSHA address listed above under the heading **FOR FURTHER INFORMATION CONTACT**. In addition, this information will be posted on the Agency's single source webpage titled ''The Technical Study Panel on the Utilization of Belt Air and the Composition and Fire Retardant Properties of Belt Materials in Underground Coal Mining Single Source Page.'' The Single Source page is located at *http://www.msha.gov/BeltAir/BeltAir.asp.*

Dated: July 26, 2007.

Richard E. Stickler,

Assistant Secretary for Mine Safety and Health.

[FR Doc. E7–14899 Filed 7–31–07; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

National Endowment for the Arts; Federal Advisory Committee on International Exhibitions

Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), as amended, notice is hereby given that a meeting of the Federal Advisory Committee on International Exhibitions will be held by teleconference on August 16, 2007 from the Nancy Hanks Center, 1100 Pennsylvania Avenue, NW., Washington, DC 20506. The meeting, for the purpose of application review, will take place from 1 p.m.–3:15 p.m. (ending time is approximate), and will be closed.

The closed portions of meetings are for the purpose of Panel review, discussion, evaluation, and recommendations on financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency. In accordance with the determination of the Chairman of February 16, 2007, these sessions will be closed to the public pursuant to subsection (c)(6) of section 552b of Title 5, United States Code.

Further information with reference to these meetings can be obtained from Ms. Kathy Plowitz-Worden, Office of Guidelines & Panel Operations, National Endowment for the Arts, Washington, DC 20506, or call 202/682–5691.

Dated: July 27, 2007.

Kathy Plowitz-Worden,

Panel Coordinator.

[FR Doc. E7–14828 Filed 7–31–07; 8:45 am]

BILLING CODE 7537–01–P

NATIONAL SCIENCE FOUNDATION

National Science Board; Sunshine Act Meetings; Notice

The National Science Board, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of meetings for the transaction of National Science Board business and other matters specified, as follows:

AGENCY HOLDING MEETING: National Science Board.

DATE AND TIME: Monday, August 6, 2007, at 1:30 p.m.; Tuesday, August 7, 2007 at 8 a.m.; and Wednesday, August 8, 2007 at 7:45 a.m.

PLACE: National Science Foundation, 4201 Wilson Blvd., Room 1235, Arlington, VA 22230. All visitors must report to the NSF visitor desk at the 9th and N. Stuart Streets entrance to receive a visitor's badge.

STATUS: Some portions open, some portions closed.

Open Sessions

August 7, 2007

8 a.m.–9 a.m.
9 a.m.–11 a.m.
11 a.m.–11:30 a.m.
11:30 a.m.–12:15 p.m.
2 p.m.–2:45 p.m.
2:45 p.m.–4:45 p.m.

August 8, 2007

7:45 a.m.–8 a.m.
8 a.m.–9 a.m.
9:30 a.m.–11:30 a.m.
1:45 p.m.–3 p.m.

Closed Sessions

August 6, 2007

1:30 p.m.–5 p.m.

August 7, 2007

1:45 p.m.–2 p.m.
4:45 p.m.–5:15 p.m.

August 8, 2007

9 a.m.–9:30 p.m.
12:30 p.m.–1 p.m.
1 p.m.–1:45 p.m.

AGENCY CONTACT: Dr. Robert E. Webber, *rwebber@nsf.gov*, (703) 292–7000, *http://www.nsf.gov/nsb/.*

MATTERS TO BE DISCUSSED:

Monday, August 6, 2007

Committee on Programs and Plans

Closed Session (1:30 a.m.–5 p.m.)
- *NSB Information Item:* Portfolio of proposed High-Performance Computing (HPC) awards.
- *NSB Action Item:* HPC Track 1: Petascale.
- *NSB Action Item:* HPC Track 2: Path to Petascale.
- *HPCOPS Overview:* High-Performance Computing for Science and Engineering Research & Education: Operations (User Support, System Administration and Maintenance) (HPCOPS).
- *NSB Action Item:* HPCOPS Awards.
- *NSB Action Item:* National High Magnetic Field Laboratory (NHMFL).
- *NSB Action Item:* Advanced Technology Solar Telescope (ATST).

Tuesday, August 7, 2007

CPP Subcommittee on Polar Issues

Open Session (8 a.m.–9 a.m.)
- Approval of May Minutes.
- SOPI Chairman's Remarks.
- OPP Director's Report.
- IceCube Neutrino Observatory.
- International Polar Year Update.

EHR Subcommittee on Science and Engineering Indicators

Open Session (9 a.m.–11 a.m.)
- Approval of May minutes.
- Subcommittee Chairman's remarks.
- Discussion of Orange Book.
- Discussion of draft Overview Chapter.
- Science and Engineering Indicators 2008 cover.
- Science and Engineering Indicators 2008 Digest.
- Science and Engineering Indicators 2008 Companion Piece.
- Subcommittee Chairman's summary.

CPP Task Force on International Science

Open Session (11 a.m.–11:30 a.m.)
- Approval of Minutes.
- Task Force Chairman Remarks.
- Discussion of the draft Task Force report on international science and engineering partnerships.

CPP Task Force on Transformative Research

Open Session (11:30 a.m.–12:15 p.m.)
- Approval of Minutes for March 2007 Meeting.
- Task Force Chairman's Remarks.
- Review of Transformative Research Initiative developed by NSF as recommended in the report, *Enhancing Support of Transformative Research at the National Science Foundation.*

Committee on Audit and Oversight

Closed Session (1:45 p.m.–2 p.m.)
- OIG FY 2009 Budget.
- Pending Investigations.

Open Session (2 p.m.–2:45 p.m.)
- Approval of Minutes of May 14, 2007 Meeting.
- Committee Chairman's Opening Remarks.
- FY 2007 Financial Statement Audit Status.
- Chief Financial Officer's Update.
- Committee Chairman's Closing Remarks.

Committee on Programs and Plans

Open Session (2:45 p.m.–4:45 p.m.)
- Approval of May 8, 2007 CPP Minutes.
- Committee Chairman's Remarks.
- *Status Reports:*
  - Subcommittee on Polar Issues.
  - *Task Force on International Science:* Draft Report and Recommendations.
  - Task Force on Transformative Research.
- *Discussion Item:* Future Plans for the *ad hoc* Task Group on Sustainable Energy.
- *Discussion Item:* NSB/DRB Thresholds.
- *Discussion Item:* NSB Policy on Recompetition of NSF Awards.
- *Discussion Item:* Facilities Operations and Management.
- *Discussion Item:* Major Research Facilities and Facility Plan.
- *NSB Item:* Examination of Priority Order of MREFC New Starts.
- Committee Chairman's Remarks.

ad hoc Committee on Nominations for NSB Class of 2008–2014

Closed Session (4:45 p.m.–5:15 p.m.)
- Approval of Minutes, Teleconference July 19, 2007.
- Approval of Minutes, Teleconference July 26, 2007.
- Committee Chairman's Remarks.
- Review of Candidates.
- Preparation of Final Slate of Candidates for Board Approval.

Wednesday, August 8, 2007

Executive Committee

Open Session (7:45 a.m.–8 a.m.)
- Approval of Minutes for May 2007.
- Executive Committee Chairman's Remarks.
- Updates or New Business from Committee Members.

Committee on Strategy and Budget

Open Session (8 a.m.–9 a.m.)
- Approval of CSB Minutes, May 15, 2007.
- Committee Chairman's Remarks.
- Report of the NSF Working Group on the Impact of Proposal and Award Management Mechanisms (IPAMM).
- Discussion of CSB *ad hoc* Task Group on Cost-Sharing.
- Status of NSF Budget Request and Congressional Testimony.

Closed Session (9 a.m.–9:30 a.m.)
- Approval of CSB Teleconference Minutes, June 18, 2007.
- Approval of CSB Teleconference Minutes, July 23, 2007.
- Discussion of FY 2009 Board Budget Request.
- Discussion of FY 2009 NSF Budget Request.

Committee on Education and Human Resources

Open Session (9:30 a.m.–11:30 a.m.)
- Approval of May 2007 Minutes.
- Committee Chairman's Remarks.
- Report on Education Commission of the States 2007 National Forum on Education Policy.
- Report of Subcommittee on Science and Engineering Indicators.
- Discussion of Summary Recommendations from Engineering Education Workshops.
- Discussion of Draft Action Plan for STEM Education.

- NSB Executive Officer's Report.

Plenary Executive Closed

Closed Session (12:30 p.m.–1 p.m.)
- Approval of May 2007 Minutes.
- Potential Board Member Nominees.
- Candidate Sites for Retreat and Visit 2008.

Plenary Closed

Closed Session (1 p.m.–1:45 p.m.)
- Approval of May 2007 Minutes.
- Awards and Agreements.
- Closed Committee Reports.

Plenary Open

Open Session (1:45 p.m.–3 p.m.)
- Approval of May 2007 Minutes.
- Resolution to Close October 2007 Meeting.
- Chairman's Report.
- Director's Report.
- Open Committee Reports.
- STEM Education Action Plan.

Michael P. Crosby,

Executive Officer and Board Office Direc.

[FR Doc. E7–14980 Filed 7–31–07; 8:45 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–247 and 50–286]

Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit Nos. 2 and 3; Notice of Acceptance for Docketing of the Application and Notice of Opportunity for Hearing Regarding Renewal of Facility Operating License Nos. DPR–26 and DPR–64 for an Additional 20-Year Period

The U.S. Nuclear Regulatory Commission (NRC or the Commission) is considering an application for the renewal of Operating License Nos. DPR–26 and DPR–64, which authorize Entergy Nuclear Operations, Inc., to operate Indian Point Nuclear Generating Unit Nos. 2 and 3, respectively, at 3216 megawatts thermal (MWt) for each unit. The renewed licenses would authorize the applicant to operate Indian Point Nuclear Generating Unit Nos. 2 and 3 for an additional 20 years beyond the period specified in the current licenses. The current operating licenses for Indian Point Nuclear Generating Unit Nos. 2 and 3 expire on September 9, 2013, and December 12, 2015, respectively.

Entergy Nuclear Operations, Inc. submitted the application dated April 23, 2007, as supplemented by letters dated May 3, 2007, and June 21, 2007, pursuant to 10 CFR Part 54, to renew Operating License Nos. DPR–26 and DPR–64 for Indian Point Nuclear Generating Unit Nos. 2 and 3, respectively. A Notice of Receipt and Availability of the license renewal application (LRA), ''Entergy Nuclear Operations, Inc.; Notice of Receipt and Availability of Application for Renewal of Indian Point Nuclear Generating Unit Nos. 2 and 3; Facility Operating Licenses Nos. DPR–26 and DPR–64 for an Additional 20-Year Period,'' was published in the **Federal Register** on May 11, 2007 (72 FR 26850).

The Commission's staff has determined that Entergy Nuclear Operations, Inc. has submitted sufficient information in accordance with 10 CFR Sections 54.19, 54.21, 54.22, 54.23, 51.45, and 51.53(c) to enable the staff to undertake a review of the application, and the application is therefore acceptable for docketing. The current Docket Nos. 50–247 and 50–286 for Operating License Nos. DPR–26 and DPR–64, respectively, will be retained. The determination to accept the license renewal application for docketing does not constitute a determination that a renewed license should be issued, and does not preclude the NRC staff from requesting additional information as the review proceeds.

Before issuance of each requested renewed license, the NRC will have made the findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. In accordance with 10 CFR 54.29, the NRC may issue a renewed license on the basis of its review if it finds that actions have been identified and have been or will be taken with respect to: (1) Managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified as requiring aging management review, and (2) time-limited aging analyses that have been identified as requiring review, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the current licensing basis (CLB), and that any changes made to the plant's CLB comply with the Act and the Commission's regulations.

Additionally, in accordance with 10 CFR 51.95(c), the NRC will prepare an environmental impact statement that is a supplement to the Commission's NUREG–1437, ''Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants,'' dated May 1996. In considering the license renewal application, the Commission must find that the applicable requirements of Subpart A of 10 CFR Part 51 have been satisfied. Pursuant to 10 CFR 51.26, and as part of the environmental scoping process, the staff intends to hold a public scoping meeting. Detailed information regarding the environmental scoping meeting will be the subject of a separate **Federal Register** notice.

Within 60 days after the date of publication of this **Federal Register** Notice, 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 or a petition for leave to intervene with respect to the renewal of the license. Requests for a hearing or petitions for leave to intervene must 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 Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852 and is accessible from the NRC's Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at *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's PDR reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail at *pdr@nrc.gov.* If a request for a hearing/petition for leave to intervene is filed within the 60-day period, 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. In the event that no request for a hearing or petition for leave to intervene is filed within the 60-day period, the NRC may, upon completion of its evaluations and upon making the findings required under 10 CFR Parts 51 and 54, renew the license without further notice.

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, taking into consideration the limited scope of matters that may be considered pursuant to 10 CFR Parts 51 and 54. The petition must specifically explain the

reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the requestor's/petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any decision or order which may be entered in the proceeding on the requestor's/petitioner's interest. The petition must also set forth the specific contentions which the petitioner/requestor seeks to have litigated in 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 requestor/petitioner shall provide a brief explanation of the bases of each contention and a concise statement of the alleged facts or the expert opinion that supports the contention on which the requestor/petitioner intends to rely in proving the contention at the hearing. The requestor/petitioner must also provide references to those specific sources and documents of which the requestor/petitioner is aware and on which the requestor/petitioner intends to rely to establish those facts or expert opinion. The requestor/petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact.[1] Contentions shall be limited to matters within the scope of the action under consideration. The contention must be one that, if proven, would entitle the requestor/petitioner to relief. A requestor/petitioner who fails to satisfy these requirements with respect to at least one contention will not be permitted to participate as a party.

The Commission requests that each contention be given a separate numeric or alpha designation within one of the following groups: (1) Technical (primarily related to safety concerns); (2) environmental; or (3) miscellaneous.

As specified in 10 CFR 2.309, if two or more requestors/petitioners seek to co-sponsor a contention or propose substantially the same contention, the requestors/petitioners will be required to jointly designate a representative who shall have the authority to act for the requestors/petitioners with respect to that contention.

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. 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 to the 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: Rulemaking and Adjudications Staff at 301–415–1101 (verification number: 301–415–1966).[2] A copy of the request for hearing or petition for leave to intervene must 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 or petition for leave to intervene should also be sent to the Assistant General Counsel, Entergy Nuclear Operations, Inc., 440 Hamilton Avenue, White Plains, NY 10601.

Non-timely requests and/or petitions and contentions will not be entertained absent a determination by the Commission, the presiding officer, or the Atomic Safety and Licensing Board that the petition, request and/or contentions should be granted based on a balancing of the factors specified in 10 CFR 2.309(a)(1)(i)–(viii).

Detailed information about the license renewal process can be found under the Nuclear Reactors icon at *http://www.nrc.gov/reactors/operating/licensing/renewal.html* on the NRC's Web site. Copies of the application to renew the operating licenses for Indian Point Nuclear Generating Unit Nos. 2 and 3, are available for public inspection at the Commission's PDR, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852–2738, and at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html*, the NRC's Web site while the application is under review. The application may be accessed in ADAMS through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/reading-rm/adams.html* under ADAMS Accession Numbers ML071210507, ML071280700, and ML071800318. As stated above, persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS may contact the NRC Public Document Room (PDR) Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *pdr@nrc.gov.*

The NRC staff has verified that a copy of the license renewal application is also available to local residents near Indian Point Nuclear Generating Unit Nos. 2 and 3 at the White Plains Public Library, 100 Martine Avenue, White Plains, NY 10601; the Field Library, 4 Nelson Avenue, Peekskill, NY 10566; and the Hendrick Hudson Free Library, 185 Kings Ferry Road, Montrose, NY 10548.

Dated at Rockville, Maryland, this 25th day of July, 2007.

For The Nuclear Regulatory Commission.

Pao-Tsin Kuo,

Director, Division of License Renewal, Office of Nuclear Reactor Regulation.

[FR Doc. E7–14864 Filed 7–31–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Application for a License To Export High-Enriched Uranium

Pursuant to 10 CFR 110.70(b)(2) ''Public Notice of Receipt of an Application,'' please take notice that the Nuclear Regulatory Commission has received the following request for an export license. Copies of the request can be accessed through the Public Electronic Reading Room (PERR) link *http://www.nrc.gov/reading-rm/adams.html* at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within 30 days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary,

[1] To the extent that the application contains attachments and supporting documents that are not publicly available because they are asserted to contain safeguards or proprietary information, petitioners desiring access to this information should contact the applicant or applicant's counsel to discuss the need for a protective order.

[2] If the request/petition is filed by e-mail or facsimile, an original and two copies of the document must be mailed within 2 (two) business days thereafter to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; Attention: Rulemaking and Adjudications Staff.

U.S. Department of State, Washington, DC 20520.

In its review of the application for a license to export special nuclear material as defined in 10 CFR part 110 and noticed herein, the Commission does not evaluate the health, safety or environmental effects in the recipient nation of the material to be exported. The information concerning the application follows.

NRC EXPORT LICENSE APPLICATION FOR HIGH-ENRICHED URANIUM

Name of applicant, date of application, date received, application number, docket number	Description of material		End use	Recipient country
	Material type	Total quantity		
DOE/NNSA—Y12 National Security Complex, June 28, 2007, July 3, 2007, XSNM3504, 11005701.	High-Enriched Uranium (93.35%).	Up to 15.5 kg Uranium (14.470 kg U–235).	To fabricate targets for irradiation in the National Research Universal (NRU) Reactor to produce medical radioisotopes.	Canada.

For the Nuclear Regulatory Commission.

Dated this 24th day of July 2007 at Rockville, Maryland.

Stephen Dembek,

Acting Deputy Director, Office of International Programs.

[FR Doc. E7–14861 Filed 7–31–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Request for a License To Export Radioactive Waste

Pursuant to 10 CFR 110.70 (c) ''Public notice of receipt of an application,'' please take notice that the Nuclear Regulatory Commission has received the following request for an export license. Copies of the request are available electronically through ADAMS and can be accessed through the Public Electronic Reading Room (PERR) link *http://www.nrc.gov/reading-rm.html* at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within 30 days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

The information concerning this license application follows.

NRC EXPORT LICENSE APPLICATION

Name of applicant, date of application, date received, application No., docket No.	Description of material		End use	Recipient country
	Material type	Total quantity		
Pacific EcoSolutions, Inc. is in the process of changing its name to Perma-Fix Northwest Inc. If approved, the licensee for this export will be Perma-Fix Northwest. Inc., May 16, 2007, June 18, 2007, XW012, 11005699.	Class A radioactive waste in various forms resulting from processing imported contaminated materials, or as non-conforming imported materials, which could not be processed nor recycled.	Not to exceed the total quantity of radioactively contaminated materials imported under NRC Import License IW022.	Return for ultimate disposal of non-conforming imported waste or processed material that can be attributed to the Canadian generator.	Canada.

For the Nuclear Regulatory Commission.

Dated this 24th day of July 2007 at Rockville, Maryland.

Stephen Dembek,

Acting Deputy Director, Office of International Programs.

[FR Doc. E7–14862 Filed 7–31–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Request for a License To Import Radioactive Waste

Pursuant to 10 CFR 110.70(c) ''Public notice of receipt of an application,'' please take notice that the Nuclear Regulatory Commission (NRC) has received the following request for an import license. Copies of the request are available electronically through ADAMS and can be accessed through the Public Electronic Reading Room (PERR) link: *http://www.nrc.gov/reading-rm.html* at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within 30 days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

The information concerning this license application follows.

NRC IMPORT LICENSE APPLICATION

Description of Material				
Name of applicant date of application date received application No. docket No.	Material type	Total quantity	End use	Country of origin
Pacific EcoSolutions, Inc. is in the process of changing its name to Perma-Fix Northwest. Inc. If approved, the licensee for this import will be Perma-Fix Northwest. Inc. May 16, 2007 June 18, 2007 IW022 11005700	Class A radioactive waste including various materials (e.g., wood, metal, paper, cloth, concrete, rubber, plastic, liquids, aqueous-organic fluids, animal carcasses, and human-animal waste) contaminated with radionuclides during licensed activities; e.g., routine operations, maintenance, equipment use, decontamination, remediation, and decommissioning.	Up to a maximum total of 5,500 tons or about 1,000 tons metal, 4,000 tons dry activity material, and 500 tons liquid, contaminated with various radionuclides in varying combinations. Activity levels will not exceed licensee possession limits, and materials will be handled in accordance with all U.S. Federal and State regulations.	Recycling for beneficial reuse and processing for volume reduction via thermal and non-thermal treatment. Liquids to be recycled. Non-conforming materials and/or radioactive waste that is attributed to Canadian supplier, will be returned per appropriate NRC export license (Ref. XW012), and will not remain in the U.S.	Canada.

For the Nuclear Regulatory Commission.

Dated this 24th day of July, 2007, at Rockville, Maryland.

Stephen Dembek,

Acting Deputy Director, Office of International Programs.

[FR Doc. E7–14931 Filed 7–31–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on the Medical Uses of Isotopes; Meeting Notice

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Notice of meeting.

SUMMARY: The U.S. Nuclear Regulatory Commission will convene a public teleconference meeting of the Advisory Committee on the Medical Uses of Isotopes (ACMUI) on August 15, 2007. The topic of the discussion will be ''Increased Controls: Fingerprinting Orders.''

Purpose: Discuss information related to increased controls and fingerprinting orders as this subject relates to medical licensees.

DATES: Wednesday, August 15, 2007, from 1 p.m. to 2 p.m Eastern Daylight Time.

Public Participation: Any member of the public who wishes to participate in the teleconference discussion may contact Ashley M. Tull using the contact information below.

Contact: Ashley M. Tull by telephone (301) 415–5294; e-mail *amt1@nrc.gov;* or mail Office of Federal and State Materials, U.S. Nuclear Regulatory Commission, Mail Stop T8-E24, Washington, DC 20555–0001.

Conduct of the Meeting

Leon S. Malmud, M.D., will chair the meeting. Dr. Malmud will conduct the meeting in a manner that will facilitate the orderly conduct of business. The following procedures apply to public participation in the meeting:

1. This meeting will be held in accordance with the Atomic Energy Act of 1954, as amended (primarily Section 161a); the Federal Advisory Committee Act (5 U.S.C. App); and the Commission's regulations in Title 10, U.S. Code of Federal Regulations, Part 7.

2 . Persons who wish to provide a statement should submit an e-mail or mail a reproducible copy to Ms. Tull at the contact information provided. Submittals must be e-mailed or postmarked by August 13, 2007, and must pertain to the topics on the agenda for the meeting.

3 . Questions and comments from members of the public will be permitted during the meeting, at the discretion of the Chairman.

4 . The transcript and written comments will be available on NRC's Web site (*http://www.nrc.gov*) and at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD 20852–2738, telephone (800) 397–4209, on or about November 15, 2007. Minutes of the meeting will be available on or about September 17, 2007.

Dated at Rockville, Maryland, this 26th day of July 2007.

For the Nuclear Regulatory Commission.

Andrew L. Bates,

Advisory Committee Management Officer.

[FR Doc. E7–14884 Filed 7–31–07; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Regulatory Guide: Issuance, Availability

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory Guide: Issuance, Availability.

FOR FURTHER INFORMATION CONTACT: John N. Ridgely, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–6555 or e-mail to *JNR@nrc.gov*.

SUPPLEMENTARY INFORMATION: The U.S. Nuclear Regulatory Commission (NRC) has issued for public comment a draft guide in the agency's Regulatory Guide series. This series has been developed to describe and make available to the public such information as methods that are acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques that the staff uses in evaluating specific problems or postulated accidents, and data that the staff needs in its review of applications for permits and licenses.

The interim revised Regulatory Guide (RG) 4.15, entitled ''Quality Assurance for Radiological Monitoring Programs (Inception Through Normal Operations to License Termination)—Effluent Streams and the Environment,'' was issued with a temporary identification as Draft Regulatory Guide DG–4010 for public comments on November 2, 2006. Public comments were received, and the NRC staff appropriately revised the Draft Regulatory Guide DG–4010. RG 4.15, Revision 2, was issued in the **Federal Register**, 72 FR 15173 on March 30, 2007, for interim use and for public comments to a wider audience. The

second public comment period closed on May 29, 2007, and no comments have been received. RG 4.15, Revision 2, is no longer considered ''for trial use'' but is considered ''for final use'' without change to the information in the guide.

Electronic copies of Regulatory Guide 4.15 are available through the NRC's public Web site under Regulatory Guides in the Regulatory Guides document collection of the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/doc-collections/*.

In addition, regulatory guides are available for inspection at the NRC's Public Document Room (PDR), which is located at 11555 Rockville Pike, Rockville, Maryland. The PDR's mailing address is USNRC PDR, Washington, DC 20555–0001. The PDR can also be reached by telephone at (301) 415–4737 or (800) 397–4209, by fax at (301) 415–3548, and by e-mail to *PDR@nrc.gov*.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them. (5 U.S.C. 552(a))

Dated at Rockville, Maryland, this 25th day of July, 2007.

For the U.S. Nuclear Regulatory Commission.

Brian W. Sheron,

Director, Office of Nuclear Regulatory Research.

[FR Doc. E7–14863 Filed 7–31–07; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

International Mail Briefing

AGENCY: Postal Regulatory Commission.

ACTION: Notice of briefing.

SUMMARY: Representatives of U.S. regulators and the private sector will present a briefing on Wednesday, August 1, 2007, beginning at 11:30 a.m., in the Postal Regulatory Commission's main conference room. The briefing will address issues raised by the sale of financial services by international postal operators.

DATES: August 1, 2007.

ADDRESSES: Postal Regulatory Commission, 901 New York Avenue, NW., Suite 200, Washington, DC 20268–0001.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, Postal Regulatory Commission, 202–789–6820 and *stephen.sharfman@prc.gov.*

Garry J. Sikora,

Acting Secretary.

[FR Doc. 07–3761 Filed 7–31–07; 8:45 am]

BILLING CODE 7710–FW–M

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–453; OMB Control No. 3235–0510]

Submission for OMB Review; Comment Request; Extension: Rule 302

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Regulation ATS (17 CFR 242.300 *et seq.*) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) provides a regulatory structure that directly addresses issues related to alternative trading systems' role in the marketplace. Regulation ATS allows alternative trading systems to choose between two regulatory structures. Alternative trading systems have the choice between registering as broker-dealers and complying with Regulation ATS or registering as national securities exchanges. Rule 302 of Regulation ATS describes the recordkeeping requirements for alternative trading systems that are not national securities exchanges. Under Rule 302, alternative trading systems are required to make a record of subscribers to the alternative trading system, daily summaries of trading in the alternative trading system, and time-sequenced records of order information in the alternative trading system.

The information required to be collected under the Rule should increase the abilities of the Commission, state securities regulatory authorities, and the SROs to ensure that alternative trading systems are in compliance with Regulation ATS as well as other rules and regulations of the Commission and the SROs. If the information is not collected or collected less frequently, the Commission would be severely limited in its ability to comply with its statutory obligations, provide for the protection of investors and promote the maintenance of fair and orderly markets.

Respondents consist of alternative trading systems that choose to register as broker-dealers and comply with the requirements of Regulation ATS. The Commission estimates that there are currently approximately 65 respondents.

An estimated 65 respondents will spend approximately 2,340 hours per year (65 respondents at 36 burden hours/respondent) to comply with the recordkeeping requirements of Rule 302. At an average cost per burden hour of $86.54, the resultant total related cost of compliance for these respondents is $202,504.00 per year (2,340 burden hours multiplied by $86.54/hour; a slight discrepancy is due to arithmetic rounding).

Compliance with Rule 302 is mandatory. The information required by the Rule 302 is available only to the examination of the Commission staff, state securities authorities and the SROs. Subject to the provisions of the Freedom of Information Act, 5 U.S.C. 522, and the Commission's rules thereunder (17 CFR 200.80(b)(4)(iii)), the Commission does not generally publish or make available information contained in any reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of, or in connection with an examination or inspection of the books and records of any person or any other investigation.

Regulation ATS requires alternative trading systems to preserve any records, for at least three years, made in the process of complying with the systems capacity, integrity and security requirements.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Comments should be directed to (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an e-mail to: *David_Rostker@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: July 23, 2007.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14842 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–451, OMB Control No. 3235–0509]

Submission for OMB Review; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Investor Education and Assistance, Washington, DC 20549–0213.

Extension: Rule 301 and Forms ATS and ATS–R.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Regulation ATS (17 CFR 242.300 *et seq.*) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) provides a regulatory structure that directly addresses issues related to alternative trading systems' role in the marketplace. Regulation ATS allows alternative trading systems to choose between two regulatory structures. Alternative trading systems have the choice between registering as broker-dealers and complying with Regulation ATS or registering as national securities exchanges. Regulation ATS provides the regulatory framework for those alternative trading systems that choose to be regulated as broker-dealers. Rule 301 of Regulation ATS contains certain notice and reporting requirements, as well as additional obligations that only apply to alternative trading systems with significant volume. Rule 301 describes the conditions with which a registered broker-dealer operating an alternative trading system must comply. The Rule requires all alternative trading systems that wish to comply with Regulation ATS to file an initial operation report on Form ATS. The initial operation report requires information regarding operation of the system including the method of operation, access criteria and the types of securities traded. Alternative trading systems are also required to supply updates on Form ATS to the Commission, describing material changes to the system, and quarterly transaction reports on Form ATS–R. Alternative trading systems are also required to file cessation of operations reports on Form ATS.

Alternative trading systems with significant volume are required to comply with requirements for fair access and systems capacity, integrity and security. Under Rule 301, such alternative trading systems are required to establish standards for granting access to trading on its system. In addition, upon a decision to deny or limit an investor's access to the system, an alternative trading system is required to provide notice to the investor of the denial or limitation and their right to an appeal to the Commission. Regulation ATS requires alternative trading systems to preserve any records made in the process of complying with the systems' capacity, integrity and security requirements. In addition, such alternative trading systems are required to notify Commission staff of material systems outages and significant systems changes.

The Commission uses the information provided pursuant to the Rule to monitor the growth and development of alternative trading systems to confirm that investors effecting trades through the systems are adequately protected, and that the systems do not impede the maintenance of fair and orderly securities markets or otherwise operate in a manner that is inconsistent with the federal securities laws. In particular, the information collected and reported to the Commission by alternative trading systems enables the Commission to evaluate the operation of alternative trading systems with regard to national market system goals, and monitor the competitive effects of these systems to ascertain whether the regulatory framework remains appropriate to the operation of such systems. Without the information provided on Forms ATS and ATS–R, the Commission would not have readily available information on a regular basis in a format that will allow it to determine whether such systems have adequate safeguards.

Respondents consist of alternative trading systems that choose to register as broker-dealers and comply with the requirements of Regulation ATS. The Commission estimates that there are currently approximately 65 respondents.

An estimated 65 respondents will file an average total of 465 responses per year, which corresponds to an estimated annual response burden of 1,982.5 hours. At an average cost per burden hour of approximately $95.57, the resultant total related cost of compliance for these respondents is $189,458.15 per year (1,982.5 burden hours multiplied by $95.57 per hour; a slight discrepancy is due to arithmetic rounding).

Compliance with Rule 301 is mandatory. The information required by the Rule 301 is available only to the examination of the Commission staff, state securities authorities and the SROs. Subject to the provisions of the Freedom of Information Act, 5 U.S.C. 522, and the Commission's rules thereunder (17 CFR 200.80(b)(4)(iii)), the Commission does not generally publish or make available information contained in any reports, summaries, analyses, letters, or memoranda arising out of, in anticipation of, or in connection with an examination or inspection of the books and records of any person or any other investigation.

Regulation ATS requires alternative trading systems to preserve any records, for at least three years, made in the process of complying with the systems capacity, integrity and security requirements.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

Comments should be directed to (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503 or by sending an e-mail to: *David_Rostker@omb.eop.gov*; and (ii) R. Corey Booth, Director/Chief Information Officer, Securities and Exchange Commission, c/o Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312 or send an e-mail to: *PRA_Mailbox@sec.gov*. Comments must be submitted within 30 days of this notice.

Dated: July 23, 2007.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14845 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56134; File No. SR–CTA–2007–01]

Consolidated Tape Association; Notice of Filing of the Ninth Charges Amendment to the Second Restatement of the Consolidated Tape Association Plan

July 25, 2007.

Pursuant to section 11A of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 608 thereunder,[2]

[1] 15 U.S.C. 78k–1.

[2] 17 CFR 242.608.

notice is hereby given that on July 20, 2007, the Consolidated Tape Association (''CTA'') Plan Participants (''Participants'') [3] filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') a proposal to amend the Second Restatement of the CTA Plan (the ''Plan'').[4] The proposal represents the ninth charges amendment to the Plan (''Ninth Charges Amendment'') and reflects changes unanimously adopted by the Participants. The proposed amendment would impose a limit on the maximum amount that any entity is required to pay for any calendar month's charge for broadcast, cable or satellite television distribution of a Network A ticker. The Commission is publishing this notice to solicit comments from interested persons on the proposed Ninth Charges Amendment to the Plan.

I. Rule 608(a)

A. Description and Purpose of the Amendment

The Plan currently imposes a charge of $2.00 for every 1,000 households reached on broadcast, cable and satellite television distribution of a Network A ticker (the ''Broadcast Charge''). A minimum monthly vendor payment of $2,000 applies. CTA permits prorating for those who broadcast the data for less than the entire business day, based upon the number of minutes that the vendor displays the real-time ticker, divided by the number of minutes the primary market is open for trading (currently 390 minutes).

The Ninth Charges Amendment proposes to cap the Broadcast Charge by providing that no entity is required to pay more than the ''Television Ticker Maximum'' for any calendar month. For months falling in calendar year 2007, the Participants propose that the monthly ''Television Ticker Maximum'' shall be $150,000. For each subsequent calendar year, the monthly Television Ticker Maximum would increase by the ''Annual Increase Amount.''

The ''Annual Increase Amount'' is an amount equal to the percentage increase in the annual composite share volume for the preceding calendar year, subject to a maximum annual increase of five percent. The ''Annual Increase Amount'' is the same adjustment factor that the Network A rate schedule has long applied to the monthly broker-dealer enterprise fee.

B. Additional Information Required by Rule 608(a)

1. Governing or Constituent Documents

Not applicable.

2. Implementation of the Amendment

The Participants have notified the vendors that would be affected by the proposed amendment. The Participants propose to apply the monthly maximum amount that any entity is required to pay for any calendar month's Broadcast Charge retroactively to May 1, 2007.

3. Development and Implementation Phases

See Item I(B)(2) above.

4. Analysis of Impact on Competition

The amendment will impose no burden on competition.

5. Written Understanding or Agreements relating to Interpretation of, or Participation in, Plan

The Participants have no written understandings or agreements relating to interpretation of the Plan as a result of the amendment.

6. Approval by Sponsors in Accordance With Plan

Under Section IV(b) of the Plan, each Plan Participant must execute a written amendment to the Plan before the amendment can become effective. The amendment is so executed.

7. Description of Operation of Facility Contemplated by the Proposed Amendment

a. Terms and Conditions of Access

Not applicable.

b. Method of Determination and Imposition, and Amount of, Fees and Charges

The Participants believe that the proposed cap on Broadcast Charges is fair and reasonable and provides for an equitable allocation of dues, fees, and other charges among vendors, data recipients and other persons using CTA Network A facilities.

c. Method of Frequency of Processor Evaluation

Not applicable.

d. Dispute Resolution

Not applicable.

II. Rule 601(a)

A. Equity Securities for Which Transaction Reports Shall be Required by the Plan.

Not applicable.

B. Reporting Requirements

Not applicable.

C. Manner of Collecting, Processing, Sequencing, Making Available and Disseminating Last Sale Information

Not applicable.

D. Manner of Consolidation

Not applicable.

E. Standards and Methods Ensuring Promptness, Accuracy and Completeness of Transaction Reports

Not applicable.

F. Rules and Procedures Addressed to Fraudulent or Manipulative Dissemination

Not applicable.

G. Terms of Access to Transaction Reports

The Network A Participants and the vendors that the proposed amendment would affect have already entered into the Network A Participants' standard form of agreement. No new terms of access will apply, other than the cap on the Broadcast Charge.

H. Identification of Marketplace Execution

Not applicable.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed Ninth Charges Amendment 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–CTA–2007–01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CTA–2007–01. This file number should be included on the subject line if e-mail is used. To help the

[3] Each Participant executed the proposed amendment. The Participants are the American Stock Exchange LLC; Boston Stock Exchange, Inc.; Chicago Board Options Exchange, Inc.; Chicago Stock Exchange, Inc.; International Securities Exchange, LLC; The NASDAQ Stock Market LLC; National Association of Securities Dealers, Inc.; National Stock Exchange, Inc.; New York Stock Exchange LLC.; NYSE Arca, Inc.; and Philadelphia Stock Exchange, Inc.

[4] The proposal was originally filed on June 19, 2007. However, it was refiled on July 20, 2007, to reflect technical revisions made in response to the Commission's staff comments.

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 Plan amendment that are filed with the Commission, and all written communications relating to the Plan amendment 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the Plan amendment also will be available for inspection and copying at the principal office of the CTA. 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–CTA–2007–01 and should be submitted on or before August 22, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14839 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56152; File No. PCAOB–2007–02]

Public Company Accounting Oversight Board; Order Approving Proposed Auditing Standard No. 5, An Audit of Internal Control Over Financial Reporting That Is Integrated With an Audit of Financial Statements, a Related Independence Rule, and Conforming Amendments

July 27, 2007.

I. Introduction

On May 25, 2007, the Public Company Accounting Oversight Board (the ''Board'' or the ''PCAOB'') filed with the Securities and Exchange Commission (the ''Commission'') Proposed Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting that is Integrated with an Audit of Financial Statements* (''Auditing Standard No. 5''), a Related Independence Rule 3525, and Conforming Amendments, pursuant to Section 107 of the Sarbanes-Oxley Act of 2002 (the ''Act'') and Section 19(b) of the Securities Exchange Act of 1934 (the ''Exchange Act''). Auditing Standard No. 5 will supersede Auditing Standard No. 2, *An Audit of Internal Control Over Financial Reporting Performed in Conjunction with an Audit of Financial Statements* (''Auditing Standard No. 2''), to provide the professional standards and related performance guidance for independent auditors when an auditor is engaged to perform an audit of management's assessment of the effectiveness of internal control over financial reporting that is integrated with an audit of the financial statements pursuant to Sections 103(a)(2)(A)(iii) and 404(b) of the Act. Additionally, Rule 3525 further implements Section 202 of the Act's pre-approval requirement by requiring auditors to take certain steps as part of seeking audit committee pre-approval of internal control related non-audit services. Finally, the conforming amendments update the Board's other auditing standards in light of Auditing Standard No. 5, move certain information that was contained in Auditing Standard No. 2 to the Board's interim standards, and change the existing requirement that ''generally, the date of completion of the field work should be used as the date of the independent auditor's report'' to ''the auditor should date the audit report no earlier than the date on which the auditor has obtained sufficient competent evidence to support the auditor's opinion.''

Notice of the proposed standard, the related independence rule, and the conforming amendments was published in the **Federal Register** on June 12, 2007,[1] and a supplemental notice of additional solicitation of comments on the rules and amendments was published in the **Federal Register** on June 20, 2007 (''Supplemental Notice'').[2] The Commission received 37 comment letters on the proposed rules and amendments. For the reasons discussed below, the Commission is granting approval of the proposed standard, the related independence rule, and conforming amendments.

II. Description

The Act establishes the PCAOB to oversee the audits of public companies and related matters, in order to protect the interests of investors and further the public interest in preparation of informative, accurate and independent audit reports.[3] Section 103(a) of the Act directs the PCAOB to establish auditing and related attestation standards, quality control standards, and ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports as required by the Act or the rules of the Commission.

Section 103(a)(2)(A)(iii) of the Act requires the Board's standard on auditing internal control to include ''testing of the internal control structure and procedures of the issuer * * *.'' Under Section 103, the Board's standard also must require the auditor to present in the audit report, among other things, ''an evaluation of whether such internal control structure and procedures * * * provide reasonable assurance that transactions are recorded as necessary to permit the preparation of financial statements in accordance with generally accepted accounting principles * * *.'' Section 404 of the Act requires that registered public accounting firms attest to and report on an assessment of internal control made by management and that such attestation ''shall be made in accordance with standards for attestation engagements issued or adopted by the Board.''

The Board's proposed Auditing Standard No. 5, which will supersede Auditing Standard No. 2, provides the new professional standards and related performance guidance for independent auditors to attest to, and report on, management's assessment of the effectiveness of internal control over financial reporting under Sections 103 and 404 of the Act.

The auditor's report on internal control over financial reporting issued pursuant to Auditing Standard No. 5 will express one opinion—an opinion on whether the company has maintained effective internal control over financial reporting as of its fiscal year-end. In order for the auditor to render an opinion, Auditing Standard No. 5 requires the auditor to evaluate and test both the design and the operating effectiveness of internal control to be satisfied that management's assessment about

[5] 17 CFR 200.30–3(a)(27).

[1] Release No. 34–55876 (June 7, 2007); 72 FR 32340 (June 12, 2007).

[2] Release No. 34–55912 (June 15, 2007); 72 FR 34052 (June 20, 2007); Notice of Additional Solicitation of Comments on the Filing of Proposed Rule on Auditing Standard No. 5, An Audit of Internal Control Over Financial Reporting That is Integrated with an Audit of Financial Statements, and Related Independence Rule and Conforming Amendments.

[3] Section 101(a) of the Act.

whether the company maintained effective internal control over financial reporting as of its fiscal year-end is correct and, therefore, fairly stated. Additionally, paragraph 72 of Auditing Standard No. 5 requires the auditor to evaluate whether management has included in its annual assessment report all of the disclosures required by Commission rules.[4] If the auditor determines that management's assessment is not fairly stated, Auditing Standard No. 5 requires that the auditor modify his or her audit report on the effectiveness of internal control over financial reporting.

III. Discussion

As discussed in detail below, the Commission believes there are many aspects of Auditing Standard No. 5 that are expected to result in improvements in both the effectiveness and efficiency of integrated audits that are currently being conducted in accordance with Auditing Standard No. 2. For example, Auditing Standard No. 5 focuses the audit on the matters most important to internal control. Auditing Standard No. 5 also eliminates unnecessary procedures by, among other things, removing the requirement to evaluate management's process; permitting consideration of knowledge obtained during previous audits; refocusing the multi-location testing requirements on risk rather than coverage; and removing unnecessary barriers to using the work of others. Further, Auditing Standard No. 5 encourages scaling of the audit for smaller companies by directing the auditor to tailor the audit to reflect the attributes of smaller, less complex companies. Lastly, Auditing Standard No. 5 simplifies the requirements by reducing detail and specificity; reflecting more accurately the sequential flow of an audit of internal control; and improving readability.

The PCAOB received 175 comment letters when it published a draft of Auditing Standard No. 5 for public comment on December 19, 2006. On April 4, 2007, the Commission held an open meeting to discuss the comments received by the PCAOB and by the Commission in connection with its proposed interpretive guidance for management. At this meeting the Commission directed its staff to focus on four areas when working with the PCAOB staff: Aligning the proposed auditing standard with the Commission's proposed interpretive guidance for management, particularly with regard to prescriptive requirements, definitions and terms; scaling the audit to account for the particular facts and circumstances of all companies, particularly smaller companies; encouraging auditors to use professional judgment, particularly in using risk-assessment; and following a principles-based approach to determining when and to what extent the auditor can use the work of others.[5]

The PCAOB addressed these areas, in addition to other matters raised by commenters, in the version of Auditing Standard No. 5 that was filed with the Commission. For example, the PCAOB made revisions to its proposed standard to: Make the auditing standard more principles-based and reduce prescriptiveness; align definitions and terminology with the Commission's final interpretive guidance for management; better incorporate scaling concepts throughout the auditing standard; further emphasize fraud controls; enhance and align the discussion of entity-level controls; eliminate the requirement to separately assess risk at the individual control level; clarify the manner in which the evidence regarding design of controls can be obtained; and clarify the framework by which auditors can make judgments regarding whether and to what extent the auditor can use the work of others, including management.

The Commission received 37 comment letters in response to its request for comments on Auditing Standard No. 5, the related independence rule, and conforming amendments. The comment letters came from issuers,[6] registered public accounting firms,[7] professional associations,[8] investors,[9] and others.[10] In general, many commenters expressed support for the proposed standard[11] and recommended that the Commission approve the standard and the related conforming amendments, with some of these commenters requesting that this approval be done on an expedited basis to enable auditors to implement the provisions of Auditing Standard No. 5 prior to the required effective date.[12] A number of the commenters noted that the new audit standard includes appropriate investor safeguards, will facilitate a more effective and efficient approach to the implementation,[13] and that the PCAOB appropriately responded to concerns raised by issuers, auditors, investors and others.[14] Specifically, some commenters noted that the standard's focus on principles rather than prescriptive requirements expands the opportunities for auditors to apply well-reasoned professional judgment.[15] Many of these commenters had provided similar communication directly to the PCAOB during its comment period, and to the Commission as part of its consideration of its proposed interpretive guidance for management.

A few commenters expressed their continuing concerns that the Commission (in its recently approved rule amendments) and the PCAOB had retained the wrong auditor opinion, indicating their belief that auditors should opine on the assessment made by management in order to comply with

[4] Item 308 of Regulations S–B and S–K.

[5] See Commission Press Release dated April 4, 2007, ''SEC Commissioners Endorse Improved Sarbanes-Oxley Implementation To Ease Smaller Company Burdens, Focusing Effort On What Truly Matters.''

[6] Alamo Group; Pepsico; and XenoPort, Inc.

[7] BDO Seidman, LLP; Deloitte & Touche LLP; Ernst & Young LLP; Grant Thornton LLP; KPMG LLP; and PricewaterhouseCoopers LLP.

[8] American Bankers Association; American Bar Association Section of Business Law Committees on Federal Regulation of Securities and Law and Accounting; America's Community Bankers; Biotechnology Industry Organization; Center for Audit Quality; Independent Community of Bankers of America; Institute of Chartered Accountants in England and Wales; Institute of Internal Auditors (IIA); Institute of Management Accountants; Organization for International Investment; National Venture Capital Association; New York State Society of Certified Public Accountants; The Hundred Group of Finance Directors; and U.S. Chamber Center for Capital Markets Competitiveness.

[9] California Public Employees Retirement System; Centre for Financial Market Integrity; and Council of Institutional Investors.

[10] Accretive Solutions; Thomas E. Damman; David A. Doney; Benjamin P. Foster; Frank Gorrell; Simone Heidema and Erick Noorloos; J. Lavon Morton; Monica Radu; Robert Richter; R.G. Scott & Associates, LLC; and United States Government Accountability Office.

[11] See for example, Accretive Solutions; America's Community Bankers; BDO Seidman, LLP; California Public Empolyees Retirement System; Center for Audit Quality; Council of Institutional Investors; Deloitte & Touche LLP; Ernst & Young LLP; Grant Thornton LLP; KPMG LLP; Institute of Chartered Accountants in England and Wales; New York State Society of Certified Public Accountants; PricewaterhouseCoopers LLP; The 100 Group of Finance Directors; and United States Government Accountability Office.

[12] See for example, America's Community Bankers; BDO Seidman, LLP; California Public Employees Retirement System; Council of Institutional Investors; Deloitte & Touche LLP; Ernst & Young LLP; Grant Thornton LLP; KPMG LLP; and PricewaterhouseCoopers LLP.

[13] See for example, American Bankers Association; Accretive Solutions; BDO Seidman, LLP; Center for Audit Quality; KPMG LLP; PricewaterhouseCoopers LLP; and The 100 Group of Finance Directors.

[14] See for example, American Bankers Association; America's Community Bankers; Council of Institutional Investors; Ernst & Young LLP; Grant Thornton LLP; The 100 Group of Finance Directors; and United States Government Accountability Office.

[15] See for example, BDO Seidman, LLP; Center for Audit Quality; Ernst & Young LLP; Institute of Chartered Accountants in England and Wales; PricewaterhouseCoopers LLP; and The 100 Group of Finance Directors.

Section 404(b) of the Sarbanes-Oxley Act.[16] These commenters expressed their belief that the auditor's opinion directly on internal control over financial reporting (as opposed to management's assessment) entails unnecessary and duplicative work. The Commission has carefully considered this comment and continues to believe that, consistent with Sections 103 and 404 of the Sarbanes-Oxley Act, the Commission's recent rule amendments and Auditing Standard No. 5 require the appropriate opinion to be expressed by the auditor. The Commission notes that this view is consistent with the view expressed by the Board in its release. Further, the Commission believes that an auditing process that is restricted to evaluating what management has done would not necessarily provide the auditor with a sufficient level of assurance to render an independent opinion as to whether management's assessment about the effectiveness of internal control over financial reporting is correct.[17] Finally, the Commission believes that the expression of a single opinion directly on the effectiveness of internal control over financial reporting provides clear communication to investors that the auditor is not responsible for issuing an opinion on management's process for evaluating internal control over financial reporting.[18] In the Commission's view, such an opinion may not only have the unintended consequence of hindering management's ability to apply appropriate judgment in designing their evaluation approach, but also may have the effect of increasing audit costs without commensurate benefit to issuers and investors.

Two commenters noted their belief that there was not sufficient incentive for auditors to modify their methods of performing the audit of internal control and therefore, were concerned that the benefits afforded by Auditing Standard No. 5 would not be fully realized. These commenters noted that it was important for the PCAOB to adjust its inspection program to align it with the changes in the audit standard and to respect the auditors' use of judgment in conducting the audit.[19] Additionally, commenters noted that the PCAOB's inspection process should monitor the extent to which, and the expediency with which, audit firms implement Auditing Standard No. 5 in the manner expected.[20] This has been an area both the Commission and the PCAOB recognize and continue to focus on. For example, it was an area specifically identified in the Commission's and the PCAOB's 2006 announcement of actions following the Commission's second roundtable on Section 404 implementation.[21] The PCAOB has incorporated procedures to evaluate the efficiency and effectiveness of audits of internal control over financial reporting in their inspection process and, in April 2007, issued its second report on auditors' implementation of the internal control standard.[22] The Commission also recognizes this concern and, as a result and consistent with its previous 2006 announcement in this area, will be carefully monitoring the implementation, including directing the Commission staff to examine whether the PCAOB inspections of registered accounting firms have been effective in encouraging changes in the conduct of integrated audits to improve both efficiency and effectiveness of attestations on internal control over financial reporting.

The Commission received one comment with respect to the indicators of a material weakness that are included in Auditing Standard No. 5. Under Auditing Standard No. 5, if an auditor determines that a deficiency might prevent prudent officials from concluding that they have reasonable assurance that transactions are recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles, an auditor should regard such a determination as an indicator of a material weakness. One commenter took exception to this requirement and requested that such a determination made by the auditor be regarded as an indicator of a deficiency that is at least a significant deficiency rather than an indicator of a material weakness; or that Auditing Standard No. 5 be revised to use the word ''would'' instead of ''might'' when describing the level of assurance that would satisfy prudent officials in the conduct of their own affairs.[23] The Commission notes that the commenter's suggestion to change the word ''might'' to ''would'' is not necessary or appropriate given that the PCAOB and the Commission both stated in their respective releases that the determination of whether or not a material weakness exists requires judgment and the presence of one or more indicators does not mandate a conclusion that a material weakness exists. Moreover, the Commission notes that the indicators are not intended to supplant or replace the definition of material weakness. This particular indicator is intended as a reminder of the requirement in Section 13(b)(2)(B) of the Exchange Act that every issuer ''devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances'' and of the explanation in Section 13(b)(7) of the Exchange Act that the term ''reasonable assurances'' in this context means ''such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.'' The Commission agrees with the list of indicators of a material weakness included in Auditing Standard No. 5, and agrees with the principles in Auditing Standard No. 5, which allow an auditor to use his or her judgment.

The Commission received one comment with respect to the PCAOB's proposed Independence Rule 3525, which relates to the requirement for auditors to obtain audit committee pre-approval of non-audit services related to internal control over financial reporting. This commenter requested a transition provision in order to clarify that internal control-related services pre-approved by audit committees before the final rule is approved by the Commission do not require re-approval under Rule 3525.[24] Auditing Standard No. 2 (paragraph 33) required specific pre-approval of internal-control related non-audit services. The Commission notes that non-audit services that have already been pre-approved by audit committees would not require re-approval with the communications required by Rule 3525. Accordingly, a transition period is not necessary.

The Commission did not receive any comments with respect to the PCAOB's proposed conforming amendments. In some cases, these proposed amendments are administrative in nature, such as updating references in the interim standards to the proposed

[16] See for example, Alamo Group; Robert Richter; Institute of Chartered Accountants in England and Wales; Institute of Management Accountants; and The 100 Group of Finance Directors.

[17] See Release No. 33–8809 (June 20, 2007), Amendments to Rules Regarding Management's Report on Internal Control Over Financial Reporting.

[18] Ibid.

[19] America's Community Bankers and the Institute of Chartered Accountants in England and Wales.

[20] See for example, America's Community Bankers, the Institute of Chartered Accountants in England and Wales, The 100 Group of Finance Directors and U.S. Chamber Center for Capital Markets Competitiveness.

[21] See for example, SEC Press Release 2006–75 (May 16, 2006).

[22] See PCAOB Press Release dated April 18, 2007, ''Board Issues Second Year Report On Auditors' Implementation of Internal Control Standard''.

[23] American Bar Association Section of Business Law Committees on Federal Regulation of Securities and Law and Accounting.

[24] KPMG LLP.

new standard's paragraph numbers and definitions. In other cases, the amendments have been proposed to move information currently contained in Auditing Standard No. 2 to the Board's existing standards. Further, the Commission notes that the Board addressed the single comment that it received on its conforming amendments. The Commission believes that the conforming amendments proposed by the Board are appropriate.

As proposed by the PCAOB, Auditing Standard No. 5, PCAOB Rule 3525, and the Conforming Amendments will be effective and required for integrated audits conducted for fiscal years ending on or after Nov. 15, 2007. However, earlier adoption is permitted by the Board. The Board has stated that auditors who elect to comply with Auditing Standard No. 5 after Commission approval but before its effective date must also comply, at the same time, with Rule 3525 and other PCAOB standards as amended by this release. The Commission believes the effective date allows for appropriate transition time and at the same time encourages early adoption. In that regard, the Commission's recent amendments to Regulation S–X become effective on August 27, 2007 and the Commission will begin accepting the single auditor's attestation report on the effectiveness of internal control over financial reporting prescribed in Auditing Standard No. 5 in timely filings received starting on that date.

In its Supplemental Notice, the Commission sought comments on seven specific questions. The following discussion addresses the comments received related to each of those questions.

(1) Is the standard of materiality appropriately defined throughout AS5 to provide sufficient guidance to auditors? For example, is materiality appropriately incorporated into the guidance regarding the matters to be considered in planning an audit and the identification of significant accounts?

The majority of the commenters who expressed a view on this question noted that Auditing Standard No. 5 appropriately addresses the concept of materiality when planning and performing an integrated audit.[25] Some commenters elaborated that while application of materiality concepts in the context of planning and performing an audit requires the use of judgment, Auditing Standard No. 5 specifies the basis on which those judgments should be made.[26]

A few commenters expressed a view that some auditors may need further and clearer guidance than is provided.[27] However, one commenter indicated its view that the Commission should not provide more guidance and interpretation, especially as related to the application of quantitative criteria to the definitions of material weakness and significant deficiency.[28] Moreover, another commenter noted that although its view was that materiality was not sufficiently defined in Auditing Standard No. 5, it recognized that the definition of materiality extends to matters beyond just Section 404 of the Act.[29]

The Commission agrees that Auditing Standard No. 5 adequately addresses materiality throughout the standard. For example, as a number of commenters observed, paragraph 20 of Auditing Standard No. 5 states that ''in planning the audit of internal control over financial reporting, the auditor should use the same materiality considerations he or she would use in planning the audit of the company's financial statements.'' Further, the Commission does not believe that the auditing standard is the appropriate forum to address broader questions about materiality, as the concept of materiality is fundamental to the federal securities laws.

(2) Please comment on the requirement in Paragraph 80 that the auditor consider whether there are any deficiencies or combinations of deficiencies that are significant deficiencies and, if so, communicate those to the audit committee. Specifically, will the communication requirement regarding significant deficiencies divert auditors' attention away from material weaknesses?

Commenters who expressed a view on this matter overwhelmingly observed that the auditor's requirement to communicate significant deficiencies would not divert auditors' attention away from material weaknesses since Auditing Standard No. 5 clearly directs the auditor to identify material weaknesses, with many of the commenters noting the importance of communicating significant deficiencies to the audit committee.[30]

The Commission agrees with commenters that the communication requirement related to significant deficiencies should not divert auditors' attention away from material weaknesses due to the clear statement in Auditing Standard No. 5 that in planning the audit, the auditor is not required to search for deficiencies that, individually, or in combination, are less severe than a material weakness. Further, the Commission agrees with the Board that limiting the discussion regarding significant deficiencies to the section of the auditing standard that relates to communications is appropriate in order to help clarify that the audit should not be scoped to identify deficiencies that are less severe than a material weakness.

(3) Is AS5 sufficiently clear that for purposes of evaluating identified deficiencies, multiple control deficiencies should only be looked at in combination if they are related to one another?

Most of those commenting on this question agreed that multiple control deficiencies should be aggregated for assessment purposes if they are related to each other and that Auditing Standard No. 5 is sufficiently clear in this regard.[31] Two commenters disagreed with the direction that multiple control deficiencies should only be evaluated in combination if they are related to one another given that the auditor is expressing an opinion on the effectiveness of internal control as a whole.[32]

The Commission agrees with the view of most of the community that Auditing Standard No. 5 is sufficiently clear with respect to aggregation of control deficiencies and further notes that this guidance is appropriately aligned with

[25] See for example, BDO Seidman, LLP; California Public Employees Retirement System; Center for Audit Quality; Deloitte & Touche LLP; Ernst & Young LLP; Grant Thornton LLP; Institute of Chartered Accountants in England and Wales; KPMG LLP; New York State Society of Certified Public Accountants; PepsiCo; PricewaterhouseCoopers LLP; and The Hundred Group of Finance Directors.

[26] See for example, KPMG LLP and PricewaterhouseCoopers LLP.

[27] See for example, Accretive Solutions; The Institute of Internal Auditors; Rod G. Scott; National Venture Capital Association; and U.S. Chamber Center for Capital Markets Competitiveness.

[28] The Institute of Chartered Accountants in England and Wales.

[29] National Venture Capital Association.

[30] See for example, American Bar Association Section of Business Law Committees on Federal Regulation of Securities and Law and Accounting; Accretive Solutions; BDO Seidman, LLP; Center for Audit Quality; Centre for Financial Market Integrity; Council of Institutional Investors; Deloitte & Touche LLP; Ernst & Young LLP; Grant Thornton LLP; Institute of Chartered Accountants in England and Wales; KPMG LLP; J. Lavon Morton; New York State Society of Certified Public Accountants; PepsiCo; PricewaterhouseCoopers LLP; Rod G. Scott; and The 100 Group of Finance Directors, but see The Institute of Internal Auditors.

[31] See for example, Accretive Solutions; BDO Seidman, LLP; Center for Audit Quality; Deloitte & Touche LLP; Ernst & Young LLP; Grant Thornton LLP, Institute of Chartered Accountants in England and Wales; PepsiCo; PricewaterhouseCoopers LLP; R.G. Scott; and The 100 Group of Finance Directors.

[32] See California Public Employees' Retirement Systems; and United States Government Accountability Office.

the guidance that is contained in the Commission's interpretive guidance for management.

(4) Please comment on whether the definition of ''material weakness'' in Paragraph A7 (which is consistent with the definition that the SEC adopted) appropriately describes the deficiencies that should prevent the auditor from finding that ICFR is effective.

The majority of those commenting on this topic expressed agreement with Auditing Standard No. 5's definition of material weakness and stated that it appropriately describes those deficiencies that should prevent the auditor from concluding that internal control over financial reporting is effective,[33] while a couple commenters stated that the definition was not as clear as it could be, thereby potentially leading to subjective assessments of whether a control deficiency is a material weakness.[34] One commenter suggested providing guidance regarding the period of time to which reasonable possibility relates,[0] [35] and another suggested reconsideration of the likelihood threshold included in the definition.[36] Two commenters suggested that the requirement to evaluate deficiencies against interim results due to the reference to interim financial statements in the definition of material weakness should be eliminated,[37] with one of these two commenters stating that this consideration should not delay the Commission's prompt approval of Auditing Standard No. 5.[38]

The Commission agrees that the definition of material weakness included in Auditing Standard No. 5, which is aligned with the Commission's interpretive guidance for management, appropriately describes the conditions that, if they exist, should be disclosed to investors and should preclude a conclusion that internal control over financial reporting is effective. Regarding the reference to interim financial statements in the definition of material weakness, the Commission continues to believe, as it stated in its release adopting the definition of a material weakness, that:

> ''* * *[while] annual materiality considerations are appropriate when making judgments about the nature and extent of evaluation procedures, the Commission believes that judgments about whether a control is adequately designed or operating effectively should consider the requirement to provide investors reliable interim and annual financial reports. Further, if a deficiency is identified that poses a reasonable possibility of a material misstatement in the company's quarterly reports, the Commission believes that the deficiency should be disclosed to investors and internal control over financial reporting should not be assessed as effective.'' [39]

(5) Is AS5 sufficiently clear about the extent to which auditors can use the work of others?

The majority of those who commented on this question expressed their view that Auditing Standard No. 5 is clear about the extent to which auditors can use the work of others to gain efficiencies in the audit,[40] with some noting that Auditing Standard No. 5 provides substantial flexibility in the application of auditor judgment when determining whether, and to what extent, to use the work of others.[41] A small number of commenters noted that further clarification regarding the extent that auditors can rely on the work of others when conducting walkthroughs would be helpful.[42] Two commenters recommended that if the work of others is found to be competent and reliable, then the standard should require the auditor to utilize it.[43]

The Commission agrees that Auditing Standard No. 5 is sufficiently clear about the extent to which the auditor can use the work of others. Further, while the Commission would anticipate auditors would use the work of others under appropriate circumstances, including when the approach results in greater efficiency, the Commission does not believe it is necessary or appropriate to preclude the auditor from utilizing his or her judgment in determining whether or not to use the work of others based on the particular facts and circumstances of the engagement.

(6) Will AS5 reduce expected audit costs under Section 404, particularly for smaller public companies, to result in cost-effective, integrated audits?

A number of commenters stated their view that Auditing Standard No. 5, as approved by the PCAOB, together with the Commission's guidance for management on assessing internal control over financial reporting, will result in a reduction of the total Section 404 compliance effort.[44] Some commenters agreed that a cost reduction would occur, but also noted that the amount of reduced effort and cost associated with the audit of internal control over financial reporting will vary by company depending on factors such as size, complexity, the degree of change from year-to-year, the quality of internal control systems and documentation, and the extent to which management appropriately applies the Commission's interpretive guidance for management.[45] None of the commenters suggested that costs would increase.

Some of the features of Auditing Standard No. 5 that the Commission expects will result in improved effectiveness and efficiency include the direction provided to auditors to focus on what matters most, the elimination of unnecessary procedures from the audit, the ability to scale the audit to fit the size and complexity of the company, the alignment with the Commission's interpretive guidance for management, and its less prescriptive nature. Consequently, the Commission believes that Section 404 compliance costs, for both management's evaluation as well as the external audit, will decrease as a result of the Commission's efforts and Auditing Standard No. 5.

Some commenters noted that while Auditing Standard No. 5 may curtail excessive testing of controls and reduce some of the unnecessary documentation currently required for Section 404 audits, they still have concerns about the extent to which it will reduce costs for smaller public companies.[46] A number of commenters urged the Commission and PCAOB to monitor

[33] See for example, BDO Seidman, LLP; Center for Audit Quality; California Public Employees Retirement System; Council of Institutional Investors; Deloitte & Touche LLP; Ernst & Young LLP; Grant Thornton LLP; Institute of Chartered Accountants in England and Wales; New York State Society of Certified Public Accountants; PepsiCo; PricewaterhouseCoopers LLP; and The 100 Group of Finance Directors.

[34] See for example, Accretive Solutions; R.G. Scott; and U.S. Chamber Center for Capital Markets Competitiveness.

[35] See The Institute of Internal Auditors.

[36] See National Venture Capital Association.

[37] See National Venture Capital Association and PricewaterhouseCoopers LLP.

[38] PricewaterhouseCoopers LLP.

[39] See Release No. 33–8809 (June 20, 2007), Amendments to Rules Regarding Management's Report on Internal Control Over Financial Reporting.

[40] See for example, Accretive Solutions; BDO Seidman, LLP; Center for Audit Quality; Council of Institutional Investors; Deloitte & Touche LLP; Ernst & Young LLP; Grant Thornton LLP; KPMG LLP; PepsiCo; and PricewaterhouseCoopers LLP.

[41] See for example, Deloitte & Touche LLP; KPMG LLP; and PricewaterhouseCoopers LLP.

[42] See for example, The 100 Group of Finance Directors; and J. Lavon Morton.

[43] See American Bankers Association and Biotechnology Industry Organization.

[44] See for example, BDO Seidman, LLP; Center for Audit Quality; Council of Institutional Investors; Deloitte & Touche LLP; Ernst & Young LLP; KPMG LLP; New York State Society of Certified Public Accountants; PricewaterhouseCoopers LLP; The 100 Group of Finance Directors; and The Institute of Internal Auditors.

[45] See for example, Accretive Solutions; BDO Seidman, LLP; Center for Audit Quality; Deloitte & Touche LLP; Ernst & Young LLP; Grant Thornton LLP; and PricewaterhouseCoopers LLP.

[46] See for example, America's Community Bankers; David A. Doney; Independent Community Bankers of America; National Venture Capital Association; J Lavon Morton; R.G. Scott; XenoPort, Inc.; and U.S. Chamber Center for Capital Markets Competitiveness.

closely the extent to which the standard as implemented achieves a reduction in cost, and to take action if there is not an appropriate reduction.[47]

In response to continued concerns about the extent of cost reductions, the Commission's staff is planning to analyze and report on the costs associated with the implementation of the Commission's interpretive guidance for management as well as the implementation of Auditing Standard No. 5. The staff will make any recommendations it believes appropriate to the Commission.

(7) Does AS5 inappropriately discourage or restrict auditors from scaling audits, particularly for smaller public companies?

With regards to scalability, most commenters who responded to this question noted that Auditing Standard No. 5 appropriately discusses the concepts of scalability based on size and complexity without including inappropriate restrictions on the auditor's ability to scale the audit.[48] Other commenters observed that where feasible, Auditing Standard No. 5 should also provide additional guidance on how to effectively plan an integrated audit for smaller public companies and a discussion of related best practices to enhance a broader understanding of risk-based auditing.[49] One commenter expressed concern that an objective definition of ''smaller company'' is necessary in order to provide meaningful direction in scaling the audit and that the standard should clarify that both smaller and less complex companies would be subject to scaled audits.[50]

The Commission believes that Auditing Standard No. 5 appropriately discusses the concepts of scalability without including inappropriate restrictions on the auditor's ability to scale the audit. Further the Commission agrees with the guidance in Auditing Standard No. 5 that provides for scaling and tailoring of all audits to fit the relevant facts and circumstances. The Commission also agrees with the statement made by the Board in its release to Auditing Standard No. 5 that ''scaling will be most effective if it is a natural extension of the risk-based approach and applicable to all companies.'' [51] As a result, Auditing Standard No. 5 contains not only a separate section on scaling the audit, but it also contains specific discussion of scaling concepts throughout the standard. The Commission believes that these concepts will enable tailoring of internal control audits to fit the size and complexity of the company being audited rather than the company's control system being made to fit the auditing standard. Additionally, as some commenters observed, the PCAOB's project to develop guidance and education for auditors of smaller public companies, along with the Committee of Sponsoring Organizations of the Treadway Commission's (''COSO'') project to develop guidance designed to help organizations monitor the quality of their internal control systems and other COSO guidance directed to smaller public companies, should also facilitate the implementation of Section 404 in an effective and efficient manner.[52]

In summary, the Commission believes that Auditing Standard No. 5, the related independence rule, and the conforming amendments will enable better integrated, more effective, and more efficient audits while satisfying the requirements set forth in Sections 103 and 404 of the Act. Further, the Commission notes that Auditing Standard No. 5 is appropriately aligned with the Commission's own rules and interpretive guidance for management.

IV. Conclusion

On the basis of the foregoing, the Commission finds that proposed Auditing Standard No. 5, the related independence rule, and the conforming amendments are consistent with the requirements of the Act and the securities laws and are necessary and appropriate in the public interest and for the protection of investors.

It is therefore ordered, pursuant to Section 107 of the Act and Section 19(b)(2) of the Exchange Act, that proposed Auditing Standard No. 5, *An Audit of Internal Control Over Financial Reporting that is Integrated with an Audit of Financial Statements,* the Related Independence Rule, and Conforming Amendments (File No. PCAOB–2007–02) be and hereby are approved.

By the Commission.

Nancy M. Morris,

Secretary.

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[47] See for example, American Bankers Association; America's Community Bankers; Biotechnology Industry Organization; Independent Community Bankers of America; Institute of Chartered Accountants in England and Wales; Institute of Management Accountants; The 100 Group of Finance Directors; and U.S. Chamber Center for Capital Markets Competitiveness.

[48] See for example, BDO Seidman, LLP; Center for Audit Quality; Council of Institutional Investors; Deloitte & Touche LLP; Ernst & Young LLP; Grant Thornton LLP; PepsiCo; PricewaterhouseCoopers LLP; and The Institute of Internal Auditors.

[49] See for example, New York State Society of Certified Public Accountants.

[50] Biotechnology Industry Organization.

[51] See PCAOB Release No. 2007–005 (May 24, 2006).

[52] See for example, Center for Audit Quality, Deloitte & Touche LLP; and PricewaterhouseCoopers LLP.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56148; File No. 4–544]

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d–2; Notice of Filing and Order Approving and Declaring Effective a Plan for the Allocation of Regulatory Responsibilities Between the National Association of Securities Dealers, Inc., New York Stock Exchange, LLC, and NYSE Regulation, Inc.

July 26, 2007.

Notice is hereby given that the Securities and Exchange Commission (''SEC'' or ''Commission'') has issued an Order, pursuant to Sections 17(d) and 11A(a)(3)(B) [1] of the Securities Exchange Act of 1934 (''Act''), approving and declaring effective a plan for the allocation of regulatory responsibilities (''17d–2 Plan'' or ''Plan'') that was filed pursuant to Rule 17d–2 under the Act,[2] by the National Association of Securities Dealers, Inc. (''NASD''), the New York Stock Exchange LLC (''NYSE''), and NYSE Regulation, Inc. (''NYSE Regulation'') (collectively, the ''Parties'').

I. Introduction

Section 19(g)(1) of the Act,[3] among other things, requires every self-regulatory organization (''SRO'') registered as either a national securities exchange or registered securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d) [4] or 19(g)(2) [5] of the Act. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO (''common members''). Such regulatory duplication would add unnecessary

[1] 15 U.S.C. 78q(d) and 15 U.S.C. 78k–1(a)(3)(B), respectively.

[2] 17 CFR 240.17d–2.

[3] 15 U.S.C. 78s(g)(1).

[4] 15 U.S.C. 78q(d).

[5] 15 U.S.C. 78s(g)(2).

expenses for common members and their SROs.

Section 17(d)(1) of the Act[6] was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication.[7] With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d–1 and Rule 17d–2 under the Act.[8] Rule 17d–1 authorizes the Commission to name a single SRO as the designated examining authority (''DEA'') to examine common members for compliance with the financial responsibility requirements imposed by the Act, or by Commission or SRO rules.[9] When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d–1 deals only with an SRO's obligations to enforce member compliance with financial responsibility requirements. Rule 17d–1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d–2 under the Act.[10] Rule 17d–2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d–2, the Commission may declare such a plan effective if it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, fosters cooperation and coordination among the SROs, removes impediments to, and fosters the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d–2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

II. The Proposed Plan

A. The Transaction

In November 2006, NASD and NYSE Group, Inc. (''NYSE Group'')[11] announced their plan to consolidate their member regulation operations into a single organization that would provide member firm regulation for securities firms that conduct business with the public in the United States (the ''Transaction'').[12] Pursuant to the Transaction, the member firm regulation and enforcement functions and employees from NYSE Regulation would be transferred to NASD,[13] and the expanded NASD would adopt a new corporate name—the Financial Industry Regulatory Authority (''FINRA'').[14] The consolidation is intended to streamline the broker-dealer regulatory system, combine technologies, and permit the establishment of a single set of rules and a single set of examiners with complementary areas of expertise within a single SRO.[15]

To effectuate the consolidation, NASD has submitted a proposed rule change to incorporate into FINRA's rulebook certain existing NYSE rules that pertain to the regulation of member firm conduct (the ''Incorporated NYSE Rules'').[16] The Incorporated NYSE Rules will apply to members of FINRA that are also members of NYSE on or after the date of the closing of the Transaction (such common members are referred to as ''Dual Members'').[17] Consequently, to relieve NYSE of its responsibility to examine for, and enforce compliance with, the applicable NYSE rules, the Parties have entered into a joint plan for the allocation of regulatory responsibilities with respect to Dual Members, as discussed below.

Subsequent to the closing of the Transaction, FINRA intends to begin the process of consolidating its rule set applicable to member firms by reducing to one the two sets of rules (*i.e.*, NASD rules and the Incorporated NYSE Rules) that are currently applicable to Dual Members.[18]

B. The Proposed Plan

On July 26, 2007, the Parties submitted the proposed 17d–2 Plan in connection with the proposed consolidation of the member regulation operations of NASD and NYSE Group. The Plan would reduce regulatory duplication for firms that are Dual Members by allocating certain regulatory responsibilities for selected NYSE rules from NYSE Regulation to FINRA.[19] Specifically, the Plan includes a list of all of those rules (the ''Common Rules,'' which are listed on the ''List of Common Rules'' attached as Exhibit 1 to the Plan) for which FINRA would assume examination, enforcement, and surveillance responsibilities under the Plan relating to compliance by Dual Members to the extent that such responsibilities involve member firm regulation.[20] The NYSE rules on the List

[6] 15 U.S.C. 78q(d)(1).

[7] *See* Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94–75, 94th Cong., 1st Session 32 (1975).

[8] 17 CFR 240.17d–1 and 17 CFR 240.17d–2, respectively.

[9] *See* Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976) (adopting Rule 17d–1).

[10] *See* Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976) (adopting Rule 17d–2).

[11] NYSE Group recently combined with Euronext N.V. (''Euronext'') to form a single, publicly traded holding company named NYSE Euronext. NYSE Group and Euronext became separate subsidiaries of NYSE Euronext. The corporate structure for the businesses of NYSE Group (including the businesses of the NYSE LLC and NYSE Arca, Inc., a registered national securities exchange) remained unchanged following the combination. Specifically, NYSE LLC remains a wholly-owned subsidiary of NYSE Group. NYSE Market remains a wholly-owned subsidiary of the NYSE LLC and conducts NYSE LLC's business. NYSE Regulation remains a wholly-owned subsidiary of NYSE LLC and performs the regulatory responsibilities for NYSE LLC pursuant to a delegation agreement with NYSE LLC and many of the regulatory functions of NYSE Arca pursuant to a services agreement with NYSE Arca. *See* Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR–NYSE–2006–120).

[12] Currently, both NASD and NYSE Regulation oversee the activities of U.S.-based broker-dealers doing business with the public, approximately 170 of which are members of both organizations.

[13] Following the closing of the Transaction, NYSE Regulation will continue to oversee market surveillance and listed company compliance at the NYSE and NYSE Arca.

[14] The closing of the Transaction and the consolidation of the member firm regulatory functions of the NASD and NYSE Regulation are subject to the execution of definitive agreements between NASD and NYSE Group, the Commission's approval of certain proposed rule changes, and certain other additional regulatory approvals.

[15] *See* Securities Exchange Act Release No. 55495 (March 20, 2007), 72 FR 14149 (March 26, 2007) (SR–NASD–2007–023) (proposing to amend the By-Laws of NASD to implement governance and related changes to accommodate the consolidation of the member firm regulatory functions of NASD and NYSE Regulation) (''By-Law Amendments Filing'').

[16] *See* File No. SR–NASD–2007–054 (''Incorporation Filing''). The list of Incorporated NYSE Rules is set forth in Exhibit 5 of SR–NASD–2007–054.

[17] *See id*. *See also* Proposed 17d–2 Plan (defining Dual Members as broker-dealer firms that are members of both the NYSE and FINRA on or after the closing date of the Transaction).

[18] FINRA's efforts to reduce regulatory duplication in this regard with respect to Dual Members by consolidating the two separate rule sets will constitute a proposed rule change and will be subject to Commission approval.

[19] *See* Incorporation Filing, *supra* note 16; *see also* paragraph 2(a) of the proposed 17d–2 Plan.

[20] *See* Paragraph 1(a) of the proposed 17d–2 Plan.

of Common Rules are the same rules that are proposed by NASD to be incorporated into the FINRA rulebook, so that such rules will be common rules of both FINRA and NYSE for purposes of the 17d–2 Plan.[21]

Under the Plan, NYSE would retain full responsibility for: (i) Examinations of Dual Member conduct covered by NYSE rules that are not Common Rules (''NYSE-only Rules'') and/or by federal laws or regulations; (ii) surveillance, investigation, and enforcement with respect to conduct relating to trading on or through the systems and facilities of NYSE and conduct otherwise covered by NYSE-only Rules, as well as surveillance, investigation, and enforcement with respect to whether such conduct may constitute a violation of federal laws or regulations; (iii) processing of applications for trading licenses or other indicia of membership in NYSE; (iv) qualification and registration of firm personnel to effect transactions or work on the floor of NYSE pursuant to NYSE's applicable qualification and registration rules; and (v) the application of any Common Rule as it pertains to matters other than member firm regulation, including matters relating to the NYSE's exclusive responsibility for the aforementioned areas (the ''Non-Exclusive Common Rules'').[22]

The text of the proposed 17d–2 Plan and the Exhibits thereto are as follows:

Agreement Between National Association of Securities Dealers, Inc., New York Stock Exchange, LLC., and NYSE Regulation, Inc. Pursuant to SEC Rule 17d–2 Promulgated by the Securities and Exchange Commission Under the Securities Exchange Act of 1934

This Agreement, between and among National Association of Securities Dealers, Inc., a Delaware nonstock membership corporation (''NASD''), New York Stock Exchange, LLC., a New York limited liability company (the ''NYSE''), and NYSE Regulation, Inc., a New York not-for-profit corporation and an indirectly wholly-owned subsidiary of NYSE Group, Inc. (''NYSE Regulation''), is made this 26th day of July, 2007, pursuant to the provisions of Rule 17d–2 promulgated by the Securities and Exchange Commission (the ''Commission'') under the Securities Exchange Act of 1934, as amended (the ''Act''), which authorizes agreements between self-regulatory organizations for plans to reduce or eliminate regulatory duplication.

Whereas, NYSE Group, Inc., a Delaware corporation and direct wholly-owned subsidiary of NYSE Euronext (''NYSE Group''), NYSE Regulation and NASD intend to enter into an Asset Purchase Agreement (the ''Purchase Agreement''), pursuant to which (i) NYSE Regulation will agree to transfer to NASD and NASD will agree to assume from NYSE Regulation, approximately 470 employees and related expenses and revenues from the following functions or groups of NYSE Regulation: (1) Member firm regulation (including testing, continuing education and registration); (2) risk assessment; (3) arbitration; and (4) enforcement (except for the portion thereof that handles cases related to market surveillance and NYSE-only Rules (as defined herein) and/or related federal laws or regulations), and (ii) NASD will operate under a new name, Financial Industry Regulatory Authority, Inc. (''FINRA''); and

Whereas, in connection with the transactions contemplated by the Purchase Agreement (collectively, the ''Transaction''), the parties seek to reduce duplication in the regulation of broker-dealer firms that are members of both the NYSE and FINRA on or after the Effective Date, as defined herein, (''Dual Members'') and in the filing and processing of certain registration and membership records; and

Whereas, the parties intend that FINRA will perform various functions formerly performed by NYSE Regulation; and

Whereas, FINRA will perform certain of these functions pursuant to a Regulatory Services Agreement to be entered into between and among the parties, and will perform certain of these functions pursuant to this Agreement among the parties in conformity with the requirements of Section 17(d) of the Act and Rule 17d–2 promulgated thereunder; and

Whereas, the parties intend this Agreement to describe the functions to be performed by FINRA pursuant to Section 17(d) of the Act and Rule 17d–2 promulgated thereunder, and intend to file such with the Commission for its approval.

Now, Therefore, in consideration of the foregoing, the mutual covenants contained hereinafter, and other good and valuable consideration, the parties hereby agree as follows:

1. *Assumption of Regulatory Responsibilities.*

(a) On the Effective Date, which shall be the closing date of the Transaction, provided that the Commission has approved this Agreement as of such closing date, FINRA will assume regulatory responsibilities for all Dual Members for the list of rules attached as Exhibit 1 (''Common Rules'') to this Agreement and made part hereof including examination, enforcement and surveillance responsibilities for such Common Rules to the extent that such responsibilities involve member firm regulation (the ''Regulatory Responsibilities''). This Agreement shall not become effective if the Transaction does not close.

(b) FINRA shall not charge NYSE for performing the Regulatory Responsibilities except for the reasonable notification expenses and travel and out-of-pocket expenses as provided in paragraphs 4(c) and 5.

2. *Scope of Regulatory Responsibilities.*

(a) Prior to the Effective Date, NASD shall submit a filing to the Commission adopting, as of the Effective Date, those NYSE rules listed in *Exhibit 1* by incorporating into the FINRA rulebook in their entirety such NYSE rules in effect as of the Effective Date so that as of the Effective Date, the rules shall be Common Rules of both FINRA and the NYSE for purposes of this Agreement, Section 17(d) of the Act and Rule 17d–2 promulgated thereunder.

(b) Whenever either NYSE or FINRA proposes to make a change to the substance of any of the Common Rules, before filing such proposal with the SEC, it shall inform the other party to determine whether the other party will agree to promptly propose a conforming change to its version of the Common Rule. In the event the parties do not agree to propose conforming changes, the parties agree that they will file with the SEC for approval an amendment to this Agreement deleting such rule from the list of Common Rules, such amendment to be effective no earlier than the date of SEC approval of the change to the Common Rule proposed by the NYSE or FINRA, as the case may be.

(c) *Common Rulebook.* FINRA intends to create a single set of Rules to replace the FINRA NASD Rules and the NYSE Rules incorporated by FINRA. There is a substantial likelihood that each FINRA rule that would replace an as then-existing NYSE Rule incorporated by FINRA and applicable to Dual Members will be substantially different from the then-existing NYSE Rule. In such case, pursuant to paragraph 2(b) above, NYSE would need to seek and obtain approval from the Commission to amend its corresponding Rule to conform to the new FINRA Rule.

[21] *See* Paragraph 2(a) of the proposed 17d–Plan.

[22] *See* Paragraphs 2(d)(i)–(v) of the proposed 17d–2 Plan; *see also infra* text accompanying notes 29–30 (discussing the Non-Exclusive Common Rules).

(d) Notwithstanding anything contained in this Agreement to the contrary, NYSE shall retain regulatory responsibility for the following (collectively, the ''Retained Responsibilities''):

(i) Examinations of conduct or action by a Dual Member that is otherwise covered by NYSE rules that are not Common Rules (the ''NYSE-only Rules'') and/or by related federal laws or regulations;

(ii) Surveillance of, and investigation and enforcement with respect to, conduct or action undertaken in connection with trading on or through the systems and facilities of the NYSE, or conduct or actions by a Dual Member that are otherwise covered by NYSE-only Rules, additionally, in all such cases, surveillance, investigation and enforcement with respect to how such conduct may constitute a violation of applicable federal laws or regulations;

(iii) Processing of applications for trading licenses or other indicia of membership in the NYSE, including without limitation applying NYSE's rules relating to the rights and obligations of Dual Members that hold a trading license to effect transactions on the floor of the NYSE or through any systems or facilities of the NYSE;

(iv) Qualification and registration of member firm personnel to effect transactions or work as Floor employees on the Floor of the NYSE, pursuant to the NYSE's applicable rules regarding qualifications and registration; and

(v) The application of any Common Rule as it pertains to matters other than member firm regulation, including matters relating to NYSE's exclusive responsibility for (i)–(iv) above (the ''Non-Exclusive Common Rules''). The parties have identified the Non-Exclusive Common Rules, which are specifically designated on *Exhibit 1,* as those rules for which both NYSE and FINRA will bear responsibility when performing their respective regulatory responsibilities.

3. *Violations.* (a) Should FINRA become aware of potential violations of the NYSE-only Rules, discovered pursuant to the performance of the Regulatory Responsibilities assumed hereunder, FINRA will promptly notify the NYSE of those potential violations, and such matters will be handled by NYSE.

(b) Should NYSE become aware of potential violations of Common Rules, discovered pursuant to the performance of the Retained Responsibilities, NYSE will promptly notify FINRA of those potential violations, and such matters will be handled by FINRA as provided in this Agreement.

4. *Applications for, Qualification for, and Termination of, Membership.* (a)(i) Dual Members subject to this Agreement will be required to submit to FINRA, and FINRA will be responsible for processing, and acting upon, all applications (each an ''Application'') submitted on behalf of the Dual Member and any individual associated with such Dual Member required to be approved by the rules of NYSE and FINRA (collectively, an ''Applicant'').

(ii) Promptly upon receipt of any complete Application, but in any event no later than seven (7) business days thereafter, FINRA shall advise NYSE of the qualifications and registration status of the Applicant required to be approved pursuant to the rules of NYSE and FINRA. The NYSE reserves the right to require additional qualifications or registrations prior to approving an Applicant as a member of the NYSE, pursuant to the process described in NYSE rules.

(b) FINRA shall promptly advise NYSE of information regarding changes in status of any person required to be approved pursuant to the rules of NYSE and FINRA that relates to a statutory disqualification, involuntary termination from employment or any other submission made to FINRA pursuant to NYSE Rule 351(a)–(c). The NYSE reserves the right to disqualify a member pursuant to the process described in NYSE rules.

(c) Dual Members will be required to send to FINRA all letters, termination notices or other material respecting persons required to be approved pursuant to the rules of NYSE and FINRA. When as a result of processing said submissions FINRA becomes aware of a statutory disqualification as defined in the Act with respect to a Dual Member or person associated with a Dual Member, FINRA will determine pursuant to Section 15A(g) or 6(c) of the Act the acceptability or continued acceptability of the person to whom such disqualification applies but will not make a determination regarding NYSE membership or participation, or association of a person with an NYSE member. FINRA shall advise NYSE in writing of its actions in this regard. NYSE shall, within 30 days of receiving such information from FINRA, determine whether to permit a Dual Member that has been determined to be statutorily disqualified by FINRA from becoming or remaining an NYSE member or a participant, or a person associated with a member. NYSE will advise FINRA of its decision. NYSE will reimburse FINRA for reasonable expenses incurred in notifying NYSE of FINRA's decision regarding a statutory disqualification under Section 15A(g) or Section 6(c) of the Act.

FINRA will also be responsible for processing and, if required, acting upon all requests for the opening, address changes, and terminations of branch offices by Dual Members and any other applications required of Dual Members under the Common Rules.

5. *Information Sharing.* The parties agree to share information as follows:

(a) General.

(i) FINRA shall promptly furnish to the NYSE any information that FINRA determines indicates possible financial or operational problems that may affect the continued ability of any Dual Member to conduct business.

(ii) NYSE shall promptly furnish to FINRA any information that the NYSE determines indicates possible financial or operational problems that may affect the continued ability of any Dual Member to conduct business.

(b) Reports and Other Documents.

(i) FINRA shall upon request promptly make available to the NYSE at no cost any existing financial, operational, or related report filed with FINRA by a Dual Member, as well as any existing files, information on customer complaints, termination notices, copies of an examination report, examination workpapers, investigative material, enforcement referrals or other documents involving compliance with the federal securities laws and regulations and the rules of the parties by the Dual Member, or other documents in the possession of FINRA relating to the Dual Member as necessary to assist the NYSE in fulfilling the Retained Responsibilities.

(ii) NYSE shall upon request promptly make available to FINRA at no cost any existing files, information on customer complaints, termination notices, copies of an examination report, examination workpapers, investigative material, enforcement referrals or other documents involving compliance with the federal securities laws and regulations and the rules of the parties by the Dual Member, or other documents in the possession of NYSE relating to the Dual Member as necessary to assist FINRA in fulfilling the self-regulatory responsibilities, obligations, and functions allocated to it under this Agreement.

(c) Third-party Complaints.

(i) If FINRA receives a copy of a complaint from any third-party or any report from a Dual Member pursuant to NYSE Rule 351, as incorporated by FINRA, relating to possible violations by a Dual Member or persons associated with a Dual Member that is not within the Regulatory Responsibilities of

FINRA and is within the Retained Responsibilities of the NYSE, FINRA shall promptly forward to the NYSE copies of such complaints, and NYSE shall have responsibility to review and take any appropriate action with respect to such complaint.

(ii) If NYSE receives a copy of a complaint from any third-party relating to a Dual Member's activity or conduct that is within the Regulatory Responsibilities of FINRA or is otherwise within the scope of FINRA's regulatory jurisdiction, the NYSE shall promptly forward to FINRA copies of such complaints, and FINRA shall have responsibility to review and take any appropriate action with respect to such complaint.

(d) Information on Formal and Informal Discipline.

(i) FINRA shall promptly make available to the NYSE information on (1) Formal disciplinary actions taken by FINRA involving a Dual Member or persons associated with a Dual Member; and (2) informal disciplinary actions taken by FINRA involving a Dual Member and such individuals identified to FINRA by NYSE that are employed by a Dual Member and who have been designated to effect transactions on the Floor of the NYSE or to work as Floor employees on the Floor of the NYSE, or to supervise such employees. For purposes of this paragraph (d)(i), informal disciplinary actions shall mean Letters of Caution.

(ii) The NYSE shall promptly make available to FINRA information on (1) formal disciplinary actions taken by NYSE involving a Dual Member or persons associated with a Dual Member; and (2) informal disciplinary actions taken by NYSE involving a Dual Member. For purposes of this paragraph (d)(ii), informal disciplinary actions shall mean Letters of Education, Letters of Admonition, and Summary Fines.

(e) Parties to Make Personnel Available as Witnesses.

(i) FINRA shall make its personnel available to the NYSE to serve as testimonial or non-testimonial witnesses as necessary to assist the NYSE in fulfilling the self-regulatory responsibilities retained by it under this Agreement. NYSE shall pay all reasonable travel and other out-of-pocket expenses incurred by FINRA's employees to the extent that the NYSE requires such employees to serve as a witness, and provide information or other assistance pursuant to this Agreement.

(ii) The NYSE shall make its personnel available to FINRA to serve as testimonial or non-testimonial witnesses as necessary to assist FINRA in fulfilling the Regulatory Responsibilities. FINRA shall pay all reasonable travel and other out-of-pocket expenses incurred by NYSE's employees to the extent that FINRA requires such employees to serve as a witness, and provide information or other assistance pursuant to this Agreement.

(f) *Confidentiality.* The parties agree that documents or information shared shall be held in confidence, and used only for the purposes of carrying out their respective regulatory obligations. Neither party shall assert regulatory or other privileges as against the other with respect to documents or information that is required to be shared pursuant to this Agreement.

(g) *No Waiver of Privilege.* The sharing of documents or information between the parties pursuant to this Agreement shall not be deemed a waiver as against third parties of regulatory or other privileges relating to the discovery of documents or information.

(h) *Periodic Meetings.* The parties agree that they shall conduct regular joint meetings between them for the purposes of reporting on the conduct of the Regulatory Responsibilities and current investigations involving significant rule violations by a Dual Member, and identifying issues or concerns with respect to the regulation of Dual Members.

6. *Arbitration of Disputes Under This Agreement.*

(a) *Regulatory Services Manager.* NYSE and NASD hereby each appoint the employee identified on *Exhibit 2* hereto as its respective Regulatory Services Manager (the ''Regulatory Services Manager'') to, among other things, resolve disputes pursuant to Section 6(b) of this Agreement and oversee day-to-day management of the services and activities contemplated by this Agreement. On reasonable prior written notice to the other, NYSE and FINRA shall each have the right to replace its respective Regulatory Services Manager with an employee or officer with comparable knowledge, expertise and decision-making authority.

(b) *Dispute Resolution.* Except as otherwise expressly set forth in this Agreement, any dispute arising out of or relating to this Agreement shall be submitted for resolution to the Regulatory Services Managers. In the event the Regulatory Services Managers fail to resolve a dispute pursuant to this Section 6(b) within a reasonable time of receiving notice of such dispute from a party, then the parties shall refer the dispute to the employee identified on *Exhibit 2* as its respective Senior Officer (the ''Senior Officer'') and such Senior Officers shall attempt in good faith to conclusively resolve any such dispute. On reasonable prior written notice to the other, NYSE and FINRA shall each have the right to replace its respective Senior Officer with an officer with comparable rank, knowledge, expertise and decision-making authority. If the Senior Officers are unable to resolve the dispute amicably within 30 days, the dispute will be resolved by binding arbitration between the parties as provided herein. Arbitration shall be conducted by a single arbitrator agreed upon by the parties in accordance with the arbitration rules of the American Arbitration Association (the ''AAA''); *provided,* that, if the parties cannot agree on the identity of the arbitrator, then the arbitrator shall be chosen by the AAA in accordance with its rules. All arbitration hearings shall be conducted in New York, New York. Each party shall pay its own costs for the arbitration, with the cost of the arbitrator to be equally divided between the parties; *provided,* that the arbitrator may, in his or her discretion, award reasonable attorneys' fees and expenses to the prevailing party. The arbitrator will have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of this Agreement. A judgment upon an award may be entered in any court having jurisdiction. No party or the arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of the other parties, other than to the Commission. Except as otherwise expressly set forth in this Agreement, the procedures set forth in this Section 6(b) must be satisfied as a condition precedent to a party commencing any arbitration in connection with any dispute arising hereunder. A party's failure to comply with the preceding sentence shall constitute cause for the dismissal without prejudice of any such arbitration.

(c) Continuity of Services. Each party acknowledges that the timely and complete performance of its obligations pursuant to this Agreement is critical to the business and operations of the other party. In the event of a dispute between the parties, the parties will continue to perform their respective obligations under this Agreement in good faith during the resolution of such dispute unless and until this Agreement is terminated in accordance with its provisions. Nothing in this Section 6(c)

will interfere with a party's right to terminate this Agreement as set forth in this Agreement.

7. *No Restrictions on Regulatory Action.* Nothing contained in this Agreement shall restrict or in any way encumber the right of either party to conduct its own independent or concurrent investigation, examination or enforcement proceeding of or against Dual Members, as either party, in its sole discretion, shall deem appropriate or necessary.

8. *Limitation of Liability.* None of the parties nor any of their respective directors, governors, officers, employees, affiliates or agents shall be liable to any other party or such party's directors, governors, officers, employees, affiliates or agents for any liability, loss or damage resulting from any delays, inaccuracies, errors or omissions with respect to its performing or failing to perform its obligations under this Agreement, except as otherwise provided for under the Act or for any liability, loss or damage resulting from the gross negligence, willful misconduct, reckless disregard or breach of confidentiality by a party or its directors, governors, officers, employees, affiliates or agents. The parties understand and agree with each other that the Regulatory Responsibilities are being performed on a good faith and best effort basis and no warranties, express or implied, are made by any party to any other party with respect to any of the obligations to be performed by the parties hereunder.

9. *Commission Approval.* (a) The parties agree to file promptly this Agreement with the Commission for its review and approval. This Agreement shall be effective upon approval of the Commission, contingent upon the closing of the Transaction.

(b) If approved by the Commission, FINRA will notify Dual Members of the general terms of the Agreement and its impact on such members. The notice will be sent on behalf of both parties and, prior to being sent, NYSE will review and approve the notice.

10. *Applicability of Certain Laws.* Notwithstanding any provision hereof, this Agreement shall be subject to any applicable federal or state statute, or any rule or order of the Commission, or industry agreement, restructuring the regulatory framework of the securities industry or reassigning regulatory responsibilities between self-regulatory organizations. To the extent such statute, rule, order or agreement is inconsistent with one or more provisions of this Agreement, such statute, rule, order or agreement shall supersede the provision(s) hereof to the extent necessary to be properly effectuated and the provision(s) hereof in that respect shall be null and void.

11. *Definitions.* Unless otherwise defined in this Agreement, or unless the context otherwise requires, the terms used in this Agreement shall have the same meaning as they have under the Act and the rules and regulations promulgated by the Commission thereunder.

12. *Severability.* Any term or provision of this Agreement that is invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining terms and provisions of this Agreement or affecting the validity or enforceability of any of the terms or provisions of this Agreement in any other jurisdiction.

13. *Amendment.* This Agreement may be amended in writing duly approved by each party. All such amendments must be filed with and approved by the Commission before they become effective.

14. *Termination.* This Agreement may be terminated by NYSE or FINRA at any time upon the approval of the Commission after 180 days written notice to the other party.

15. *General.* The parties agree to perform all acts and execute all supplementary instruments or documents that may be reasonably necessary or desirable to carry out the provisions of this Agreement.

16. *Liaison and Notices.* All questions regarding the implementation of this Agreement shall be directed to the persons identified in subsections (a), (b) and (c), as applicable, below. All notices and other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given upon (i) actual receipt by the notified party or (ii) constructive receipt (as of the date marked on the return receipt) if sent by certified or registered mail, return receipt requested, to the following addresses:

(a) If to NYSE Regulation: NYSE Regulation, Inc., 20 Broad Street, New York, New York 10005. Telephone: (212) 656–3000, Facsimile: (212) 656–8101, Attention: General Counsel Regulatory Services Manager.

(b) If to New York Stock Exchange, LLC.: New York Stock Exchange, LLC., 11 Wall Street, New York, NY 10005. Telephone: (212) 656–3000, Facsimile: (212) 656–8101, Attention: General Counsel.

(c) If to FINRA: Financial Industry Regulatory Authority, Inc., 1735 K Street, NW., Washington, DC 20006–1500. Telephone: (202) 728–8071, Facsimile: (202) 728–8075, Attention: General Counsel Regulatory Services Manager.

17. *Relief from Regulatory Responsibility.* Pursuant to Section 17(d)(1)(A) of the Act, and Rule 17d–2 thereunder, NASD and the NYSE jointly request the SEC, upon its approval of this Agreement, to relieve the NYSE of any and all responsibilities with respect to the matters allocated to NASD or FINRA pursuant to this Agreement for purposes of Sections 17(d) and 19(g) of the Act.

18. *Governing Law.* This Agreement shall be deemed to have been made in the State of New York, and shall be construed and enforced in accordance with the law of the State of New York, without reference to principles of conflicts of laws thereof. Each of the parties hereby consents to submit to the jurisdiction of the courts by or for the State of New York or the United States District Court for the Southern District of New York in connection with any action or proceeding relating to this Agreement.

19. *Survival of Provisions.* Provisions intended by their terms or context to survive and continue notwithstanding delivery of the regulatory services by FINRA, the payment of the price by the NYSE, and any termination of this Agreement shall survive and continue.

20. *Prior Agreements.* This Agreement is wholly separate from the multiparty Agreement made pursuant to Rule 17d–2 of the Exchange Act between the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Incorporated, the International Securities Exchange LLC., the National Association of Securities Dealers, Inc., the New York Stock Exchange, LLC., the NYSE Arca, Inc., and the Philadelphia Stock Exchange, Inc. involving the allocation of regulatory responsibilities with respect to common members for compliance with common rules relating to the conduct by broker-dealers of accounts for listed options or index warrants entered into on December 1, 2006, and as may be amended from time to time.

21. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and such counterparts together shall constitute but one and the same instrument.

In Witness Whereof, the parties hereto have caused this Agreement to be executed by their respective officers thereunto duly authorized, as of the date first written above.

National Association of Securities Dealers, Inc.
By: _____
Name:
Title:

New York Stock Exchange, LLC.
By: _____
Name:
Title:

NYSE Regulation, Inc.
By: _____
Name:
Title:

Exhibit 1—List Of Common Rules

As referenced in paragraph 2(d)(v) of the Agreement, rules designated with a ''*'' are Non-Exclusive Common Rules, and NYSE shall retain regulatory responsibility for these rules insofar as necessary to discharge its Retained Responsibilities.

NYSE Rule	FINRA Rule
*Rule 1 ''The Exchange''	NYSE Rule 1 ''The Exchange.''
*Rule 2 ''Member,'' ''Membership,'' ''Member Firm,'' etc.	NYSE Rule 2 ''Member,'' ''Membership,'' ''Member Firm,'' etc.
*Rule 2A ''Jurisdiction''	NYSE Rule 2A ''Jurisdiction.''
*Rule 2B No Affiliation between Exchange and any Member Organization.	NYSE Rule 2B No Affiliation between Exchange and any Member Organization.
*Rule 3 ''Security''	NYSE Rule 3 ''Security.''
*Rule 4 ''Stock''	NYSE Rule 4 ''Stock.''
*Rule 5 ''Bond''	NYSE Rule 5 ''Bond.''
*Rule 6 ''Floor''	NYSE Rule 6 ''Floor.''
*Rule 8 ''Delivery''	NYSE Rule 8 ''Delivery.''
*Rule 9 ''Branch Office Manager''	NYSE Rule 9 ''Branch Office Manager.''
*Rule 10 ''Registered Representative''	NYSE Rule 10 ''Registered Representative.''
*Rule 11 Effect of Definitions	NYSE Rule 11 Effect of Definitions.
*Rule 12 ''Business Day''	NYSE Rule 12 ''Business Day.''
*Rule 134 Differences and Omissions—Cleared Transactions	NYSE Rule 134 Differences and Omissions—Cleared Transactions.
Rule 176 Delivery Time	NYSE Rule 176 Delivery Time.
Rule 177 Delivery Time—''Cash'' Contracts	NYSE Rule 177 Delivery Time—''Cash'' Contracts.
Rule 180 Failure to Deliver	NYSE Rule 180 Failure to Deliver.
Rule 282 Buy-in Procedures	NYSE Rule 282 Buy-in Procedures.
Rule 283 Members Closing Contracts—Procedure	NYSE Rule 283 Members Closing Contracts—Procedure.
Rule 285 Notice of Intention to Successive Parties	NYSE Rule 285 Notice of Intention to Successive Parties.
Rule 286 Closing Portion of Contract	NYSE Rule 286 Closing Portion of Contract.
Rule 287 Liability of Succeeding Parties	NYSE Rule 287 Liability of Succeeding Parties.
Rule 288 Notice of Closing to Successive Parties	NYSE Rule 288 Notice of Closing to Successive Parties.
Rule 289 Must Receive Delivery	NYSE Rule 289 Must Receive Delivery.
Rule 290 Defaulting Party May Deliver After ''Buy-In'' Notice	NYSE Rule 290 Defaulting Party May Deliver After ''Buy-In'' Notice.
Rule 291 Failure to Fulfill Closing Contract	NYSE Rule 291 Failure to Fulfill Closing Contract.
Rule 292 Restrictions on Members' Participation in Transaction to Close Defaulted Contracts.	NYSE Rule 292 Restrictions on Members' Participation in Transaction to Close Defaulted Contracts.
Rule 293 Closing Contracts in Suspended Securities	NYSE Rule 293 Closing Contracts in Suspended Securities.
Rule 294 Default in Loan of Money	NYSE Rule 294 Default in Loan of Money.
Rule 296 Liquidation of Securities Loans and Borrowings	NYSE Rule 296 Liquidation of Securities Loans and Borrowings.
Rule 311 Formation and Approval of Member Organizations	NYSE Rule 311 Formation and Approval of Member Organizations.
Rule 312 Changes Within Member Organizations	NYSE Rule 312 Changes Within Member Organizations.
Rule 313 Submission of Partnership Articles—Submission of Corporate Documents.	NYSE Rule 312 Submission of Partnership Articles—Submission of Corporate Documents.
Rule 319 Fidelity Bonds	NYSE Rule 319 Fidelity Bonds.
Rule 321 Formation of Acquisition of Subsidiaries	NYSE Rule 321 Formation of Acquisition of Subsidiaries.
Rule 322 Guarantees by, or Flow Through Benefits for Members or Member Organizations.	NYSE Rule 322 Guarantees by, or Flow Through Benefits for Members or Member Organizations.
*Rule 325 Capital Requirements Members Organizations	NYSE Rule 325 Capital Requirements Members Organizations.
Rule 326(a) Growth Capital Requirement	NYSE Rule 326(a) Growth Capital Requirement.
Rule 326(b) Business Reduction Capital Requirement	NYSE Rule 326(b) Business Reduction Capital Requirement.
Rule 326(c) Business Reduction Capital Requirement	NYSE Rule 326(c) Business Reduction Capital Requirement.
Rule 326(d) Reduction of Elimination of Loans and Advances	NYSE Rule 326(d) Reduction of Elimination of Loans and Advances.
Rule 328 Sale-and-Leasebacks, Factoring, Financing and Similar Arrangements.	NYSE Rule 328 Sale-and-Leasebacks, Factoring, Financing and Similar Arrangements.
*Rule 342 Offices—Approval, Supervision and Control	NYSE Rule 342 Offices—Approval, Supervision and Control.
Rule 343 Offices—Sole Tenancy, Hours, Display of Membership Certificates.	NYSE Rule 343 Offices—Sole Tenancy, Hours, Display of Membership Certificates.
Rule 344 Research Analysts and Supervisory Analysts	NYSE Rule 344 Research Analysts and Supervisory Analysts.
Rule 345 Employees—Registration, Approval, Records	NYSE Rule 345 Employees—Registration, Approval, Records.
Rule 345A Continuing Education for Registered Persons	NYSE Rule 345A Continuing Education for Registered Persons.
Rule 346 Limitations—Employment and Association with Members and Member Organizations.	NYSE Rule 346 Limitations—Employment and Association with Members and Member Organizations.
*Rule 350 Compensation or Gratuities to Employees of Others	NYSE Rule 350 Compensation or Gratuities to Employees of Others.
Rule 351 Reporting Requirements	NYSE Rule 351 Reporting Requirements.
Rule 352 Guarantees, Sharing in Accounts, and Loan Arrangements	NYSE Rule 352 Guarantees, Sharing in Accounts, and Loan Arrangements.
Rule 353 Rebates and Compensation	NYSE Rule 353 Rebates and Compensation.
Rule 354 Reports to Control Persons	NYSE Rule 354 Reports to Control Persons.
*Rule 375 Missing the Market	NYSE Rule 375 Missing the Market.
Rule 382 Carrying Agreements	NYSE Rule 382 Carrying Agreements.
Rule 387 COD Orders	NYSE Rule 387 COD Orders.

NYSE Rule	FINRA Rule
*Rule 392 Notification Requirements for Offerings of Listed Securities ..	NYSE Rule 392 Notification Requirements for Offerings of Listed Securities.
*Rule 401 Business Conduct	NYSE Rule 401 Business Conduct.
Rule 401A Customer Complaints	NYSE Rule 401A Customer Complaints.
Rule 402 Customer Protection-Reserves and Custody of Securities	NYSE Rule 402 Customer Protection-Reserves and Custody of Securities.
Rule 404 Individual Members Not To Carry Accounts	NYSE Rule 404 Individual Members Not To Carry Accounts.
Rule 405 Diligence as to Accounts	NYSE Rule 405 Diligence as to Accounts.
Rule 405A Non-Managed Fee-Based Account Programs—Disclosure and Monitoring.	NYSE Rule 405A Non-Managed Fee-Based Account Programs—Disclosure and Monitoring.
Rule 406 Designation of Accounts	NYSE Rule 406 Designation Of Accounts.
*Rule 407 Transactions-Employees of Members, Member Organizations and the Exchange.	NYSE Rule 407 Transactions—Employees of Members, Member Organizations and the Exchange.
*Rule 407A Disclosure of All Member Accounts	NYSE Rule 407A Disclosure of All Member Accounts.
Rule 408 Discretionary Power in Customers' Accounts	NYSE Rule 408 Discretionary Power in Customers' Accounts.
Rule 409 Statements of Accounts to Customers	NYSE Rule 409 Statements of Accounts to Customers.
Rule 409A SIPC Disclosures	NYSE Rule 409A SIPC Disclosures.
*Rule 410 Records of Orders	NYSE Rule 410 Records of Orders.
*Rule 411 Erroneous Reports	NYSE Rule 411 Erroneous Reports.
Rule 412 Customer Account Transfer Contracts	NYSE Rule 412 Customer Account Transfer Contracts.
Rule 413 Uniform Forms	NYSE Rule 413 Uniform Forms.
*Rule 414 Index and Currency Warrants	NYSE Rule 414 Index and Currency Warrants.
*Rule 416 Questionnaires and Reports	NYSE Rule 416 Questionnaires and Reports.
*Rule 416A Member and Member Organization Profile Information Updates and Quarterly Certifications Via the Electronic Filing Platform.	NYSE Rule 416A Member and Member Organization Profile Information Updates and Quarterly Certifications Via the Electronic Filing Platform.
Rule 418 Audit	NYSE Rule 418 Audit.
Rule 420 Reports of Borrowings and Subordinate Loans for Capital Purposes.	NYSE Rule 420 Reports of Borrowings and Subordinate Loans for Capital Purposes.
Rule 421 Periodic Reports	NYSE Rule 421 Periodic Reports.
Rule 424 Reports of Options	NYSE Rule 424 Reports of Options.
Rule 430 Partial Delivery of Securities to Customers on C.O.D. Purchases.	NYSE Rule 430 Partial Delivery of Securities to Customers on C.O.D. Purchases.
Rule 431 Margin Requirements	NYSE Rule 431 Margin Requirements.
Rule 432 Daily Record of Required Margin	NYSE Rule 432 Daily Record of Required Margin.
Rule 434 Required Submission of Requests for Extensions of Time for Customers.	NYSE Rule 434 Required Submission of Requests for Extensions of Time for Customers.
*Rule 435 Miscellaneous Prohibitions (Excessive Trading by Members)	NYSE Rule 435 Miscellaneous Prohibitions (Excessive Trading by Members).
Rule 436 Interest on Credit Balances	NYSE Rule 436 Interest on Credit Balances.
*Rule 440 Books and Records	NYSE Rule 440 Books and Records.
Rule 440A Telephone Solicitation	NYSE Rule 440A Telephone Solicitation.
Rule 440F Public Short Sale Transactions Effected on the Exchange ...	NYSE Rule 440F Public Short Sale Transactions Effected on the Exchange.
Rule 440G Transactions in Stocks and Warrants for the Accounts of Members, Allied Members and Member Organizations.	NYSE Rule 440G Transactions in Stocks and Warrants for the Accounts of Members, Allied Members and Member Organizations.
Rule 440I Records of Compensation Arrangements—Floor Brokerage ..	NYSE Rule 440I Records of Compensation Arrangements—Floor Brokerage.
Rule 445 Anti-Money Laundering Compliance Program	NYSE Rule 445 Anti-Money Laundering Compliance Program.
Rule 446 Business Continuity and Contingency Plans	NYSE Rule 446 Business Continuity and Contingency Plans.
Rule 472 Communications with the Public	NYSE Rule 472 Communications with the Public.
*Rule 477 Retention of Jurisdiction—Failure to Cooperate	NYSE Rule 477 Retention of Jurisdiction—Failure to Cooperate.
Rule 700 Applicability, Definitions and References	NYSE Rule 700 Applicability, Definitions and References.
Rule 704 Position Limits	NYSE Rule 704 Position Limits.
Rule 705 Exercise Limits	NYSE Rule 705 Exercise Limits.
Rule 707 Liquidation of Positions	NYSE Rule 707 Liquidation of Positions.
Rule 709 Other Restrictions on Exchange Option Transactions and Exercises.	NYSE Rule 709 Other Restrictions on Exchange Option Transactions and Exercises.
Rule 720 Registration of Options Principals	NYSE Rule 720 Registration of Options Principals.
Rule 721 Opening of Accounts	NYSE Rule 721 Opening of Accounts.
Rule 722 Supervision of Accounts	NYSE Rule 722 Supervision of Accounts.
Rule 723 Suitability	NYSE Rule 723 Suitability.
Rule 724 Discretionary Accounts	NYSE Rule 724 Discretionary Accounts.
Rule 725 Confirmations	NYSE Rule 725 Confirmations.
Rule 726 Delivery of Options Disclosure Document and Prospectus	NYSE Rule 726 Delivery of Options Disclosure Document and Prospectus.
Rule 727 Transactions with Issuers	NYSE Rule 727 Transactions with Issuers.
Rule 728 Registered Stock	NYSE Rule 728 Registered Stock.
Rule 730 Statement of Accounts	NYSE Rule 730 Statement of Accounts.
Rule 732 Customer Complaints	NYSE Rule 732 Customer Complaints.
Rule 780 Exercise of Option Contracts	NYSE Rule 780 Exercise of Option Contracts.
Rule 781 Allocation of Exercise Assignment Notices	NYSE Rule 781 Allocation of Exercise Assignment Notices.
Rule 791 Communications to Customers	NYSE Rule 791 Communications to Customers.

Exhibit 2

For purposes of this Agreement, the Regulatory Services Managers required under paragraph 6 shall be:

For NYSE Regulation: Susan Axelrod, Chief of Staff, NYSE Regulation, Inc., 11 Wall Street, New York, NY 10005, (212) 656–2347 (phone), (212) 656–5788 (fax).

For NASD/FINRA: James F. Price, Jr., Vice President, Business & Exchange Solution, FINRA, 9509 Key West Avenue, Rockville, MD 20850–3329, (240) 386–4608 (phone), (240) 386–5139 (fax).

For purposes of this Agreement, the Senior Officers required under paragraph 6 shall be:

For NYSE Regulation: Richard G. Ketchum, Chief Regulatory Officer, NYSE Regulation, Inc., 20 Broad Street, New York, NY 10005, (212) 656–2789 (phone), (212) 656–5809 (fax).

For NASD/FINRA: Stephen I. Luparello, Senior Executive Vice President, FINRA, 1735 K Street, NW., Washington, DC 20006, (202) 728–6947 (phone), (202) 728–8075 (fax).

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the 17d–2 Plan 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/other.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number 4–544 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number 4–544. 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/other.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan that are filed with the Commission, and all written communications relating to the proposed plan 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 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the Plan also will be available for inspection and copying at the principal offices of NASD and 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 4–544 and should be submitted on or before August 22, 2007.

IV. Discussion

The Commission finds that the proposed Plan is consistent with the factors set forth in Section 17(d) of the Act[23] and Rule 17d–2(c) thereunder[24] in that the Plan is necessary or appropriate in the public interest and for the protection of investors, fosters cooperation and coordination among SROs, and removes impediments to and fosters the development of the national market system. In particular, the Commission believes that the Plan will reduce unnecessary regulatory duplication by fostering cooperation and coordination between NYSE and FINRA, and will thereby remove impediments to the development of the national market system. In particular, the Plan will allocate to FINRA certain responsibilities for Dual Members that would otherwise be performed by both NYSE and FINRA following the closing of the Transaction. Accordingly, the Plan promotes efficiency by reducing costs to Dual Members. Furthermore, because NYSE and FINRA will coordinate their regulatory functions in accordance with the Plan, the Plan should promote investor protection and the public interest.

Under paragraph (c) of Rule 17d–2, the Commission may, after appropriate notice and opportunity for comment, declare a plan, or any part of a plan, effective.[25] In this instance, the Commission believes that appropriate notice and comment can take place after the proposed Plan is effective. The purpose of the 17d–2 Plan is to allocate regulatory responsibilities for certain member conduct rules from NYSE to FINRA in connection with the proposed consolidation of NYSE Regulation's and NASD's member regulation operations.[26] As discussed above, for an interim period while FINRA develops a single rulebook to apply to all Dual Members, it has adopted into its rulebook the Incorporated NYSE Rules, and it is those exact same rules that constitute the List of Common Rules covered by the 17d–2 Plan. As such, the NYSE rules covered by the 17d–2 Plan for which FINRA will assume regulatory responsibilities will, at least initially, be identical to the Incorporated NYSE Rules on FINRA's own rulebook. Thus, the Plan will benefit Dual Members by avoiding duplicative regulation by two separate SROs of identical rules. The Commission, therefore, believes it is appropriate to herein declare effective the proposed 17d–2 Plan, so that it may be effective upon the closing of the Transaction.

The Commission notes that, under the proposed Plan, NYSE and NASD have allocated regulatory responsibility for the Common Rules to the extent that such responsibilities involve member firm regulation.[27] The Plan further sets forth those areas for which NYSE will retain full regulatory responsibility, including: Examinations of Dual Member conduct covered by NYSE-only Rules and/or by federal laws or regulations; surveillance, investigation, and enforcement with respect to conduct relating to trading on or through the systems and facilities of NYSE and conduct otherwise covered by NYSE-only Rules, as well as whether such conduct may constitute a violation of federal laws or regulations; processing of applications for trading licenses or other membership in NYSE; and qualification and registration of firm personnel to effect transactions or work on the Floor of NYSE pursuant to its unique rules.[28]

The Commission notes that the proposed Plan also provides that NYSE will retain regulatory responsibility for the application of any Common Rule as it pertains to matters other than member firm regulation, including matters relating to the NYSE's exclusive retained responsibilities as set forth in the Plan and noted above (the ''Non-Exclusive Common Rules'').[29] The Non-

[23] 15 U.S.C. 78q(d).

[24] 17 CFR 240.17d–2(c).

[25] *Id.*

[26] *See* By-Law Amendments Filing, *supra* note 15.

[27] *See infra* text accompanying notes 29–30 (discussing those Common Rules that are deemed to be Non-Exclusive Common Rules, for which NYSE will retain certain regulatory responsibilities).

[28] *See* Paragraphs 2(d)(i)–(iv) of the proposed 17d–2 Plan.

[29] *See* Paragraph 2(d)(v) of the proposed 17d–2 Plan and the List of Common Rules. Because NYSE will retain responsibility for all rules related to market regulation, as well as Common Rules as they pertain to matters other than member regulation, the Commission staff believes that the proposed

Exclusive Common Rules are specifically annotated in the List of Common Rules and include those rules for which FINRA and NYSE will each bear their respective regulatory responsibilities, consistent with the scope of the 17d–2 Plan. Notably, such rules are ''non-exclusive'' in the sense that they have aspects that may relate to member firm regulation (for which FINRA would assume regulatory responsibility) and aspects that may relate to matters other than member firm regulation (for which the NYSE would retain regulatory responsibility).[30] Accordingly, both NYSE and FINRA will bear responsibility for the application of each Non-Exclusive Common Rule as it relates to their particular regulatory responsibilities.

According to the Plan, whenever either NYSE or FINRA wishes to make a change to the substance of any Common Rule, before filing such proposed rule change with the Commission, it will inform the other party of the intended change to determine whether the other party will propose a conforming change to its version of the Common Rule. If the Parties do not agree to propose conforming changes, the Parties agree to file with the Commission an amendment to the 17d–2 Plan to delete such rule from the list of Common Rules.[31] Similarly, the Parties anticipate that when FINRA creates a consolidated rulebook, it is likely that the new FINRA rules that would replace existing Incorporated NYSE Rules might be substantially different from the then-existing NYSE rules. In such case, the NYSE would need to submit a proposed rule change and seek approval from the Commission to amend its corresponding rule to conform to the new FINRA rule.[32]

Additionally, the Commission notes that, since the Plan allocates regulatory responsibility to FINRA for the oversight and enforcement of all NYSE rules on the list of Common Rules to the extent that such responsibilities involve member firm regulation, any additions to, deletions from, or other changes to the List of Common Rules pursuant to the aforementioned provisions or otherwise would constitute an amendment to the Plan, which must be filed with the Commission pursuant to Rule 17d–2 under the Act.

The Plan permits NYSE and FINRA to terminate the Plan at any time, subject to 180 days written notice to the other party. The Commission notes, however, that while the Plan permits the Parties to terminate the Plan, the Parties cannot by themselves reallocate the regulatory responsibilities set forth in the Plan, since Rule 17d–2 under the Act requires that any allocation or re-allocation of regulatory responsibilities be filed with, and approved by, the Commission.[33]

Finally, the Plan also requires the Parties to share information on a number of matters. Specifically, the Parties must provide information to one another relating to possible financial or operational problems that may affect the ability of any Dual Member to conduct business and must also, upon request, make available to one another certain reports and documents set forth in the Plan, such as existing files, copies of examination reports, examination work papers, or investigative materials. Further, the Parties must promptly provide one another with copies of third-party complaints that relate to the other party's regulatory responsibilities under the Plan. The Parties also must promptly share information relating to any formal disciplinary actions or informal disciplinary actions taken involving a Dual Member or other certain individuals. The Commission believes that the information sharing provisions contained in the Plan further foster cooperation and coordination between NYSE and FINRA, thereby promoting investor protection and removing impediments to the development of a national market system.

V. Conclusion

This Order gives effect to the Plan filed with the Commission in File No. 4–544. The Parties shall notify all members affected by the Plan of their rights and obligations under the Plan.

It is therefore ordered, pursuant to Sections 17(d) and 11A(a)(3)(B) of the Act, that the Plan in File No. 4–544, between NASD, NYSE, and NYSE Regulation filed pursuant to Rule 17d–2 under the Act, is approved and declared effective.

It is therefore ordered that NYSE is relieved of those responsibilities allocated to FINRA under the Plan in File No. 4–544.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[34]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14877 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56127; File No. SR–Amex–2007–63]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Options Order Cancellation Fee

July 24, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 27, 2007, 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 substantially prepared by the Exchange. The Amex has filed the proposed rule change as one establishing or changing a due, fee, or other charge imposed by the Exchange 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 with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to revise the options order cancellation fee. The text of the proposed rule change is available at Amex, the Commission's Public

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Plan does not adversely affect NYSE's ability to ensure compliance with the outstanding undertakings contained in two recent settlement orders relating to trading violations by certain NYSE floor members. *See* Order Instituting Public Administrative Proceedings Pursuant to Sections 19(h)(1) and 21C of the Securities Exchange Act of 1934, Making Findings, Ordering Compliance with Undertakings, and Imposing a Censure and Cease-and-Desist Order, File No. 3–11892, Release No. 34–51524 (April 12, 2005); and Order Instituting Public Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Ordering Compliance with Undertakings, File No. 3–9925, Release No. 34–41574 (June 29, 1999).

[30] For example, a Non-Exclusive Common Rule may contain multiple provisions, certain of which relate to matters of NYSE's retained responsibilities under the Plan, such as trading-related provisions.

[31] *See* Paragraph 2(b) of the Plan.

[32] *See* Paragraph 2(c) of the Plan. Further, the Parties thereafter would need to consider whether any amendments to the Plan or the List of Common Rules are required.

[33] The Commission notes that paragraph 14 of the Plan reflects the fact that Commission approval of any termination of the Plan is required.

[34] 17 CFR 200.30–3(a)(34).

[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).

Reference Room, and *http://www.amex.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to revise the existing options order cancellation fee set forth in the Options Fee Schedule. The proposed revision would change the manner in which the fee is determined or calculated so that the cancellation fee of $1.00 is assessed to the executing Clearing Member for each order cancelled through the Amex Order File (''AOF'') in excess of the number of orders that the executing Clearing Member executes through AOF in a given month.[5]

The current options order cancellation fee set forth in the Options Fee Schedule differs in how the fee is assessed against executing Clearing Members. The fee of $1.00 is currently charged against an executing Clearing Member for every order that it cancels through the AOF in a given month when the total number of orders the executing Clearing Member canceled through AOF in that month exceeds the total number of orders that same Clearing Member executed through AOF in that same month. The fee does not apply to executing Clearing Members that cancel fewer than 500 orders through AOF in a given month. Accordingly, an executing Clearing Member is charged $1.00 for each cancelled order in a given month when such cancelled orders exceed executed orders through AOF unless the executing Clearing Member cancels fewer than 500 orders in such given month. The proposal seeks to change how the executing Clearing Member is assessed the order cancellation fee so that the fee pertains only to the excess of order cancellations versus order executions.

The Exchange believes that the proposal will simplify the application of the options order cancellation fee and provide greater clarity to market participants. In addition, the Exchange submits that the proposal is similar to the order cancellation fee of other options exchanges.

The Exchange believes that charging an options order cancellation fee, where applicable, for excess order cancellations is reasonable given the increase in costs to the Exchange that may occur as a result of a large volume of order cancellations. Accordingly, the Exchange seeks, through this proposal, to better manage the application of its options order cancellation fee.

2. Statutory Basis

The Exchange asserts that the proposal is equitable as required by section 6(b)(4) of the Act.[6] In addition, the Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,[7] in general, and furthers the objectives of section 6(b)(5),[8] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received by the Exchange on this proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change establishes or changes a due, fee, or other charged imposed by the Exchange, it has become effective pursuant to section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(2)[10] thereunder. 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-Amex-2007–63 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR-Amex-2007–63. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F. Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of 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-2007–63 and should

[5] The operative date of the proposal was designated by Amex as July 1, 2007.

[6] Section 6(b)(4) states that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 19b–4(f)(2).

be submitted on or before August 22, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14831 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56129; File No. SR–BSE–2007–29]

Self-Regulatory Organizations; Boston Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Existing Fee Schedules

July 25, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 28, 2007, 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 substantially prepared by the Exchange. The BSE has designated this proposal as one 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 with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The BSE proposes to amend certain transaction fees set forth in the Boston Equities Exchange (''BeX'') fee schedule. The text of the proposed rule change is available at *http://www.bostonstock.com*, at the BSE, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On November 20, 2006, the BSE filed File No. SR–BSE–2006–44, a rule filing that amended the existing BSE fee schedule and established a fee schedule for the BeX, a facility of the Exchange. On March 5, 2007, a subsequent filing, SR–BSE–2007–13, was made to add a new Smart Order Routing fee. This fee is charged to Members on whose behalf an order is routed and who are also not members or subscribers of the away market center and, as a result, must utilize the give-up services provided through the Exchange. In this filing, the Exchange proposes to revise the rate for this service from $0.0050 per share to $0.0040 per share, with an operative date of July 1, 2007. The cost to the Exchange to provide this service has been reduced and, as a result, the Exchange proposes to pass these cost savings on to its Members.

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 furthers the objectives of section 6(b)(4) of the Act,[6] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among Exchange members and issuers and other persons using Exchange facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

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 proposed rule change has been designated as a fee change pursuant to section 19(b)(3)(A)(ii) of the Act[7] and Rule 19b–4(f)(2) thereunder,[8] because it establishes or changes a due, fee, or other charge imposed by the Exchange. Accordingly, the proposal will take effect upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the 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–2007–29 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–BSE–2007–29. 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

[11] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] 15 U.S.C. 78f(b).

[6] 15 U.S.C. 78f(b)(4).

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2).

provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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–2007–29 and should be submitted on or before August 22, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14833 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56132; File No. SR–CBOE–2007–71]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change as Modified by Amendment No. 1 Relating to an Extension of the Linkage Fee Pilot Program

July 25, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 28, 2007, 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 and II below, which Items have been substantially prepared by the Exchange. On July 20, 2007, CBOE filed Amendment No. 1 to the proposed rule change. This order provides notice of the proposed rule change, as modified by Amendment No. 1, and approves the proposed rule change, as amended, on an accelerated basis.

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CBOE proposes to amend its Fees Schedule to extend until July 31, 2008 the Options Intermarket Linkage (''Linkage'') fees pilot program. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.cboe.org/legal.*

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 III 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 Exchange's fees for Principal Orders (''P Orders'') and Principal Acting as Agent Orders (''P/A Orders'')[3] are operating under a pilot program scheduled to expire on July 31, 2007.[4] The Exchange proposes to amend its Fees Schedule to extend the pilot program until July 31, 2008.

The Exchange assesses its members the following Linkage Order related fees: (i) $.26 per contract transaction fee, (ii) $.30 per contract Retail Automatic Execution System (''RAES'') access fee, if a Linkage Order is executed in whole or in part on RAES, and (iii) $.10 per contract surcharge fee on transactions in options on the Nasdaq-100 Index (MNX and NDX) and options on the Russell 2000 Index (RUT).[5] Satisfaction Orders are not assessed Exchange fees.

The Exchange believes that extension of the Linkage fee pilot program until July 31, 2008 will give the Exchange and the Commission further opportunity to evaluate the appropriateness of Linkage fees.

The Exchange also proposes to amend section 21 of the Fees Schedule to change the Linkage fees pilot expiration date included in that section to July 31, 2008, thereby extending the term of the DPM Linkage Fees Credit program for P/A Orders.

2. Statutory Basis

The proposed fee change is consistent with section 6(b) of the Act[6] in general, and furthers the objectives of section 6(b)(4) of the Act[7] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members and other persons using its facilities.

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 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. 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

[3] Under the Plan for the Purpose of Creating and Operating an Options Intermarket Linkage (''Plan'') and Exchange Rule 6.80(12), which tracks the language of the Plan, a ''Linkage Order'' means an Immediate or Cancel Order routed through the Linkage as permitted under the Plan. There are three types of Linkage Orders: (i) ''P/A Order,'' which is an order for the principal account of a specialist (or equivalent entity an another Participant Exchange that is authorized to represent Public Customer orders), reflecting the terms of a related unexecuted Public Customer order for which the specialist is acting as agent; (ii) ''P Order,'' which is an order for the principal account of an Eligible Market Maker and is not a P/A Order; and (iii) ''Satisfaction Order,'' which is an order sent through the Linkage to notify a member of another Participant Exchange of a Trade-Through and to seek satisfaction of the liability arising from that Trade-Through.

[4] *See* Securities Exchange Act Release No. 54272 (August 3, 2006), 71 FR 45865 (August 10, 2006) (SR–CBOE–2006–59).

[5] *See* CBOE Fees Schedule, Footnote 14. Surcharge fees are also assessed on OEX, XEO, SPX, VIX, DJX and DXL options. However, Linkage fees do not apply to these products because they are not multiply listed.

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

Number SR–CBOE–2007–71 on the subject line.

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2007–71. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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–CBOE–2007–71 and should be submitted on or before August 22, 2007.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, 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,[8] and, in particular, the requirements of section 6(b) of the Act[9] and the rules and regulations thereunder. The Commission finds that the proposed rule change is consistent with section 6(b)(4) of the Act,[10] which requires that the rules of the Exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Commission believes that the extension of the Linkage fee pilot until July 31, 2008 will give the Exchange and the Commission further opportunity to evaluate whether such fees are appropriate.

The Commission also finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of the notice of filing thereof in the **Federal Register**. The Commission believes that granting accelerated approval of the proposed rule change will preserve the Exchange's existing pilot program for Linkage fees without interruption as the Exchange and the Commission continue considering the appropriateness of Linkage fees. Therefore, the Commission finds good cause, consistent with section 19(b)(2) of the Exchange Act,[11] to approve the proposed rule change on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[12] that the proposed rule change (SR–CBOE–2007–71), as modified by Amendment No. 1, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14837 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

[8] In approving this rule change, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] 15 U.S.C. 78s(b)(2).

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56139; File No. SR–CBOE–2007–86]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Extend the Penny Pilot Program

July 26, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 24, 2007, 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 and II below, which Items have been substantially prepared by the CBOE. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which rendered the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to extend the Penny Pilot Program. The text of the proposed rule change is available at CBOE, the Commission's Public Reference Room, and *http://www.cboe.com.*

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. 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 23, 2007, the Commission approved CBOE's rule filing (SR–CBOE–2006–92),[5] which permits thirteen option classes to quote in penny increments in connection with the implementation of an industry wide, six month Penny Pilot Program.[6] The Penny

[5] *See* Securities Exchange Act Release No. 55154 (January 23, 2007), 72 FR 4743 (February 1, 2007) (SR–CBOE–2006–92).

[6] The Exchange acknowledged that the approval order permitted quoting in penny increments in the Pilot classes. Telephone conversation between Patrick Sexton, Associate General Counsel, CBOE, Jennifer L. Colihan, Special Counsel, Division of Market Regulation (''Division''), Commission, and

Continued

Pilot Program is scheduled to expire on July 26, 2007. CBOE proposes to extend the Penny Pilot Program in the thirteen option classes for an additional two months, until September 27, 2007, while the Commisison analyzes whether to expand the Pilot, and if so, by how much. CBOE understands that all options exchanges are submitting similar rule filings to extend the duration of the Penny Pilot Program until September 27, 2007.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act [7] in general, and furthers the objectives of section 6(b)(5) of the Act [8] 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.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received by the Exchange.

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) of the Act [9] and Rule 19b–4(f)(6) thereunder,[10] because the foregoing proposed 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.

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing.[11] However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest.[12] The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will ensure continuity of the Exchange's rules and will allow the Penny Pilot Program to remain in effect without interruption. For these reasons, the Commission designates the proposal to be operative upon filing with the Commission.[13]

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.[14]

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–2007–86 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F. Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2007–86. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the 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–2007–86 and should be submitted on or before August 22, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14840 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

Johnna B. Dumler, Special Counsel, Division, Commission, on July 25, 2007.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to give the Commission 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. CBOE has satisfied the five-day pre-filing requirement.

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[14] *See* 15 U.S.C. 78s(b)(3)(C).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56126; File No. SR–DTC–2007–08]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Use of the National Settlement Service

July 24, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on May 1, 2007, The Depository Trust Company (''DTC'') 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 DTC. The Commission is publishing this notice to

[1] 15 U.S.C. 78s(b)(1).

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 permits DTC to use the Federal Reserve Bank's National Settlement Service (''NSS'') for the settlement of credit balances.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC 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. DTC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In 2003, DTC mandated NSS as the vehicle for all DTC Settling Banks to satisfy their end of day net debits.[3] In an effort to increase the efficiencies afforded by NSS, DTC is modifying its rules and procedures to permit DTC's use of NSS to also distribute net credits.[4] Utilizing NSS as the payment mechanism for net credits will eliminate the need for DTC to initiate wire payments for settlement monies owed by DTC. However, should NSS not be available for any reason, DTC will retain the capability to satisfy its settlement obligations using wire transfer.

The proposed rule change is consistent with the requirements of section 17A of the Act and the rules and regulations thereunder because it will not affect the safeguarding of funds or securities in DTC's custody and control or for which it is responsible.

(B) Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change would have any impact or impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the proposed rule change have not yet been solicited or received. DTC will notify the Commission of any written comments received by DTC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(iii) of the Act[5] and Rule 19b–4(f)(4)[6] promulgated thereunder because the proposal effects a change in an existing service of DTC that (A) Does not adversely affect the safeguarding of securities or funds in the custody or control of DTC or for which it is responsible and (B) does not significantly affect the respective rights or obligations of DTC or persons using the service. At any time within sixty days of the filing of the proposed rule change, the Commission could have summarily abrogated such rule change if it appeared to the Commission that such action was necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. 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–DTC–2007–08 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–DTC–2007–08. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of DTC. 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–DTC–2007–08 and should be submitted on or before August 22, 2007.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14830 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56128; File No. SR–ISE–2007–55]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Linkage Fees

July 24, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 29, 2007, the International Securities Exchange, LLC (''ISE'' 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 substantially prepared by the

[2] The Commission has modified parts of these statements.

[3] Securities Exchange Act Release No. 48089 (June 25, 2003), 68 FR 40314 (July 7, 2003) (File No. SR–DTC–2002–06).

[4] The National Securities Clearing Corporation (''NSCC'') has submitted a similar proposed rule change (File No. SR–NSCC–2007–02) providing for the use of NSS for the distribution of net-net credits.

[5] 15 U.S.C. 78s(b)(3)(A)(iii).

[6] 17 CFR 240.19b–4(f)(4).

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Exchange. This order provides notice of the proposed rule change and approves the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

ISE proposes to extend until July 31, 2008 the current pilot program regarding transaction fees charged for trades executed through the intermarket options linkage (''Linkage''). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.ise.com*.

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 III 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 this proposed rule change is to extend for one year the pilot program establishing ISE fees for Principal Orders (''P Orders'') and Principal Acting as Agent Orders (''P/A Orders'') sent through Linkage and executed on ISE. The fees currently are effective for a pilot period scheduled to expire on July 31, 2007.[3] This filing would extend the pilot program for another year, through July 31, 2008.

ISE fees affected by this filing are: The Linkage P Order fee of $0.24 per contract; the Linkage P/A Order fee of $0.15 per contract; a surcharge fee of between $0.05 and $0.15 for trading certain licensed products; and a $0.03 comparison fee (collectively ''linkage fees''). These are the same fees that all ISE members pay for non-customer transactions executed on the Exchange.[4] ISE does not charge for the execution of Satisfaction Orders[5] sent through Linkage and is not proposing to charge for such orders.

The Exchange believes it is appropriate to charge fees for P Orders and P/A Orders executed through Linkage. Notably, while market makers on competing exchanges always can match a better price on ISE, they never are obligated to send orders to ISE through Linkage. However, if such market makers do seek ISE's liquidity, whether through conventional orders or through the use of P Orders or P/A Orders, the Exchange believes it is appropriate to charge its members the same fees levied on other non-customer orders. ISE appreciates that there has been limited experience with Linkage and that the Commission is continuing to study Linkage in general and the effect of fees on Linkage trading. Thus, this filing would extend the status quo with Linkage fees for an additional year.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under section 6(b)(4)[6] that an exchange have an equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. As discussed above, ISE believes that this proposed rule change will equitably allocate fees by having all non-customer users of ISE transaction services pay the same fees. The Exchange believes that, if it were to not charge linkage fees, the Exchange's fee would not be equitable, in that ISE members would be subsidizing the trading of their competitors, all of whom access the same trading services.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Moreover, failing to adopt the proposed rule change would impose a burden on competition by requiring ISE members to subsidize the trading of their competitors.

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. 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–ISE–2007–55 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ISE–2007–55. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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–ISE–2007–55 and should be submitted on or before August 22, 2007.

[3] *See* Securities Exchange Act Release No. 54204 (July 25, 2006), 71 FR 43548 (August 1, 2006) (SR–ISE–2006–38) (extending the Linkage fee pilot program).

[4] ISE charges these fees only to its members, generally firms who clear P Orders and P/A Orders for market makers on the other linked exchanges.

[5] The term ''Satisfaction Order'' is defined in ISE Rule 1900(10)(iii).

[6] 15 U.S.C. 78f(b)(4).

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, 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,[7] and, in particular, the requirements of section 6(b) of the Act[8] and the rules and regulations thereunder. The Commission finds that the proposed rule change is consistent with section 6(b)(4) of the Act,[9] which requires that the rules of the Exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Commission believes that the extension of the Linkage fee pilot until July 31, 2008 will give the Exchange and the Commission further opportunity to evaluate whether such fees are appropriate.

The Commission also finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of the notice of filing thereof in the **Federal Register**. The Commission believes that granting accelerated approval of the proposed rule change will preserve the Exchange's existing pilot program for Linkage fees without interruption as the Exchange and the Commission continue considering the appropriateness of Linkage fees. Therefore, the Commission finds good cause, consistent with section 19(b)(2) of the Exchange Act,[10] to approve the proposed rule change on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[11] that the proposed rule change (SR–ISE–2007–55), be and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14832 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

[7] In approving this rule change, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(2).

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56130; File No. SR–NASDAQ–2007–061]

Self-Regulatory Organizations; the NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Institute a Pricing Incentive Program for Market Makers in Exchange-Traded Funds and Index-Linked Securities

Date: July 25, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 18, 2007, The NASDAQ Stock Market LLC (''Nasdaq'' 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 substantially prepared by Nasdaq. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by a self-regulatory organization pursuant to 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 with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Nasdaq proposes to institute a pricing incentive program for market makers in exchange-traded funds (''ETFs'') and index-linked securities (''ILSs'') listed on Nasdaq.[5] Nasdaq plans to implement the proposed rule change on August 1, 2007. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nasdaq.com/about/LegalCompliance.stm.*

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, Proposed Rule Change

1. Purpose

Nasdaq proposes to introduce a pricing incentive program for market makers in ETFs and ILSs listed on Nasdaq. In April 2007, Nasdaq executed 34.8% of all transactions in ETFs listed on U.S. exchanges, making it the largest market for ETF transactions. Nasdaq also executes a large percentage of transactions in ILSs. However, Nasdaq currently lists fewer ETFs and ILSs than the New York Stock Exchange LLC and the American Stock Exchange LLC. The proposal is designed both to enhance Nasdaq's competitiveness as a listing venue for ETFs and ILSs and further strengthen its market quality as a transaction venue for ETFs and ILSs.

Nasdaq proposes to adopt rules that are similar to those regarding NYSE Arca, Inc.'s (''NYSE Arca's'') program for Designated Market Makers.[6] Under NYSE Arca's program, a Designated Market Maker for a security listed on NYSE Arca is required to maintain minimum performance standards with regard to (1) Percent of time at the national best bid (best offer) (''NBBO''), (2) percent of executions better than the NBBO, (3) average displayed size, (4) average quoted spread, and (5) in the case of derivative securities, the ability of the Designated Market Maker to transact in underlying markets. In return, the Designated Market Maker pays $0.0025 per share when accessing liquidity in stocks for which it is the Lead Market Maker, and receives a $0.004 per share credit when providing liquidity.

Under Nasdaq's proposed program, a market maker in an ETF or ILS may become a ''Designated Liquidity Provider'' in a ''Qualified Security'' and receive similarly favorable incentive pricing. A Qualified Security must be an ETF or ILS listed on Nasdaq, have at least one Designated Liquidity Provider, and have a Nasdaq-designated maximum trading volume. Specifically, a security is no longer eligible to be a

[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).

[5] The Exchange's proposed rule text is contained in the Nasdaq 7000 Series (Charges for Membership, Services, and Equipment) at paragraph (g) of Rule 7018 (Nasdaq Market Center Order Execution and Routing).

[6] *See* NYSE Arca Equities Rule 7.24 (Designated Market Maker Performance Standards) and NYSE Arca Schedule of Fees and Charges for Exchange Services (*http://www.nyse.com/pdfs/NYSEArca_Equities_Fees.pdf*).

Qualified Security once there have been two calendar months in any three calendar-month period during which its average daily volume on Nasdaq exceeded 250,000 shares. Thus, the program is designed to encourage support of ETFs and ILSs during their period of initial listing, when the security must develop an active trading market in order to succeed. Once the volume threshold is reached, the pricing for the ETF or ILS would be consistent with pricing for other securities traded on Nasdaq.

A ''Designated Liquidity Provider'' is a registered Nasdaq market maker in a Qualified Security that has committed to maintain minimum performance standards. Designated Liquidity Providers would be selected by Nasdaq based on factors including, but not limited to, experience with making markets in ETFs and ILSs, adequacy of capital, willingness to promote Nasdaq as a marketplace, issuer preference, operational capacity, support personnel, and history of adherence to Nasdaq rules and securities laws. Nasdaq may limit the number of Designated Liquidity Providers in a Qualified Security, or modify a previously established limit, upon prior written notice to members. Specifically, Nasdaq may modify such limit either to increase or decrease the number of Designated Liquidity Providers for a Qualified Security upon providing such prior written notice.

As is true under the equivalent rules of NYSE Arca, the minimum performance standards applicable to a Designated Liquidity Provider may be determined from time to time by Nasdaq and may vary depending on the price, liquidity, and volatility of a particular Qualified Security. The performance measurements would include: (1) Percent of time at the NBBO; (2) percent of executions better than the NBBO; (3) average displayed size; and (4) average quoted spread. Nasdaq may remove Designated Liquidity Providers that do not meet the performance standards or that decide to change their status at any time.

When accessing liquidity in a Qualified Security or routing to another market, the Designated Liquidity Provider would pay $0.003 per share executed; when providing liquidity, the Designated Liquidity Provider would receive a credit of $0.004 per share executed. Consistent with the requirements of Rule 610 of Regulation NMS,[7] however, in the unlikely event that the security trades at less than $1 per share, the normal execution fee and credit schedule in Nasdaq Rule 7018(a) regarding securities trading less than $1 would apply.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of section 6 of the Act,[8] in general, and sections 6(b)(4) and 6(b)(5) of the Act,[9] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which Nasdaq operates or controls, and 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, respectively. Nasdaq believes that by allocating pricing benefits to certain market makers that make tangible commitments to enhancing market quality for ETFs and ILSs listed on Nasdaq, the proposal will encourage the development of new financial products, provide a better trading environment for investors in ETFs and ILSs, and encourage greater competition between listing venues for ETFs and ILSs.

B. Self-Regulatory Organization's Statement on Burden on Competition

Nasdaq believes that the proposed rule change will encourage greater competition among venues that list ETFs and ILSs and further strengthen the quality of the Nasdaq market as a venue for transactions in ETFs and ILSs. Accordingly, Nasdaq does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Nasdaq states that written comments were neither solicited nor received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposed rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act [10] and Rule 19b–4(f)(2) [11] thereunder because it establishes or changes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the 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–NASDAQ–2007–061 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F. Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2007–061. 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, 100 F. Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of Nasdaq. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that

[7] 17 CFR 242.610.

[8] 15 U.S.C. 78f.

[9] 15 U.S.C. 78f(b)(4) and (5).

[10] 15 U.S.C. 78s(b)(3)(A)(ii).

[11] 17 CFR 19b–4(f)(2).

you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2007–061 and should be submitted on or before August 22, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14841 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56124; File No. SR–NASD–2007–042]

Self-Regulatory Organizations: National Association of Securities Dealers, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Delay the Implementation of NASD Interpretive Material 2210–4, which Requires Certain Member Firms to Provide a Hyperlink to *http://www.nasd.com.*

July 24, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 27, 2007, the National Association of Securities Dealers, Inc. (''NASD'' 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 NASD. NASD 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] as one constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule, which renders the proposed rule change effective upon filing with the Commission. On July 20, 2007, NASD filed Amendment No. 1 to the proposed rule change. 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

NASD is proposing to delay, until October 31, 2007, implementation of an amendment to Interpretive Material 2210–4 (''IM 2210–4'')[5] that was scheduled to be implemented on July 7, 2007.[6] The recent amendment to IM–2210–4 requires an NASD member referring to its NASD membership on its Web site to provide a hyperlink to the Internet domain *http://www.nasd.com* (''hyperlink requirement''). There are no proposed changes to the text of NASD rules.

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. 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

On November 9, 2006, the SEC approved an amendment to IM–2210–4 establishing the hyperlink requirement.[7] On January 8, 2007, NASD published Notice to Members 07–02, which announced the Commission's approval of the hyperlink requirement and established July 7, 2007 as its implementation date.[8] Following SEC approval of the hyperlink requirement, NASD and NYSE Group, Inc. (''NYSE'') announced a plan to consolidate their member regulation operations into a combined organization that will be the sole U.S. private-sector provider of member firm regulation for securities firms that do business with the public.[9] To reflect this consolidation, NASD will be changing its name to the Financial Industry Regulatory Authority, Inc. (''FINRA'') and changing its internet domain. NASD is delaying implementation of the hyperlink requirement until its new name and internet domain are established and is providing sufficient time for firms to make the necessary changes to their Web sites. NASD will submit a separate rule change to amend IM–2210–4 to reflect its new corporate name and internet domain.

NASD has filed the proposed rule change for immediate effectiveness to immediately postpone, until October 31, 2007, the implementation date of the hyperlink requirement, which otherwise would have been implemented on July 7, 2007.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,[10] which requires, among other things, that NASD's rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD is delaying implementation of the hyperlink requirement until its new name and internet domain are established and is providing sufficient time for firms to make the necessary changes to their Web sites.

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.

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.

[12] 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)(i).

[4] 17 CFR 240.19b–4(f)(1).

[5] *See* Securities Exchange Act Release No. 54740 (November 9, 2006), 71 FR 67184 (November 20, 2006) (SR–NASD–2006–073) (Order Approving Proposed Rule Change and Amendment No. 1 thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 2 to Amend NASD Interpretive Material 2210–4 to Require Certain Member Firms to Provide a Hyperlink to the NASD's Internet Home Page) (''Approval Order'').

[6] As required by the Approval Order, unless amended, the implementation date of the hyperlink requirement will be 180 days following publication of Notice to Members 07–02, which announces Commission approval of the hyperlink requirement. Notice to Members 07–02 was published on January 8, 2007.

[7] *See* Approval Order.

[8] *See* NASD Notice to Members 07–02 (January 2007).

[9] *See* SR–NASD–2007–023, which proposes to amend the By-Laws of NASD to implement governance and related changes to accommodate the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc., Securities Exchange Act Release No. 55495 (March 20, 2007), 72 FR 14149 (March 26, 2007).

[10] 15 U.S.C. 78o–3(b)(6).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing proposal has become effective pursuant to section 19(b)(3)(A)(i) of the Act,[11] and Rule 19b–4(f)(1)[12] thereunder, in that it constitutes a stated policy with respect to the enforcement of an existing rule. 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.[13]

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–2007–042 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASD–2007–042. 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, 100 F. Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal 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 File Number SR–NASD–2007–042 and should be submitted on or before August 22, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14834 Filed 7–31–07; 8:45 am]

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[11] 15 U.S.C. 78s(b)(3)(A)(i).

[12] 17 CFR 240.19b–4(f)(1).

[13] 15. U.S.C. 78s(b)(3)(C). For purposes of calculating the 60-day period within which the Commission may abrogate the proposal, the Commission considers the period to commence on July 20, 2007, the date on which NASD filed Amendment No. 1.

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56147; File No. SR–NASD–2007–054]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Incorporate Certain NYSE Rules Relating to Member Firm Conduct

July 26, 2007.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 24, 2007, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change to incorporate into its rulebook certain rules of the New York Stock Exchange LLC (''NYSE'') relating to the regulation of member firm conduct (''Incorporated NYSE Rules'') as described in Items I and II below, which Items have been substantially prepared by NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is simultaneously approving the proposal on an accelerated basis.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

In connection with the proposed transaction to combine the member regulation operations of NASD and NYSE into a single organization (''Transaction''), NASD proposes to add the Incorporated NYSE Rules to its rules. As discussed below, the Incorporated NYSE Rules will apply solely to members of the Financial Industry Regulatory Authority, Inc. (''FINRA'')[3] that also are members of NYSE (''Dual Members'') on or after the date of closing (''Closing'') of the Transaction. The text of the proposed rule change, including the list of the Incorporated NYSE Rules, is available at NASD, the Commission's Public Reference Room, and *http://nasd.complinet.com.*

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 III 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

Currently, both NASD and NYSE Regulation, Inc. (''NYSE Regulation'')[4] oversee the activities of U.S.-based broker-dealers doing business with the public, approximately 170 of which are regulated by both organizations. According to NASD, the result is a duplicative, sometimes conflicting system that makes inefficient use of resources and, as such, can be detrimental to the ultimate goal of investor protection.

NASD states that it has long supported the adoption of a hybrid

[3] In connection with the Transaction, NASD will change its corporate name to FINRA as of the date of closing of the Transaction (''Closing''). *See* Securities Exchange Act Release No. 56146 (July 26, 2007) (changing the name of NASD to FINRA in the Restated Certificate of Incorporation).

[4] NYSE Regulation is a wholly-owned subsidiary of NYSE.

model of self-regulation, with one self-regulatory organization (''SRO'') having responsibility for all member firm regulation.[5] NASD further notes that, at the same time, the Commission, Congress, securities firms and independent observers have long encouraged greater efficiencies, clarity and cost savings in the regulation of the U.S. financial markets.

With these goals in mind, on November 28, 2006, NASD and the NYSE Group, Inc. (''NYSE Group'') announced a plan to consolidate their member regulation operations into a combined organization that will be the sole U.S. private-sector provider of member firm regulation for securities firms that conduct business with the public.[6] This consolidation is intended to streamline the broker-dealer regulatory system, combine technologies, and permit the establishment of a single set of rules and group examiners with complementary areas of expertise in a single organization—all of which will serve to enhance oversight of U.S. securities firms and help ensure investor protection. Moreover, NASD notes that the new organization will be committed to reducing regulatory costs and burdens for firms of all sizes through greater regulatory efficiency.

Incorporation of NYSE Conduct Rules—General

NASD represents that FINRA will work expeditiously to consolidate the rules that apply to its member firms, reducing to one the two sets of rules currently applicable to Dual Members. During an interim period, however, until the approval of a consolidated rulebook, NASD is proposing to incorporate into FINRA's rulebook the Incorporated NYSE Rules.[7] The Incorporated NYSE Rules will apply solely to Dual Members until such time as FINRA adopts, subject to Commission approval, consolidated rules applicable to all of its members.[8]

The proposed rule change would incorporate those NYSE rules pertaining to the regulation of member firm conduct.[9] In applying the Incorporated NYSE Rules to Dual Members, FINRA also would incorporate the related interpretative positions set forth in the NYSE Rule Interpretations Handbook and NYSE Information Memos.

Importantly, under the proposed rule change, there would be no new rule requirements placed on member firms as a result of the Transaction. Until the adoption of a consolidated rulebook by FINRA, those members that are NASD-only members as of the date of the Closing would continue to comply with NASD (and not NYSE) rules; those members that were Dual Members as of the date of Closing would continue to be subject to NASD and NYSE rules; and NYSE members that were not also members of NASD as of the date of Closing (''NYSE-only members'') would continue to comply with NYSE (and not NASD) rules, provided that any such NYSE-only member does not engage in any activities that would require it to be an NASD member, in which case the NYSE-only member would be subject to both NYSE and NASD rules.[10] In short, the proposed rule change is designed to ensure that all firms, whether Dual Members or members of only NYSE or NASD, will have the same set of regulatory obligations immediately following the Closing of the Transaction that those firms had prior to the Closing of the Transaction.

Because NYSE Group would maintain the functions it currently carries out with respect to market operations, including market surveillance functions, the proposed rule change would not incorporate NYSE rules in such areas as market regulation, including those rules addressing NYSE's Order Tracking System (''OTS'') and listing standards. The proposed rule change also would not incorporate NYSE's proxy rules. Further, the proposed rule change would not incorporate NYSE arbitration rules, as FINRA would operate its arbitration and mediation forums pursuant to the NASD Code of Arbitration Procedure.[11]

Disciplinary Matters

Because FINRA would conduct its disciplinary proceedings in accordance with the NASD Code of Procedure, the proposed rule change would not incorporate the NYSE disciplinary rules. With respect to any disciplinary investigations pending at NYSE Regulation as of the Transaction's Closing date that pertain to the Incorporated NYSE Rules, the applicable rules and forum would depend on whether NYSE Regulation has filed a Charge Memorandum or Stipulation of Facts and Consent to Penalty (''Stipulation and Consent'') as of the date of Closing. In the event NYSE Regulation has filed a Charge Memorandum or Stipulation and Consent as of the date of Closing, the matter (including any later appeals) would be adjudicated in accordance with the NYSE disciplinary rules and before the NYSE Hearing Board. Similarly, to the extent an NYSE Hearing Board decision remains subject to appeal as of the date of Closing, any such appeal would be addressed pursuant to the NYSE disciplinary rules.[12]

In contrast, if as of the date of Closing, NYSE Regulation has not filed a Charge Memorandum or Stipulation and Consent in an investigation relating to the Incorporated NYSE Rules, the matter (including any later appeals) would be adjudicated by FINRA, pursuant to the

[5] *See* NASD comment letter dated March 15, 2005 in response to the SEC's Concept Release Concerning Self-Regulation, Securities Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71256 (December 8, 2004) (File No. S7–40–04).

[6] Today, the Commission approved the amendments to the NASD's By-Laws proposed in connection with the Transaction. Securities Exchange Act Release No. 56145 (July 26, 2007).

[7] The text of the Incorporated NYSE Rules, as of the effective date of the proposed rule change, will be available on the FINRA Web site. To the extent the Commission has approved an amendment to an Incorporated NYSE Rule that has not yet become effective prior to the closing of the Transaction, NASD is proposing to incorporate any such amendment into FINRA's rulebook (with such amendment becoming effective upon its scheduled effective date). In the event the NYSE were to file a proposed rule change to amend an NYSE rule relating to member firm conduct following the closing of the Transaction, NASD is not proposing to incorporate any such amendment into FINRA's rulebook, absent a separate rule filing by FINRA to adopt conforming changes.

[8] The Incorporated NYSE Rules would continue to apply to the same categories of persons to which they currently apply. In other words, in addition to applying to Dual Members, the Incorporated NYSE Rules would apply to persons affiliated with those firms to the same extent and in the same manner that the Incorporated NYSE Rules currently apply. NASD stated that it expects FINRA to submit to the Commission within one year of the date of Closing proposed rule changes that would constitute a significant portion of a harmonized rulebook, with the remaining rules being submitted to the Commission within two years of the Closing. *See* Letter from T. Grant Callery, Executive Vice President and General Counsel, NASD to Nancy M. Morris, Secretary, Commission, dated July 16, 2007.

[9] To the extent an Incorporated NYSE Rule includes a reference to NYSE or the Exchange, such terms will be construed to mean FINRA, unless the context otherwise requires.

[10] NASD anticipates NYSE's filing a proposed rule change to require its members to be members of FINRA, and expects to file a separate rule change to establish a waive-in application process for the NYSE-only members. These NYSE-only members will be subject to FINRA's By-Laws and Schedules to the By-Laws, including Schedule A (Assessments and Fees), as well as the NASD Rule 8000 Series (Investigations and Sanctions) and Rule 9000 Series (Code of Procedure).

[11] NYSE recently filed a proposed rule change to provide guidance regarding new and pending arbitration claims in light of the consolidation of NYSE Regulation's arbitration department with that of NASD Dispute Resolution, Inc. *See* Securities Exchange Act Release No. 56015 (July 5, 2007), 72 FR 37811 (July 11, 2007) (Notice of Filing of Proposed Rule Change and Amendment No. 1) (SR–NYSE–2007–48).

[12] *See* SR–NYSE–2007–69 (Information Memo to NYSE members reflecting changes to disciplinary proceedings at NYSE Regulation as a result of the Transaction).

FINRA Code of Procedure, which includes the Acceptance, Waiver and Consent process pursuant to the FINRA Code of Procedure.[13]

Regarding summary proceedings currently adjudicated pursuant to NYSE Rule 475, the applicable rule and forum would depend on whether NYSE Regulation has notified the person or entity in writing of the summary action before the Closing date. If the notification in writing has occurred before the Closing date, then the matter would be adjudicated pursuant to NYSE disciplinary rules. If no such notification has occurred, the matter would be addressed by FINRA, pursuant to FINRA rules.

Finally, with regard to fines imposed pursuant to NYSE Rule 476A (Imposition of Fines for Minor Violation(s) of Rules) (or summary fines), if a summary fine notice is issued before the date of Closing, the matter would be handled pursuant to NYSE rules. With respect to matters arising after the date of Closing, NASD expects to file with the Commission a proposed rule change to modify its Minor Rule Violation Plan (''MRVP'') to include the Incorporated NYSE Rules that, as of the date of such filing, are enumerated in NYSE's MRVP. Thus, NASD states that after the date of Closing, if the Commission were to approve the proposed rule changes, FINRA would be authorized to impose fines under NASD's MRVP for minor violations by Dual Members of the NYSE rules that are set forth in FINRA's MRVP.

Non-Exclusive Common Rules

As further detailed in the Agreement between NASD, NYSE, and NYSE Regulation pursuant to Rule 17d–2 under the Act[14] (''Rule 17d–2 Agreement''), certain of the Incorporated NYSE Rules have been designated ''Non-Exclusive Common Rules'' for which both FINRA and NYSE will bear responsibility when performing their respective regulatory responsibilities. To the extent a Non-Exclusive Common Rule pertains to matters other than member firm regulation as set forth in the Rule 17d–2 Agreement, the potential violation of such a rule would continue to be adjudicated by NYSE Regulation, in accordance with NYSE disciplinary rules. In addition, NYSE Regulation would retain sole authority to investigate and prosecute any violations of the NYSE rules that are not Incorporated NYSE Rules.

The effective date of the proposed rule change will be the Closing date of the Transaction. The proposed rule change will not become effective if the Transaction does not close.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A of the Act,[15] including Section 15A(b)(2) of the Act,[16] in that it will permit FINRA to carry out the purposes of the Act, to comply with the Act and to enforce compliance by FINRA members and persons associated with members with the Act, the rules and regulations thereunder and FINRA rules. NASD further believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[17] which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. As a result of the proposed rule change, firms that currently are regulated by both NASD and NYSE Regulation will continue to comply with the same set of rules applicable to their operations, with minimal disruption to the businesses. FINRA will work expeditiously to consolidate the rules applicable to such members, so that they are required to comply with only one set of rules.

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.

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. 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–2007–054 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASD–2007–054. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal 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 File Number SR–NASD–2007–054 and should be submitted on or before August 22, 2007.

IV. Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the Act

[13] Under the proposed rule change, FINRA would incorporate NYSE Rule 477 (Retention of Jurisdiction-Failure to Cooperate) with respect to matters relating to potential violations of the Incorporated NYSE Rules. NYSE Rule 477 governs, among other things, NYSE's retention of jurisdiction over certain persons for purposes of initiating disciplinary actions. The rule generally provides that NYSE shall retain jurisdiction over such persons if, prior to termination, or within one year following receipt by NYSE of written notice of the termination, of a person's status as a member, member organization, allied member, approved person or registered or non-registered employee of a member or member organization, NYSE serves written notice on such person that it is making inquiry into matters occurring prior to the termination of such person's status.

[14] 17 CFR 240.17d–2.

[15] 15 U.S.C. 78o–3.

[16] 15 U.S.C. 78o–3(b)(2).

[17] 15 U.S.C. 78o–3(b)(6).

and the rules and regulations thereunder applicable to a national securities association.[18] Specifically, the Commission finds that the proposal is consistent with Section 15A(b)(6) of the Act[19] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission also finds that the proposed rule change is consistent with Section 15A(b)(2) of the Act[20] in that it will permit FINRA to be so organized to carry out the purposes of the Act, to comply with the Act and to enforce compliance by FINRA members and persons associated with members with the Act, the rules and regulations thereunder, and FINRA rules.

As a result of the proposed rule change, firms that currently are regulated by both NASD and NYSE will continue to comply with the same member conduct rules following the Transaction until the member conduct rules of the NASD and NYSE Regulation are consolidated into a single set of FINRA rules. NASD represents that FINRA will work expeditiously to consolidate the rules applicable to Dual Members.[21] In the Commission's view, the proposed rule change is an important step in the process of consolidating the member firm regulatory functions of the NASD and NYSE. This regulatory consolidation is intended, among other things, to increase efficient, effective, and consistent regulation of securities firms, provide cost savings to securities firms of all sizes, and strengthen investor protection and market integrity.

The Commission notes that the Incorporated NYSE Rules will be subject to the Rule 17d–2 Agreement in which the regulatory responsibility for these rules will be allocated to FINRA, although specified Non-Exclusive Common Rules as set forth in the Rule 17d–2 Agreement also would continue to be adjudicated by NYSE in accordance with NYSE disciplinary rules.[22] The proposed rule change also provides clarity with respect to the handling of disciplinary proceedings and summary proceedings initiated by NYSE prior to the date of Closing.

[18] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[19] 15 U.S.C. 78*o*–3(b)(6).

[20] 15 U.S.C. 78*o*–3(b)(2).

[21] *See supra* note 8.

[22] The Commission declared the Rule 17d–2 Agreement effective today. *See* Securities and Exchange Act Release No. 56148 (July 26, 2007).

The Commission finds good cause to approve the proposed rule change prior to the thirtieth day after the proposal was published for comment in the **Federal Register**. Accelerating approval of the proposed rule change facilitates the proposed consolidation of NASD and NYSE's regulatory functions without delay. No changes are being made to the Incorporated NYSE Rules aside from their placement in FINRA's rulebook and no changes are being made to the class of members to which the Incorporated NYSE Rules apply. As NASD noted, the proposed rule change is designed to ensure that all firms, whether Dual Members, NYSE-only members, or NASD-only members, will have the same set of regulatory obligations immediately following the Closing of the Transaction that such firms had prior to the Closing of the Transaction. In addition, the Commission finds good cause to approve the proposal that any disciplinary matter in which a Charge Memorandum or Stipulation and Consent is filed after the date of Closing would be adjudicated pursuant to the FINRA Code of Procedure and that any summary proceeding in which the person or entity is notified in writing after the date of Closing, would be adjudicated pursuant to FINRA rules. This proposal reflects the fact that as of the date of Closing, FINRA will be responsible, under the Rule 17d–2 Agreement, for conducting disciplinary proceedings involving violations of FINRA's rules, including the Incorporated NYSE Rules, by Dual Members. Dual Members are already familiar with, and subject to, the NASD Code of Procedure, which is the FINRA Code of Procedure, and NASD rules, which are FINRA rules. While there are some distinctions between NASD's and NYSE's rules, both sets of rules applicable to the disciplinary process were previously approved by the Commission as consistent with the Act, generally following full notice and comment. Accordingly, although Dual Members and their associated persons no longer would be subject to NYSE's disciplinary procedures, but to FINRA's instead, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,[23] to grant accelerated approval to the proposed rule change.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–NASD–2007–054) is hereby approved on an accelerated basis.[24]

By the Commission.

Nancy M. Morris,

Secretary.

[FR Doc. E7–14854 Filed 7–31–07; 8:45 am]

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[23] 15 U.S.C. 78s(b)(2).

[24] 15 U.S.C. 78s(b)(2).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56145; File No. SR–NASD–2007–023]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change To Amend the By-Laws of NASD To Implement Governance and Related Changes To Accommodate the Consolidation of the Member Firm Regulatory Functions of NASD and NYSE Regulation, Inc.

July 26, 2007.

I. Introduction

On March 19, 2007, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the By-Laws of NASD (''NASD By-Laws'') to implement governance and related changes to accommodate the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. (''NYSE Regulation''), a wholly-owned subsidiary of New York Stock Exchange LLC (''NYSE LLC''). The proposed rule change was published for comment in the **Federal Register** on March 26, 2007.[3] The Commission received 80 comment letters from 72 commenters on the proposed rule change.[4] The NASD filed a response to comments on May 29, 2007 and a supplemental response to comments on July 16, 2007.[5] This order approves the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 55495 (March 20, 2007), 72 FR 14149 (''Notice'').

[4] A list of commenters on the rule proposal, whose comments were received as of July 16, 2007, is attached as Exhibit A to this Order. The public file for the proposal, which includes comment letters received on the proposal, is located at the Commission's Public Reference Room located at 100 F Street, NE., Washington, DC 20549. The comment letters are also available on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*).

[5] *See* Letter from Patrice M. Gliniecki, Senior Vice President and Deputy General Counsel, NASD, to

Continued

II. Description of the Proposed Rule Change

In November 2006, NASD and NYSE Group, Inc. (''NYSE Group'')[6] announced their plan to consolidate their member regulation operations into a single self-regulatory organization (''SRO'') that would provide member firm regulation for securities firms that do business with the public in the United States (''Transaction''). Pursuant to the Transaction, the member firm regulation and enforcement functions and employees from NYSE Regulation would be transferred to NASD, and NASD would adopt a new corporate name. In the proposed rule change, the NASD proposes to amend the NASD By-Laws to implement governance changes that are integral to the Transaction. The proposed rule change and this Order refer to the NASD, whose name would be changed to the Financial Industry Regulatory Authority, as the ''New SRO'' and the amended NASD By-Laws as the ''New SRO By-Laws.''

The New SRO would be responsible for regulatory oversight of all securities firms that do business with the public; professional training, testing and licensing of registered persons; arbitration and mediation; market regulation by contract for The NASDAQ Stock Market, Inc., the American Stock Exchange LLC, and the International Securities Exchange, LLC; and industry utilities, such as Trade Reporting Facilities and other over-the-counter operations. NASD represents that none of NASD's current functions and activities would be eliminated as a result of the Transaction.

The closing of the Transaction (''Closing'') and the consolidation of the member firm regulatory functions of the NASD and NYSE Regulation are subject to the execution of definitive agreements between NASD and NYSE Group, the Commission's approval of the proposed rule change, and certain additional regulatory approvals.[7] The effective date of the proposed rule change would be the date of the Closing. There would be a transitional period commencing on the date of the Closing and ending on the third anniversary of the date of the Closing (''Transitional Period'').

A description of the most significant changes to the NASD By-Laws follows.

A. Composition of the New SRO Board

The proposed rule change would implement a governance structure that includes both public and industry representation, and designates certain Governor[8] positions on the New SRO Board of Governors (''New SRO Board'') to represent member firms. Members would not have the ability to elect all Governors of the New SRO Board, but would have the ability to elect Governors that are from member firms that are similar in size to their own firms. All other Governors would be appointed, as described below. All members would continue to have the ability to vote on any future amendments to the New SRO By-Laws,[9] to petition to propose amendments to the New SRO By-Laws,[10] to vote in district elections,[11] and to petition to nominate a candidate for the Governor position(s) they are entitled to elect.[12]

1. Composition of New SRO Board During the Transitional Period

During the Transitional Period, the New SRO Board would consist of 23 Governors as follows: (a) Eleven Governors would be ''Public Governors;''[13] (b) ten Governors would be ''Industry Governors'';[14] and (c) two Governors initially would be Richard G. Ketchum, currently Chief Executive Officer (''CEO'') of NYSE Regulation and Mary L. Schapiro, currently CEO of NASD. Mr. Ketchum would serve as Chair of the New SRO Board (''Chair'')[15] for a term of three years.[16] Ms. Schapiro would serve as CEO of the New SRO.

Initially, five Public Governors would be appointed by the Board of Directors of NYSE Group (''NYSE Group Board''); five Public Governors would be appointed by the NASD Board of Governors in office prior to the Closing (''NASD Board''); and one Public Governor would be appointed jointly by the NYSE Group Board and the NASD Board (the ''Joint Public Governor''). A Public Governor must not have any material business relationship with a broker or dealer or an SRO registered under the Exchange Act (other than serving as a public director of such an SRO).[17]

The ten Industry Governors would consist of: (a) Three Governors who are

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Nancy M. Morris, Secretary, Commission, dated May 29, 2007 (''NASD Response Letter'') and Letter from T. Grant Callery, Executive Vice President and General Counsel, NASD, to Nancy M. Morris, Secretary, Commission, dated July 16, 2007 (''NASD Supplemental Response Letter''). NASD Dispute Resolution also filed two letters in response to comments. *See* Letter from Linda D. Fienberg, President, NASD Dispute Resolution, to the Public Members of SICA, dated January 26, 2007 (''NASD Dispute Resolution Letter I'') and Letter from Linda D. Fienberg, President, NASD Dispute Resolution, to Nancy M. Morris, Secretary, Commission, dated May 29, 2007 (''NASD Dispute Resolution Letter II''). NASD submitted an opinion of counsel regarding the approval by NASD members of proposed amendments to the NASD By-Laws and the amount of the payment to NASD members under Delaware Law. *See* Letter from William J. Haubert, Richards, Layton & Finger, to Nancy M. Morris, Secretary, Commission, dated July 16, 2007 (''RLF Letter''). NASD also submitted an opinion of counsel describing generally the case law, statutory provisions, and guidance published by the Internal Revenue Service (''IRS'') relevant to the disclosure in the NASD's proxy statement to members. *See* Letter from Mario J. Verdolini, Davis Polk & Wardwell, to Nancy M. Morris, Secretary, Commission, dated July 16, 2007 (''DPW Letter'').

[6] NYSE Group recently combined with Euronext N.V. (''Euronext'') to form a single, publicly traded holding company named ''NYSE Euronext.'' NYSE Group and Euronext became separate subsidiaries of NYSE Euronext. The corporate structure for the businesses of NYSE Group (including the businesses of the NYSE LLC and NYSE Arca, Inc., a registered national securities exchange) remained unchanged following the combination. Specifically, NYSE LLC remains a wholly-owned subsidiary of NYSE Group. NYSE Market remains a wholly-owned subsidiary of the NYSE LLC and conducts NYSE LLC's business. NYSE Regulation remains a wholly-owned subsidiary of NYSE LLC and performs the regulatory responsibilities for NYSE LLC pursuant to a delegation agreement with NYSE LLC and many of the regulatory functions of NYSE Arca pursuant to a regulatory services agreement with NYSE Arca. *See* Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007).

Commenters on the proposed rule change generally referred to NYSE Group as ''NYSE.''

[7] On March 7, 2007, NASD and NYSE Group filed notification reports with the Department of Justice and the Federal Trade Commission under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. NASD represented that the waiting period for such a filing expired on April 6, 2007. NASD also represented that it received a favorable ruling by the IRS that the Transaction would not affect the tax-exempt status of NASD or NASD Regulation. *See* NASD Supplemental Response Letter, *supra* note 5, at 3.

[8] A ''Governor'' is a member of the Board of Governors of the New SRO. *See* New SRO By-Laws, Article I(q).

[9] *See* New SRO By-Laws, Article XVI, Section 1.

[10] *Id.*

[11] *See* Article VIII of the NASD Regulation, Inc. By-Laws (''NASD Regulation By-Laws'').

[12] *See* New SRO By-Laws, Article VII, Section 10.

[13] A ''Public Governor'' means any Governor who is not the Chief Executive Officer of the New SRO or, during the Transitional Period, the CEO of NYSE Regulation, who is not an Industry Governor (as defined below) and who otherwise has no material business relationship with a broker or dealer or an SRO registered under the Exchange Act, other than as a public director of such an SRO. *See* New SRO By-Laws, Article I(tt).

[14] An ''Industry Governor'' is the Floor Member Governor (as defined below), the Independent Dealer/Insurance Affiliate Governor (as defined below), the Investment Company Affiliate Governor (as defined below) or any other Governor (excluding the CEO of the New SRO and, during the Transitional Period, the CEO of NYSE Regulation) who: (a) Is or has served in the prior year as an officer, director (other than as an independent director), employee or controlling person of a broker or dealer, or (b) has a consulting or employment relationship with or provides professional services to an SRO registered under the Exchange Act, or has had any such relationship or provided any such services at any time within the prior year. *See* New SRO By-Laws, Article I(t).

[15] *See infra* text accompanying notes 63 to 65 for a more detailed description of the Chair.

[16] During the Transitional Period, Mr. Ketchum, the current CEO of NYSE Regulation, would serve as the Chair so long as he remains a Governor. *See* New SRO By-Laws, Article XXII, Section 2(b).

[17] *See supra* note 13.

registered with members that employ 500 or more registered persons (''Large Firm Governors''); (b) one Governor who is registered with a member that employs at least 151 and no more than 499 registered persons (''Mid-Size Firm Governor''); (c) three Governors who are registered with members that employ at least one and no more than 150 registered persons (''Small Firm Governors'' and, together with the Large Firm Governors and the Mid-Size Firm Governors, ''Firm Governors''); (d) one Governor who is associated with a floor member (or a firm in the process of becoming a floor member) of the New York Stock Exchange (''Floor Member Governor''); [18] (e) one Governor who is associated with an independent contractor financial planning member firm or an affiliate of an insurance company (''Independent Dealer/Insurance Affiliate Governor''); [19] and (f) one Governor who is associated with an affiliate of an Investment Company (''Investment Company Affiliate Governor'').[20] During the Transitional Period, the three Small Firm Governors would be nominated by the NASD Board and elected by members that have at least one and no more than 150 registered persons, although members of that size also would have the right to nominate opposing candidates for the Small Firm Governor position. The one Mid-Size Firm Governor would be nominated jointly by the NYSE Group Board and the NASD Board and elected by members that have at least 151 and no more than 499 registered persons, although members of that size also can nominate opposing candidates for the Mid-Size Firm Governor position. The three Large Firm Governors would be nominated by the NYSE Group Board and elected by members that have 500 or more registered persons, although members of that size also can nominate opposing candidates for the Large Firm Governor position. In addition, the one Floor Member Governor would be appointed by the NYSE Group Board; the one Independent Dealer/Insurance Affiliate Governor would be appointed by the NASD Board; and the one Investment Company Affiliate Governor would be appointed jointly by the NYSE Group Board and the NASD Board.[21]

To implement the New SRO Board structure described above, the NYSE Group Board and the NASD Board would appoint the Public Governors and Industry Governors that they, either individually or jointly, have the power to appoint, effective as of the Closing. The Public Governors, the Floor Member Governor, the Investment Company Affiliate Governor, and the Independent Dealer/Insurance Affiliate Governor would hold office for the three-year Transitional Period. The three Small Firm Governors, three Large Firm Governors, and one Mid-Size Firm Governor would be elected as Governors at the first annual meeting of members of the New SRO following the Closing, which is expected to be held within ninety days after the Closing, and would hold office until the first annual meeting of members of the New SRO following the Transitional Period.[22] During the interim period from the Closing until the first annual meeting of members, the Small Firm Governor, Large Firm Governor, and Mid-Size Firm Governor seats would be filled by three interim Industry Governors appointed by the NASD Board from industry governors currently on the NASD Board, three interim Industry Governors appointed by the NYSE Group Board, and one interim Industry Governor jointly appointed by the NYSE Group Board and the NASD Board, in each case prior to the Closing.[23]

2. Composition of the New SRO Board after the Transitional Period

The composition of the New SRO Board would remain the same after the Transitional Period, except that the term of office of the CEO of NYSE Regulation as a member of the New SRO Board would automatically terminate at the end of the Transitional Period. Thus, the authorized number of members of the New SRO Board would be reduced by one.[24] Other changes after the Transitional Period are described below.

As of the first annual meeting of members following the Transitional Period, the Large Firm Governors, the Mid-Size Firm Governor, and the Small Firm Governors would be divided into three classes.[25] The composition of the classes would be arranged as follows:[26]

- First class: Consisting of one Large Firm Governor and one Small Firm Governor, who would be elected for a term of office expiring at the first succeeding annual meeting of members;
- Second class: Consisting of one Large Firm Governor, one Mid-Size Firm Governor, and one Small Firm Governor, who would be elected for a term of office expiring at the second succeeding annual meeting of members; and
- Third class: Consisting of one Large Firm Governor and one Small Firm Governor, who would be elected for a term of office expiring at the third succeeding annual meeting of members.

While these classes are designed to ensure staggered board seats, at no time would there be less than ten Industry Governor positions on the New SRO Board. At each annual election following the first annual meeting of members after the Transitional Period, Large Firm Governors, Small Firm Governors, and Mid-Size Firm Governors would be elected for a term of three years to replace those Governors whose terms have expired.[27] These Governors would serve until a successor is duly appointed and qualified, or until death, resignation, disqualification or removal. A Governor elected by the members may not serve more than two consecutive terms.

As of the first annual meeting of members following the Transitional Period, the Public Governors, the Floor Member Governor, the Independent Dealer/Insurance Affiliate Governor, and the Investment Company Affiliate Governor (''Appointed Governors'') would be divided by the New SRO Board into three classes, as equal in number as possible, with the first class holding office until the first succeeding annual meeting of members, the second class holding office until the second succeeding annual meeting of members, and the third class holding office until the third succeeding annual meeting of members. Each class would initially contain as equivalent a number as possible of Appointed Governors who

[18] *See* New SRO By-Laws, Article I(n).

[19] *See* New SRO By-Laws, Article I(r). *See infra* text accompanying note 213 for additional discussion regarding the definition of Independent Dealer/Insurance Affiliate Governor.

[20] *See* New SRO By-Laws, Article I(w). *See infra* text accompanying note 213 for additional discussion regarding the definition of Investment Company Affiliate Governor.

[21] *See* New SRO By-Laws, Article XXII, Sections 3 and 4.

[22] *Id.*

[23] *See* New SRO By-Laws, Article XXII, Section 2(a).

[24] Under New SRO By-Laws, Article VII, Section 4 (Composition and Qualification of the Board), the total number of Governors is determined by the Board of Governors, with such number being no fewer than 16 nor more than 25 Governors. The number of Public Governors must exceed the number of Industry Governors. As a practical matter, the New SRO Board cannot have fewer than 22 Governors due to the number of designated Industry Governor positions and the requirement that the number of Public Governors must exceed the number of Industry Governors. Thus, absent the filing of a proposed rule change under Section 19(b) of the Exchange Act, there would be a minimum number of ten Industry Governors, eleven Public Governors, plus the CEO of the New SRO. *See* NASD Response Letter, *supra* note 5, at 3.

[25] *See* New SRO By-Laws, Article VII, Section 5.

[26] *Id.*

[27] Governors would be elected by a plurality of the votes of the members of the New SRO present in person or represented by proxy at the annual meeting of the New SRO and entitled to vote for such category of Governors. *See* New SRO By-Laws, Article VII, Section 13.

were members of the New SRO Board appointed or nominated by the NYSE Group Board or are successors to such Governor positions, on the one hand, and Appointed Governors who were members of the New SRO Board appointed or nominated by the NASD Board or are successors to such Governor positions, on the other hand, to the extent the New SRO Board determines such persons are to remain Governors after the Transitional Period. At each annual election following the first annual meeting of members following the Transitional Period, Appointed Governors would be appointed by the New SRO Board for a term of three years to replace those whose terms expire. These Governors would serve until a successor is duly appointed and qualified, or until death, resignation, disqualification or removal. No Appointed Governor may serve more than two consecutive terms.[28]

B. Governor Vacancies

1. During the Transitional Period

As noted above, the CEO of NYSE Regulation would be a Governor and the Chair during the Transitional Period. In the event of a vacancy in the Governor position held by Mr. Ketchum (or his successor) during the Transitional Period, the new CEO of NYSE Regulation would serve as a Governor for the remainder of the Transitional Period. If Mr. Ketchum ceases to occupy the office of Chair for any reason during the Transitional Period, then his successor as Chair would be selected by the NYSE Group Committee,[29] from among its members, with the exception that those Governors who also serve as NYSE Group directors may not become Chair nor may Mr. Ketchum's successor as CEO of NYSE Regulation become Chair.[30]

In the event of any vacancy among the Large Firm Governors, the Mid-Size Firm Governor, or the Small Firm Governors during the Transitional Period, (a) Such vacancy would be filled, and nominations for persons to fill such vacancy would be made, by the NYSE Group Committee in the case of a Large Firm Governor vacancy; (b) such vacancy would be filled by the Board, and nominations for persons to fill such vacancy would be made by the New SRO's Nominating Committee in the case of a Mid-Size Firm Governor vacancy; and (c) such vacancy would be filled, and nominations for persons to fill such vacancy would be made by the NASD Group Committee [31] in the case of a Small Firm Governor vacancy.[32] In the event the remaining term of office of any such Governor is more than twelve months, nominations would be made as set forth above, but such vacancy would be filled by the New SRO members entitled to vote on such Governor position at a meeting of members called to fill the vacancy.[33]

In the event of any vacancy among the Floor Member Governor, the Investment Company Affiliate Governor, or the Independent Dealer/Insurance Affiliate Governor during the Transitional Period, (a) Such vacancy would be filled by, and nominations for persons to fill such vacancy would be made by the NYSE Group Committee in the case of a Floor Member Governor vacancy; (b) such vacancy would be filled by the New SRO Board, and nominations for persons to fill such vacancy would be made by the New SRO's Nominating Committee in the case of an Investment Company Affiliate Governor vacancy; or (c) such vacancy would be filled by, and nominations for persons to fill such vacancy would be made by, the NASD Group Committee in the case of an Independent Dealer/Insurance Affiliate Governor vacancy.[34]

In the event of any vacancy among those Public Governors appointed by the NYSE Group Board (or their successors), such vacancy would be filled by, and nominations for persons to fill such vacancy would be made by, the NYSE Group Committee. In the event of any vacancy among those Public Governors appointed by the NASD Board (or their successors), such vacancy would be filled by, and nominations for persons to fill such vacancy would be made by, the NASD Group Committee. In the event of any vacancy of the Public Governor position jointly appointed by the NYSE Group Board and the NASD Board (or their successors), such vacancy would be filled by the New SRO Board, and nominations for persons to fill such vacancy would be made by the New SRO's Nominating Committee.[35]

2. After the Transitional Period

In the event of any vacancy among the Large Firm Governors, the Mid-Size Firm Governor, or the Small Firm Governors, such vacancy would be filled by the Large Firm Governor Committee [36] in the case of a Large Firm Governor vacancy, the New SRO Board in the case of a Mid-Size Firm Governor vacancy, or the Small Firm Governor Committee [37] in the case of a Small Firm Governor vacancy; provided, however, that in the event the remaining term of office of any Large Firm, Mid-Size Firm, or Small Firm Governor position becomes vacant for more than twelve months, such vacancy would be filled by the members of the New SRO entitled to vote thereon at a meeting thereof convened to vote thereon.[38] Whether a vacancy is filled by the appropriate committee for a position that is vacant for twelve months or less or by election if the vacancy is greater than twelve months, nominations would be made by the Nominating Committee as described below.[39]

In the event of any vacancy among the Public Governors or among the Floor Member Governor, the Investment Company Affiliate Governor, or the Independent Dealer/Insurance Affiliate Governor after the Transitional Period, such vacancies would be filled by the New SRO Board from candidates recommended to the Board by the Nominating Committee.[40]

C. Committees of the New SRO Board

1. Committees Generally

a. *During the Transitional Period.*

During the Transitional Period, the New SRO is required to have the following committees of the Board [41]:

[28] *See* New SRO By-Laws, Article VII, Section 5.

[29] ''NYSE Group Committee'' means a committee of the New SRO Board composed of the five Public Governors and the Floor Member Governor appointed as such by the Board of NYSE Group, and the Large Firm Governors which were nominated for election as such by the Board of NYSE Group, and in each case their successors. *See* New SRO By-Laws, Article I(pp).

[30] *See* New SRO By-Laws, Article XXII, Section 2(b).

[31] ''NASD Group Committee'' means a committee of the New SRO Board composed of the five Public Governors and the Independent Dealer/Insurance Affiliate Governor appointed as such by the NASD Board in office prior to the Closing, and the Small Firm Governors which were nominated for election as such by the NASD Board in office prior to the Closing, and in each case their successors. *See* New SRO By-Laws, Article I(jj).

[32] *See* New SRO By-Laws, Article XXII, Section 3.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] ''Large Firm Governor Committee'' means a committee of the Board composed of all of the Large Firm Governors. *See* New SRO By-Laws, Article I(aa).

[37] ''Small Firm Governor Committee'' means a committee of the Board composed of all the Small Firm Governors. *See* New SRO By-Laws, Article I(yy).

[38] If a Governor is appointed to fill a vacancy of an elected Governor position for a term of less than one year, the Governor may serve up to two consecutive terms following the expiration of the Governor's initial terms. *See* New SRO By-Laws, Article VII, Section 5.

[39] *See* New SRO By-Laws, Article VII, Sections 5 and 9.

[40] *Id.* If a Governor is appointed to fill the vacancy of an Appointed Governor position for a term of less than one year, the Governor may serve up to two consecutive terms following the expiration of the Governor's initial terms. *See* New SRO By-Laws, Article VII, Section 5.

[41] *See* New SRO By-Laws, Article IX, Section 1(a). These committees play a role in the filling of

The NASD Group Committee; the NYSE Group Committee; the Small Firm Governor Committee, and the Large Firm Governor Committee. The New SRO also is required to have an Audit,[42] Finance,[43] and Nominating Committees and, during the first year of the Transitional Period, or as may be extended thereafter by the Board, an Integration Committee.[44] In addition, the New SRO would have an Investment Committee, which would not be a committee of the Board.[45]

Unless otherwise provided in the New SRO By-Laws, any other committee having the authority to exercise the powers and authority of the New SRO Board must have a number of Public Governors that is greater than the number of Industry Governors.[46] In addition, any committee of the New SRO Board having the authority to exercise the powers and authority of the Board (with the exception of the Large Firm Governor Committee, the Small Firm Governor Committee, the NASD Group Committee, and the NYSE Group Committee) also must have: (i) A percentage of members (to the nearest whole number of committee members) that are members of the NASD Group Committee at least as great as the percentage of Governors on the Board that are members of the NASD Group Committee; and (ii) a percentage of members (to the nearest whole number of committee members) that are members of the NYSE Group Committee at least as great as the percentage of Governors on the Board that are members of the NYSE Group Committee.[47]

The New SRO Board may appoint an Executive Committee which can exercise all the powers and authority of the New SRO Board in the management and affairs of the New SRO between meetings of the New SRO Board, subject to the limitations in the New SRO's Certificate of Incorporation[48] and applicable state law.[49] The Executive Committee would consist of no fewer than five and no more than eight Governors. The Executive Committee would include the CEO of the New SRO and the Chair of the New SRO Board.[50]

b. *After the Transitional Period.*

After the Transitional Period, the New SRO is required to have the following committees of the Board: The Small Firm Governor Committee and the Large Firm Governor Committee. New SRO also is required to have Audit, Finance, and Nominating Committees. The structure and composition of the Executive Committee, and any other committee having the authority to exercise the powers and authority of the Board, remains unchanged from that described above for the Transitional Period.

2. Nominating Committee

The Nominating Committee would be a committee of the New SRO Board and would replace the NASD's National Nominating Committee.[51]

a. *During the Transitional Period.*

For the first annual meeting following the Closing, nominations for the seven elected industry seats would not be made by the Nominating Committee. Instead, the NASD Board would make nominations for the Small Firm Governors positions, the NYSE Group Board would make nominations for the Large Firm Governors positions, and the NASD Board and NYSE Group Board jointly would make the nominations for the Mid-Size Firm Governor position.[52] In addition, prior to the Closing, the NASD Board would identify and appoint five Public Governors and the Independent Dealer/Insurance Affiliate Governor; the NYSE Group Board would identify and appoint five Public Governors and the Floor Member Governor; and the NASD Board and the NYSE Group Board would jointly identify and appoint one Public Governor and the Investment Company Affiliate Governor.[53]

During the Transitional Period, members of the Nominating Committee would be appointed jointly by the New SRO CEO and the CEO of NYSE Regulation as of Closing (or his duly appointed or elected successor as Chair of the New SRO Board), subject to ratification of the appointees by the New SRO Board.[54] The Nominating Committee would be responsible solely for nominating persons to fill vacancies in Governor positions for which the New SRO Board has the authority to fill, namely, the Mid-Size Firm Governor position, the Investment Company Affiliate Governor position, and the one Public Governor position that is initially appointed jointly by the NYSE Group Board and the NASD Board in office prior to the Closing.[55]

b. *After the Transitional Period.*

Following the Transitional Period, the members of the Nominating Committee would be determined by the New SRO Board.[56] At all times, the number of Public Governors on the Nominating Committee must equal or exceed the number of Industry Governors on the Nominating Committee.[57] In addition, the Nominating Committee must at all times be composed of a number of Governors that is a minority of the entire New SRO Board.[58] The New SRO CEO may not be a member of the Nominating Committee. The Nominating Committee would be responsible for nominating persons for appointment or election to the New SRO Board, as well as nominating persons to fill vacancies in appointed or elected Governor seats.[59]

vacancies on the Board and appointing the Chair of the Board of the New SRO. *See* New SRO By-Laws, Article XXII, Section 3.

[42] The Audit Committee would consist of four or five Governors, none of whom would be officers or employees of the New SRO. The Audit Committee would perform the following functions: (i) Ensure the existence of adequate controls and the integrity of the financial reporting process of the New SRO; (ii) recommend to the New SRO Board, and monitor the independence and performance of, the certified public accountants retained as outside auditors by the New SRO; and (iii) direct and oversee all the activities of the New SRO's internal review function, including, but not limited to, management's responses to the internal review function. *See* New SRO By-Laws, Article IX, Section 5.

[43] The Finance Committee would consist of four or more Governors, including the CEO of the New SRO. A Finance Committee member would hold office for a term of one year. The Finance Committee would advise the Board with respect to the oversight of the financial operations and conditions of the New SRO, including recommendations for the annual operating and capital budgets and proposed changes to the rates and fees charged by the New SRO. *See* New SRO By-Laws, Article IX, Section 6(a)–(c).

[44] The Integration Committee would have a term not to exceed one year from the Closing, unless continued for a longer period by resolution of the Board. The Chair of the Board would be the Chair of the Integration Committee unless, in the case of the Integration Committee continuing beyond one year after the Closing, otherwise determined by the Board. *See* New SRO By-Laws, Article IX, Section 7.

[45] The majority of the Investment Committee during the Transitional Period would be composed of members of the Investment Committee immediately prior to the Closing, unless otherwise determined by the NASD Group Committee, and a minority of the Investment Committee during the Transitional Period would be composed of members of the NYSE Group Committee. *See* New SRO By-Laws, Article IX, Section 6(d).

[46] *See* New SRO By-Laws, Article IX, Section 1(b).

[47] *Id.*

[48] NASD will be submitting a proposed rule change to amend its Certificate of Incorporation to reflect the New SRO By-Laws.

[49] *See* New SRO By-Laws, Article IX, Section 4(a).

[50] *See* New SRO By-Laws, Article IX, Section 4(b).

[51] *See* New SRO By-Laws, Article I(oo) and Article VII, Section 9.

[52] *See* New SRO By-Laws, Article XXII, Section 4.

[53] *See* New SRO By-Laws, Article XXII, Section 3.

[54] *See* New SRO By-Laws, Article XXII, Section 1.

[55] *See* New SRO By-Laws, Article XXII, Section 3.

[56] *See* New SRO By-Laws, Article VII, Sections 9(b) and 9(c).

[57] *See* New SRO By-Laws, Article VII, Section 9(b). At least 20% of the Nominating Committee is expected to be composed of Industry Governors. *See* NASD Response Letter, *supra* note 5, at 7.

[58] *Id.*

[59] *See* New SRO By-Laws, Article VII, Section 9(a).

D. Additional Changes

1. Annual Meetings

a. *During the Transitional Period.*

Except for the first annual meeting following the Closing at which Large Firm Governors, the Mid-Size Firm Governor, and Small Firm Governors would be elected, there would be no annual meetings of members during the Transitional Period.[60] At such first annual meeting, Small Firm members would be entitled to vote for the election of Small Firm Governors, Mid-Size Firm members would be entitled to vote for the election of the Mid-Size Firm Governor, and Large Firm members would be entitled to vote for the election of Large Firm Governors.[61]

b. *After the Transitional Period.*

An annual meeting of members of the New SRO would be held on a date and at a place as the New SRO Board designates.[62] The business of the annual meeting includes the election of the Small, Mid-Size, and Large Firm Governors of the New SRO Board. Small Firm members would be entitled to vote for the election of Small Firm Governors, Mid-Size Firm members would be entitled to vote for the election of the Mid-Size Firm Governor, and Large Firm members would be entitled to vote for the election of Large Firm Governors.

2. Chair

During the Transitional Period, the Chair would be the CEO of NYSE Regulation as of the Closing as long as he remains a Governor of the New SRO.[63] In the event the CEO of NYSE Regulation as of the Closing ceases to be the Chair during the Transitional Period, subject to the New SRO Certificate of Incorporation and the By-Laws, the Chair would be selected by the NYSE Group Committee from among its members, provided that the Chair so selected may not be a member of the Board of Directors of NYSE Group nor may the successor CEO of NYSE Regulation serve as Chair.[64]

After the Transitional Period, the Chair would be elected by the New SRO Board from among its members.[65]

3. Lead Governor

The New SRO Board would have a Governor who would preside over executive sessions of the New SRO Board in the event the Chair is recused (''Lead Governor'').[66]

a. *During the Transitional Period.*

During the Transitional Period, the Lead Governor would be selected by the New SRO Board, after consultation with the New SRO's CEO, but cannot be a member who is concurrently serving on the NYSE Group Board.[67] The New SRO Board, the CEO, the Chair, and the Lead Governor of the New SRO each would have the authority to call meetings of the New SRO Board.[68] Both the CEO and Chair, and for matters from which the CEO and Chair are recused from considering, the Lead Governor, would have the authority to place items on the New SRO Board agendas.[69]

b. *After the Transitional Period.*

After the Transitional Period, the New SRO Board would continue to have a Lead Governor who would preside over executive sessions of the New SRO Board in the event the Chair is not present or recused.[70] The Lead Governor would be elected by the Board but cannot be a member who is concurrently serving on the NYSE Group Board.[71] The New SRO Board, the New SRO CEO, the Chair, and the Lead Governor would have the authority to call meetings of the New SRO Board.[72] Both the New SRO CEO and the Chair, and for matters from which the New SRO CEO and the Chair are recused from considering, the Lead Governor, would have the authority to place items on the New SRO Board agenda.[73]

4. Definition of Disqualification

The New SRO By-Laws also include changes or additions to certain defined terms. In addition to changes to accommodate the New SRO's new governance structure, the proposed rule change would amend the definition of ''disqualification'' in the NASD By-Laws to conform to the federal securities laws, such that any person subject to a statutory disqualification under the Exchange Act also would be subject to disqualification under NASD rules.[74]

5. References to the NASD

In addition, NASD proposes other technical changes to its By-Laws. For example, each reference to ''NASD'' in the NASD By-Laws would be replaced with ''Corporation'' in contemplation of the change in the name of the Corporation. In addition, each reference to the ''Rules of the Association'' in the NASD By-Laws would be replaced with ''Rules of the Corporation.''

6. Proposed Changes to NASD Regulation By-Laws

In 2000, NASD created a subsidiary for its mediation and arbitration functions, NASD Dispute Resolution, pursuant to the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries (''Delegation Plan''). NASD proposes to make limited conforming changes to the NASD Regulation By-Laws solely to reflect the proposed governance structure of the New SRO Board.

First, in light of the new proposed composition of the New SRO Board, the proposed rule change would amend Section 5.2 of the NASD Regulation By-Laws (Number of Members and Qualifications of the National Adjudicatory Council (''NAC'')) to eliminate the reference that the Chairman of the NAC would serve as a Governor of the NASD Board for a one-year term. Second, because the Chairman of the NAC may continue to serve as a Director of the NASD Regulation Board, the proposed rule change would eliminate the requirement in Section 4.3 of the NASD Regulation By-Laws (Qualifications) that only Governors of the NASD Board are eligible for election to the NASD Regulation Board. Finally, NASD proposes to amend the statement in Section 4.3 of the NASD Regulation By-Laws that provides that the CEO of NASD would be an ex-officio non-voting member of the NASD Regulation Board, to reflect that Ms. Schapiro would occupy both the position of CEO of the New SRO and the President of NASD Regulation. In particular, the proposed rule change would clarify that where the CEO of the New SRO also serves as President of NASD Regulation, then the person would have all powers, including voting powers, granted to all other Directors of NASD Regulation pursuant to applicable law, the Certificate of Incorporation of NASD Regulation, the Delegation Plan, and the NASD Regulation By-Laws.

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[60] *See* New SRO By-Laws, Article XXI, Section 1.

[61] *Id. See also* New SRO By-Laws, Article XXII, Section 3.

[62] *Id. See also* New SRO By-Laws, Article XXI, Section 1.

[63] *See* New SRO By-Laws, Article XXII, Section 2(b).

[64] *Id.*

[65] *See* New SRO By-Laws, Article VII, Section 4(b).

[66] *See* New SRO By-Laws, Article I(bb) and Article VII, Section 4(b).

[67] *See* New SRO By-Laws, Article I(bb) and Article XXII, Section 1.

[68] *See* New SRO By-Laws, Article VII, Section 8.

[69] *Id.*

[70] *See* New SRO By-Laws, Article VII, Section 4(b).

[71] *See* New SRO By-Laws, Article I(bb).

[72] *See* New SRO By-Laws, Article VII, Section 8.

[73] *Id.*

[74] NASD represented that it will file a proposed rule change, which will be reviewed by the Commission pursuant to Section 19(b) of the Exchange Act, to address the applicable eligibility proceedings for persons subject to disqualification as a result of the proposed change in definition. *See* Notice, *supra* note 3.

III. Summary of Comments on the Proposal

The Commission received a total of 80 comment letters from 72 commenters on the proposal.[75] Seventeen commenters supported the proposed New SRO By-Laws,[76] some of whom believed that the consolidation proposal would streamline regulation and simplify compliance with a uniform set of regulations.[77] Forty-four commenters urged the Commission not to approve the proposal, generally arguing that the proposed New SRO By-Laws do not protect investors or provide enough representation for industry members or smaller member firms.[78] Three commenters supported the consolidation but opposed the New SRO By-Laws primarily because of the member voting provisions.[79] Other commenters were concerned about the fairness and independence of the arbitration process and the loss of an arbitration forum resulting from the consolidation which would allocate sole responsibility for arbitration and mediation to the New SRO.[80] One commenter provided copies of an amended complaint and an order relating to a lawsuit filed by an NASD member firm against NASD, NYSE Group and certain NASD officers.[81] Four commenters raised additional issues relating to the proposed rule change.[82] The commenters generally addressed issues falling into one or more of the categories discussed below.

A. Fair Representation

1. Classification of Member Governors

Some commenters argued that the New SRO should retain the NASD's current ''one firm, one vote'' election process, whereby each NASD member is currently entitled to vote for the election of all NASD Governors (other than the CEO of NASD, the President of NASD Regulation, the Chair of the NAC, and, if applicable, a second officer of NASD).[83] In this regard, several commenters argued that the proposal would dilute the voting rights of members in New SRO Board elections, particularly with respect to small member firms.[84] These commenters also expressed concern that the New SRO By-Laws would result in the New SRO's Board being dominated by the large firms at the expense of the views and concerns of the small firms.

One commenter stated that there has been insufficient review to address the concerns of small independent broker-dealers.[85] One commenter maintained that the current NASD By-Laws state that firms, not the number of representatives or revenues collected, dictate the ''one firm, one vote rule.''[86] Other commenters argued that the proposal is designed to prevent the voices of the small member firms from being heard[87] or to eliminate small firms by escalating the cost of doing business.[88] Commenters also believed that there is no rational connection between the ''one firm, one vote'' policy and the consolidation of regulatory rules and procedures, arguing that ''the NASD Board has used this regulatory consolidation * * * as a means of consolidating its power and, in turn, limiting the power of an institution that has wholly democratic origins.''[89]

The FSI, along with two other commenters, expressly supported the proposed New SRO By-Laws, noting that the New SRO By-Laws would provide for effective, diverse representation of all members of the securities industry on the New SRO Board.[90] These commenters believed that the proposal is a reasonable way to maintain proper representation on the

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[75] Exhibit A to this Order contains a list of comment letters received by the Commission on the proposal as of July 16, 2007, including the citations to the comment letters referenced in this Order.

[76] *See* Vanguard Letter, Kirk Letter, SIFMA Letter, Casady Letter, Moloney Letter, Stringer Letter, Alsover Letter, Johnstone Letter, Castiglioni Letter, Robertson Letter, Pictor Letter, NAIBD Letter, FSI Letter, Bakerink Letter, NSCP Letter, Mungenast Letter, and NASAA Letter.

[77] *See* Vanguard Letter, SIFMA Letter, Castiglioni Letter, FSI Letter, NSCP Letter, and Bakerink Letter.

[78] *See* Mortarotti Letter, Lek Letter, Darcy Letter, Jordan Letter, Blumenschein Letter, Kosinsky Letter, Roberts Letter, Botzum Letter, Busacca Letter, RKeenan Letters I & II, King Letter, Flater Letter, Hebert Letter, Schunk Letter, Arnold Letter, High Letter, Eitel Letters I & II, Cohen Letter, Vande Weerd Letter, Jester Letters I & II, Schultz Letter, Benchmark Letter, Benchmark/Standard Letter I, de Leeuw Letter, Elish Letter, Hanson Letter, Horney Letter, Mayfield Letter, Solomon Letter, Patterson Letter, Daily Letter, Cray Letter, Biddick Letter, Penrod Letter, Spindel Letter, Isolano Letter, Lundgren Letters I & II, Haney Letter, Schooler Letter, Callaway Letter, John Q Letter, Miller Letters, JKeenan Letter, and Massachusetts Letter.

[79] *See* Kramer Letter, IASBDA Letter, and Wachtel Letter.

[80] *See e.g.*, Public Members of SICA Letter, Greenberg Letters I & II, and Caruso Letter. One commenter who objected to the consolidation also argued that investor rights would be reduced by cutting the number of arbitration venues in half. *See* Lundgren Letter I. As discussed below, NASD Dispute Resolution responded directly to one commenter. *See* NASD Dispute Resolution Letter I, *supra* note 5.

[81] *See* Johnny Q Member Letters I & II. The Commission also received a letter on behalf of Benchmark Financial Services, Inc. (''Benchmark'') and Standard Investment Chartered, Inc. (''Standard''), forwarding certain documents and pleadings relating to the lawsuit filed by Standard against the NASD, the NYSE, and three individuals defendants (Mary L. Schapiro, NASD's CEO; Richard F. Brueckner, Presiding Governor of the NASD Board of Governors; and Barbara Z. Sweeney, NASD's Senior Vice President and Corporate Secretary) (collectively, with NASD and NYSE, the ''Defendants'') in the U.S. District Court for the Southern District of New York (''Standard Lawsuit''). *See* Benchmark/Standard Letter I.

The Court recently granted the Defendants' motion to dismiss, finding that Standard had failed to exhaust its administrative remedies. *See Standard Investment Chartered, Inc.* v. *National Association of Securities Dealers, Inc.*, No. 07–CV–2014 (S.D.N.Y.), 2007 WL 1296712 (May 2, 2007). On July 13, 2007, the Court denied Standard's motion for reconsideration. *See Standard Investment Chartered, Inc.* v. *National Association of Securities Dealers, Inc.*, No. 07–CV–2014 (S.D.N.Y.) (July 13, 2007) (denying Plaintiff's Motion for Reconsideration of the Court's May 2, 2007 Opinion and Order). Standard's complaint alleged seven state law claims: (1) That the individual Defendants breached fiduciary duties to the proposed class in negotiating the proposed Transaction and failing to disclose all material facts in the proxy statement; (2) that the Defendants engaged in negligent misrepresentation with respect to the proxy statement; (3) that the NYSE and the individual Defendants will be unjustly enriched by the Transaction; (4) that NASD members have been denied their right to elect Governors of the NASD in violation of Section 211 of the Delaware General Corporation Law, 8 Del. C. section 211(a); (5) that the Defendants have improperly converted or, if the Transaction is effected, will have taken the prospective class members' assets and/or ''Member's Equity''; (6) that the Defendants have caused a substantial diminution in the value of NASD membership, with imminent completion of such diminution; and (7) that the Defendants have deprived the prospective class members of their voting membership.

[82] *See* Harriman-Thiessen Letter (requesting that the Commission determine why NASD member firms voted the way they did), Judith Schapiro Letter (*see* text accompanying *infra* note 105), Schriner Letter (not opposed to reducing regulatory redundancies but believes that the proposed combination does not satisfy standards of ''just and equitable principles of fair trade''), and Hawks Letter (*see infra* note 88).

[83] *See* Lek Letter, Kosinsky Letter, Roberts Letter, RKeenan Letter II, Miller Letters, Blumenschein Letter, Eitel Letter II, de Leeuw Letter, Elish Letter, Patterson Letter, Callaway Letter, Isolano Letter, Hebert Letter, Biddick Letter, John Q Letter, and Schriner Letter.

[84] *See* Mortarotti Letter, Jordan Letter, Roberts Letter, Botzum Letter, Arnold Letter, High Letter, Eitel Letter I, Cohen Letter, JKeenan Letter, Schultz Letter, Benchmark Letter, Benchmark/Standard Letter I (adding Standard to the Benchmark Letter to be an additional objector), Solomon Letter, Isolano Letter, Haney Letter, Callaway Letter, Cray Letter, Blumenschein Letter, Biddick Letter, and Wachtel Letter.

[85] *See* Horney Letter.

[86] *See* Blumenschein Letter.

[87] *See* Callaway Letter.

[88] *See* Haney Letter (defining ''small'' firms as those firms with one to ten representatives). Four commenters were concerned about burdensome regulation of small broker-dealers generally. *See* Penrod Letter (stating that small broker-dealers might be better off forming another organization designed for small broker-dealers), Hawks Letter, Roberts Letter, and Callaway Letter.

[89] *See* Benchmark Letter and Benchmark/Standard Letter I (adding Standard to the Benchmark Letter to be an additional objector). The Benchmark Letter also noted that it does not dispute that the regulatory consolidation has some merit. *See also* Busacca Letter (arguing that there was no specific reason given by the NASD or NYSE for ''member firms * * * surrender[ing] their right to vote for their Board of Governors'').

[90] *See* Castiglioni Letter, FSI Letter, and Bakerink Letter.

New SRO Board. The FSI also believed that the New SRO's governance structure is designed to insure that neither the largest nor the smallest broker-dealer firms can dominate the New SRO Board.[91] Another commenter, which identified itself as a small broker-dealer, supported the proposal and argued that small members would have increased representation on the New SRO Board as a result of the increase in their representation to three seats from the current one seat.[92]

2. Appointed Governors

Commenters were concerned that the majority of the Governors serving on the New SRO Board would be appointed by the New SRO Board itself and would not be elected by member firms.[93] Similarly, some commenters objected to members no longer having the right to vote for all Governors.[94] In addition, one commenter argued that the New SRO Board structure could create a ''self-perpetuating'' club in which the New SRO Board's Governors would not be held accountable to serve the members' needs.[95]

Some of these commenters maintained that the appointment of Governors is contrary to good corporate governance and questioned the independence and accountability of the appointed Governors.[96] Another commenter was concerned that the Public Governors would be appointed by the securities industry representatives on the Board.[97] This commenter believed that Public Governors should be chosen by the investing public or their representatives which would ensure that the views of investors would be heard and that their interests would be protected.[98]

3. Industry Representation

A number of commenters objected to the proposed composition of the New SRO Board for failing to include more industry representatives to serve as Governors.[99] These commenters stated that the ten Governor positions allocated to industry representatives are insufficient. These commenters also opined that the lack of industry representatives on the Board would defeat the purpose of self-regulation.

In contrast, one commenter stated that the New SRO Board structure would have too many industry representatives and not enough Public Governors.[100] This commenter noted that, because the New SRO Board would include ten Industry Governors as well as representatives of the NASD and NYSE Group on an *ex officio* basis, Governors who are from the securities industry would outnumber the Public Governors on the New SRO Board. Another commenter added that, because the current NASD definition of Public Governors would be amended, any ex-industry official or ex-industry regulator would be eligible to be a Public Governor, thereby biasing the New SRO Board toward industry interests.[101]

Several commenters supported the regulatory consolidation, noting that the proposed amendments are intended to maintain adequate representation on the New SRO Board for industry members.[102] Two commenters noted that the proposed composition of the industry members on the New SRO Board and in New SRO Board committees appears to promote diversity among industry representation on the Board.[103] Another commenter indicated that balanced representation of industry and non-industry members, as well as large and small firms, would reflect a broad spectrum of industry experience and would preserve the constructive feedback of non-industry participants.[104]

One commenter noted confusion about the proposed rule change regarding the eligibility for the ''Independent Dealer/Insurance Affiliate Governor'' and ''Investment Company Affiliate Governor'' positions.[105]

B. State Law and Proxy

1. Timing

Several commenters claimed that the proxy process was rushed, which forced members to make quick and uninformed decisions.[106] Other commenters stated that the proxy process was deceptive because it was held over the holiday season and involved alleged procedural omissions and coercive tactics by the NASD, including the threat of Commission action if the By-Law revisions were not approved.[107] Another commenter did not dispute the results of the vote but expressed concerns about the lack of discussion of alternative ways to structure the New SRO Board.[108]

In addition, a few commenters claimed that the NASD did not present the New SRO By-Laws to the NASD membership for a vote quickly enough, thereby violating current NASD By-Laws that require a membership vote within 30 days of the submission of the proposal to the membership.[109]

2. Disclosure

Several commenters questioned the adequacy of the proxy statement.[110] These commenters indicated that oral statements made by NASD staff were not contained in the proxy statement, such as representations that the Commission would force consolidation in the event the members did not support the proposal[111] and that the NYSE required the New SRO By-Law provisions.[112] Two other commenters stated that the proxy statement failed to explain why the merger is connected to the governance changes, specifically the one firm, one vote policy.[113] These commenters also believed that the transaction is unfair to the NASD members who are not also NYSE members.[114] Another commenter objected to the proposed payments to the NYSE and believed that proposed

[91] *See* FSI Letter.

[92] *See* Moloney Letter.

[93] *See* Lek Letter, RKeenan Letters I & II, Hebert Letter, Mayfield Letter, Blumenschein Letter, Eitel Letter II, de Leeuw Letter, Elish Letter, Patterson Letter, Schriner Letter, Roberts Letter, and Biddick Letter.

[94] *See* Kramer Letter and Hebert Letter.

[95] *See* Wachtel Letter.

[96] *See* Mayfield Letter, Isolano Letter, Hebert Letter, Wachtel Letter, and Lek Letter.

[97] *See* Massachusetts Letter.

[98] *Id.*

[99] *See, e.g.*, Roberts Letter, Busacca Letter, Blumenschein Letter, and Miller Letters.

[100] *See* Massachusetts Letter.

[101] *See* Blumenschein Letter.

[102] *See* NAIBD Letter, Vanguard Letter, Moloney Letter, and FSI Letter.

[103] *See* NAIBD Letter and FSI Letter.

[104] *See* Vanguard Letter.

[105] *See* Judith Schapiro Letter.

[106] *See* Mortarotti Letter, Jordan Letter, Busacca Letter, Schunk Letter, and Cray Letter.

[107] *See* Benchmark Letter, Benchmark/Standard Letter I (adding Standard to the Benchmark Letter to be an additional objector), Daily Letter, Cray Letter, Eitel Letter I, Miller Letters, and John Q Letter.

[108] *See* IASBDA Letter.

[109] *See* Jester Letter I, Miller Letters, and Blumenschein Letter. In response to the NASD Response Letter, Jester submitted a supplemental comment letter, asserting that the NASD was still required to comply with Article XVI of the NASD By-Laws which requires that By-Law amendments must be approved within 30 days of the submission of the proposal to the membership, even if the By-Law amendments are approved at a special meeting. *See* Jester Letter II.

[110] *See* Darcy Letter, Roberts Letter, Busacca Letter, Benchmark Letter, Benchmark/Standard Letter I (adding Standard to the Benchmark Letter to be an additional objector), Benchmark/Standard Letter II, Cray Letter, Spindel Letter, and Schriner Letter.

[111] *See* Roberts Letter, Blumenschein Letter, Eitel Letter II, de Leeuw Letter, Elish Letter, Patterson Letter, Biddick Letter, Wachtel Letter, Isolano Letter, and Miller Letters.

[112] *See* Wachtel Letter.

[113] *See* Benchmark Letter and Benchmark/Standard Letter I (adding Standard to the Benchmark Letter to be an additional objector). Some commenters also noted that they were unable to get answers to their questions about the consolidation from the NASD. *See, e.g.*, Miller Letters.

[114] *Id.*

consolidation needed more study by the current NASD members.[115]

3. Payment of $35,000

Several commenters questioned the calculation and origin of the $35,000 one-time payment to the NASD members.[116] Two commenters specifically posited whether the representation by the NASD that the payment came from reduced costs is misleading.[117] Other commenters expressed concern that the $35,000 amount appears arbitrary and may have been calculated based on financial information the NASD knows about its member firms.[118] One commenter believed that the $35,000 is a fraction of the value of the NASD,[119] while other commenters wanted an explanation as to why a larger payment to members is not possible.[120] One of these commenters submitted a supplemental comment letter in response to the discussion of the proposed $35,000 payment to NASD members in the NASD Response Letter.[121] This commenter stated that, from the perspective of an NASD member, the focus of the proxy statement was ''the fundamental change in members' voting rights and the $35,000 that each member is to receive in exchange for 'surrendering' members' equity valued at as much as $300,000, or more, per NASD member.'' [122] The commenter believed that the discussion of the $35,000 in the proposed rule change was inadequate, and stated that the Commission ''should disapprove the rule change, re-notice the issue properly or limit its findings to the issues it noticed.'' [123]

Some commenters questioned whether the payment was an improper inducement to members in order to obtain their vote.[124] One commenter expressed its concern that NASD member firms would receive funds for voting in favor of the consolidation, while public investors would not receive any financial benefit from the anticipated cost savings.[125] Commenters also inquired whether a fairness opinion was done in connection with the consolidation or the $35,000 payment [126] and whether the Internal Revenue Service gave a legal opinion on this payment.[127]

Two commenters believed that the monetary aspect of the proposed consolidation is simply a return of monies to the members for increased efficiency.[128] One of these commenters, which identified itself as a small NASD member firm, believed that the $35,000 payment would benefit many of the small firms financially.[129] This commenter did not believe that members' votes were bought or that members had given up voting rights because members retain a vote on any future By-Law changes.[130]

4. Delaware Law

One commenter argued that the proposal violates Delaware law because the omission in the proxy materials of the merger contract between NYSE and NASD makes the transaction illegal.[131] This commenter further believed that the proposed merger may have violated Delaware law by providing a proxy statement that allegedly had conclusory, one-sided statements.[132]

Another commenter argued that NASD violated Delaware law because it has not held an annual meeting in 13 months, which, according to the commenter, is required under Delaware law.[133] Another commenter stated that the proposed combination, ''by combining under current unknown By-Laws,'' violates the NASD's charter as stated on August 7, 1936.[134]

5. Antitrust Laws

Some commenters posited that the proposal violates antitrust laws.[135]

C. Efficiency and Investor Protection

1. Efficiency

Some commenters explicitly questioned the benefits of the proposed consolidation.[136] Three commenters argued that the consolidation would benefit mainly the larger firms;[137] two commenters noted specifically that firms should not have to incur costs to make changes in advertising, letterhead, and signage because the proposal mainly would benefit the larger firms.[138] Several commenters argued that the proposal would benefit the larger firms, while being disruptive to small broker-dealers.[139]

One commenter did not believe that the merger would be effective in reducing duplicative regulation because there are only about 170 firms subject to both NASD and NYSE rules.[140] The commenter believed that it would be easier for those 170 firms to be regulated by NYSE than to effect the consolidation solely for the benefit of those 170 firms.[141] One commenter argued that the merger is unnecessary because most firms already belong to the NASD.[142]

Commenters who supported the proposal believed that the proposed consolidation would benefit investors by streamlining regulation and simplifying compliance with a uniform set of regulations [143] or by increasing efficiency.[144] In this regard, some of these commenters believed that the use of two distinct rulebooks has caused unnecessary redundancy, complication, and conflict, which in their view undermines basic SRO objectives of effectively and efficiently protecting the capital markets and investors.[145] In addition, two commenters believed that combining the conflicting rules of the two SROs into one set of rules and

[115] *See* Kramer Letter.

[116] *See* Kosinsky Letter, Busacca Letter, Benchmark Letter, Benchmark/Standard Letter I (adding Standard to the Benchmark Letter to be an additional objector), Benchmark/Standard Letter II, Daily Letter, Miller Letters, Wachtel Letter, John Q Letter, and Schriner Letter.

[117] *See* Busacca Letter and Schriner Letter.

[118] *See* Isolano Letter, Blumenschein Letter, Eitel Letter II, de Leeuw Letter, Elish Letter, Patterson Letter, and Biddick Letter.

[119] *See* Lundgren Letter I.

[120] *See* Benchmark Letter, Benchmark/Standard Letter I (adding Standard to the Benchmark Letter to be an additional objector), and Benchmark/Standard Letter II.

[121] *See* Benchmark/Standard Letter II.

[122] *Id.* (also noting that at least 22 comments mentioned or raised issues relating to the $35,000 payment, which, according to the commenter, ''clearly demonstrate the materiality of the representations about the $35,000 payment'').

[123] *Id.*

[124] *See* Eitel Letter II, Blumenschein Letter, Busacca Letter, Isolano Letter, Spindel Letter, Elish Letter, de Leeuw Letter, Patterson Letter, and Biddick Letter.

[125] *See* Caruso Letter.

[126] *See* Cohen Letter, Lundgren Letter I, and Miller Letters.

[127] *See* Daily Letter.

[128] *See* Moloney Letter and FSI Letter.

[129] *See* Moloney Letter.

[130] *Id.*

[131] *See* Cray Letter.

[132] *Id.*

[133] *See* John Q Letter.

[134] *See* Blumenschein Letter.

[135] *See* Blumenschein Letter, Eitel Letter II, de Leeuw Letter, Elish Letter, Patterson Letter, and Biddick Letter.

[136] *See* RKeenan Letter I, Mayfield Letter, and Schooler Letter.

[137] *See* Vande Weerd Letter, Isolano Letter, and Eitel Letter II.

[138] *See* Flater Letter (also noting that the $35,000 payment does not cover the cost of these changes) and Vande Weerd Letter.

[139] *See* Schooler Letter, Biddick Letter, de Leeuw Letter, Eitel Letter II, Elish Letter, Blumenschein Letter, Isolano Letter, and Patterson Letter.

[140] *See* Spindel Letter.

[141] *Id.*

[142] *See* Hebert Letter.

[143] *See* Vanguard Letter, SIFMA Letter, Stringer Letter, Bakerink Letter, NSCP Letter, and FSI Letter. In addition, six commenters stated their agreement with SIFMA's Letter. *See* Casady Letter, Alsover Letter, Johnstone Letter, Robertson Letter, Mungenast Letter, and Pictor Letter.

[144] *See* Moloney Letter, Kirk Letter, Castiglioni Letter, and NAIBD Letter.

[145] *See* Vanguard Letter, SIFMA Letter, and NSCP Letter. In addition, seven commenters stated their agreement with SIFMA's Letter. *See* Casady Letter, Alsover Letter, Johnstone Letter, Robertson Letter, Mungenast Letter, Stringer Letter, and Pictor Letter.

eliminating inconsistent interpretations would be benefit both large and small firms.[146]

2. Investor Protection

Some commenters noted that having one less regulator overseeing the securities firms that deal with the public would harm investors.[147] One commenter likened the regulatory consolidation to reducing the number of ''police departments'' that oversee the markets.[148] Another commenter stated that the proposal would remove any competitiveness between the two SROs and any choice that firms would have.[149] Yet another commenter added that having two independent regulatory entities would create advantages from a regulatory point of view.[150] This commenter noted that the NASD and NYSE are able to bring distinct perspectives to regulating their member firms and that such independence is vital to preventing SROs and other regulators from becoming myopic about certain regulatory issues. On the other hand, one commenter believed that the proposed structure would offer the best opportunity for balanced and effective regulation in furtherance of customer protection.[151]

Other commenters believed that the proposal overlooked investor interests because of the failure to include investors in the merger talks,[152] the lack of accountability and control over NASD/NYSE management by owners,[153] and the conflict of interest on the part of the NASD management because of benefits they may receive in connection with the merger.[154] Other commenters questioned the effectiveness of the regulatory oversight of a board whose members are directly funded by the persons they are regulating.[155]

D. Arbitration

Five commenters focused on the effects the merger may have on the arbitration of customers' disputes with their brokers.[156] One commenter urged the Commission to disapprove the merger, stating that it would reduce investor rights ''by cutting the number of major available arbitration venues in half.''[157] Another recommended that the Commission consider holding public hearings to discuss anticipated benefits and detriments of consolidating the NASD and NYSE dispute resolution forums before approving the merger.[158]

One commenter expressed the view that a single SRO arbitration forum will heighten public investors' suspicion that SRO arbitration is ''less than independent and hence less than fair.'' [159] This commenter suggested either creating an ''independent securities arbitration forum, with SEC oversight and public investor and securities industry participation'' or providing that public investors may choose between resolving their disputes in court or in arbitration. In addition, this commenter stated that the role of the Securities Industry Conference on Arbitration (''SICA'') should be strengthened and that public members should compose at least one half of the voting members of SICA.

Another commenter cited those views with approval, stating that combining the NASD and NYSE arbitration forum is ''not desirable'' and called for changes in the arbitration system ''to make it fairer to investors'' including the elimination of ''industry'' arbitrators.[160] This commenter also expressed concern about the use of dispositive motions in SRO arbitration and stated that the New SRO should incorporate the relevant NYSE rule rather than the NASD rule in its arbitration code.

One commenter noted that the NASD and NYSE forums have different rules, procedures, and administrative practices, and stated this ''can often have a significant procedural impact on an arbitration proceeding.'' [161] Expressing skepticism that a single forum will provide ''any recognizable benefits'' for public customers, this commenter stated that a ''notable portion of the anticipated cost savings'' from the regulatory consolidation should be allocated toward the reduction of public investors' filing, administrative and forum fees.

As discussed more fully below, NASD responded to comments, in part, by citing studies and reports analyzing its arbitration forum, and noting that it is subject to SEC oversight, including through inspections and the rule approval process.[162] One commenter questioned the methodology and impartiality of the studies and reports, as well as the efficacy of SEC oversight.[163] This commenter also noted that he had filed a petition for rulemaking with the Commission calling for a number of changes in arbitration rules and stated that these changes would ''correct many aspects of the arbitration process, which make the process unfair to the investing public.'' [164]

E. Other Matters

1. Request for Delay

Several commenters argued that the proposal should be put on hold for one year,[165] while two other commenters [166] suggested tabling the proposal until after the resolution of the Standard Lawsuit.[167] Another commenter suggested that the Commission could approve the consolidation but require another vote in three years on the composition of the New SRO Board, after the firms and the public have had a chance to evaluate the effects of the merger.[168] This commenter did not express concern about the voting results

[146] *See* Bakerink Letter and Vanguard Letter.

[147] *See* King Letter, Eitel Letter II, de Leeuw Letter, Elish Letter, Patterson Letter, Biddick Letter, and Massachusetts Letter.

[148] *See* King Letter.

[149] *See* Schooler Letter.

[150] *See* Massachusetts Letter.

[151] *See* FSI Letter.

[152] *See* King Letter. One commenter who supported the consolidation urged that compliance professionals be included in the consolidation process. *See* NSCP Letter.

[153] *See* Lundgren Letter I.

[154] *See* Lundgren Letter II, Eitel Letter II, de Leeuw Letter, Biddick Letter, Elish Letter, Isolano, and Patterson Letter. Several commenters also questioned the compensation packages of the NASD management. *See, e.g.*, Isolano Letter, Mayfield Letter, and Daily Letter.

[155] *See* Biddick Letter, de Leeuw Letter, Eitel Letter II, Elish Letter, Isolano Letter, and Patterson Letter.

[156] *See* Caruso Letter, Greenberg Letters I & II, Lundgren Letter, Massachusetts Letter, and Public Members of SICA Letter.

[157] *See* Lundgren Letter.

[158] *See* Caruso Letter.

[159] *See* Public Members of SICA Letter.

[160] *See* Massachusetts Letter.

[161] *See* Caruso Letter.

[162] *See* NASD Dispute Resolution Letter, *supra* note 5.

[163] *See* Greenberg Letters I & II.

[164] *Id. See also* Request for rulemaking under the Securities Exchange Act of 1934 concerning arbitration sponsored by NASD Dispute Resolution, Submitted by Les Greenberg, Esq., File No. 4–502 (May 13, 2005).

[165] *See* Busacca Letter. Three commenters argued that the proposal should be put on hold and membership should be consulted and given the opportunity for input. *See also* Miller Letters, Kramer Letter, and Hebert Letter.

[166] *See* Benchmark Letter and Benchmark/Standard Letter I (adding Standard to the Benchmark Letter to be an additional objector).

[167] The Court recently granted the Defendants' motion to dismiss, finding that Standard had failed to exhaust its administrative remedies. *See Standard Investment Chartered, Inc.* v. *National Association of Securities Dealers, Inc.*, No. 07–CV–2014 (S.D.N.Y.), 2007 WL 1296712 (May 2, 2007). According to the Benchmark/Standard Letter II, the Plaintiffs filed a motion for reconsideration on May 17, 2007. *See supra* note 81. On July 13, 2007, the Court denied Standard's motion for reconsideration. *See Standard Investment Chartered, Inc.* v. *National Association of Securities Dealers, Inc.*, No. 07–CV–2014 (S.D.N.Y.) (July 13, 2007) (denying Plaintiff's Motion for Reconsideration of the Court's May 2, 2007 Opinion and Order).

[168] *See* IASBDA Letter. This commenter argued that a reassessment in three years might ''possibly calm the concerns of a large number of small firms. . .which feel disenfranchised by a process that shows no discussion of alternatives.''

but about the lack of any discussion of other alternatives to the New SRO Board's composition.[169]

Other commenters believed that the proposed regulatory consolidation should occur as soon as practicable or in the timeframe announced by the NASD and NYSE Group.[170] One of these commenters believed that the regulatory consolidation should proceed because a majority of the members already have given their approval to the proposed regulatory consolidation.[171]

2. Public Hearing

Two commenters urged the Commission to consider the proposal at a public hearing.[172] As noted above, one of these commenters recommended that the Commission consider holding public hearings to discuss anticipated benefits and detriments of consolidating the NASD and NYSE dispute resolution forums before approving the consolidation.[173] Another commenter stated that the Commission and government oversight committees should be part of the discussion of the consolidation.[174]

IV. NASD Response to the Comment Letters

NASD submitted two letters to respond to issues raised by the commenters, including the proposed governance structure, the proxy statement, the approval process for the By-Law amendments, and the $35,000 payment.[175] NASD also submitted two letters providing opinions of counsel with respect to the approval process of the By-Law amendments and the $35,000 payment.[176] In two separate letters, NASD Dispute Resolution responded to comments regarding the effects of the consolidation on arbitration of customers' disputes with member firms.

A. Fair Representation

NASD stated that the proposed rule change was designed to provide a ''carefully balanced and calibrated governance structure that was approved by a majority of the membership,'' rather than the existing NASD governance structure preferred by a number of commenters.[177] NASD stated that the proposed By-Law changes satisfy the statutory requirement for ''fair representation'' pursuant to Section 15A(b)(4) of the Exchange Act.[178]

1. Industry Representation and Classification of Governors

In response to commenters who contended that the New SRO Board would have insufficient industry representation, NASD stated that the proposal ''ensures substantial industry representation, while still maintaining the overall independence of the New SRO Board and the numerical dominance of Public Governors'' and ''comfortably fits within the parameters the Commission has previously articulated to comply with the fair representation requirement.'' [179] Specifically, NASD noted that 40% of the New SRO Board would be composed of industry representatives.[180] NASD also noted that the member representation on the New SRO Board would exceed the member representation of The NASDAQ Stock Market LLC (''Nasdaq'') (whose Board is composed of 20% member representatives), NYSE LLC (whose Board is wholly independent), NYSE Regulation (whose Board is wholly independent [181]), and would be comparable to member representation of the Chicago Stock Exchange (''CHX'') (twelve directors, of which five are ''participants'') and the International Securities Exchange LLC (''ISE'') (14 directors, of which six are market participants allocated by business types).[182]

In response to commenters who stated that the proposed rule change would abolish the current ''one-member-one-vote'' governance structure and the existing right to elect all of the NASD Board seats (with the exception of the Chair of the National Adjudicatory Council and the NASD CEO, who hold seats based on position), NASD stated that the proposed governance structure ensures diversity of member representation on the New SRO Board by guaranteeing certain seats for different size firms and those with particular business models.[183] In this regard, NASD noted that small firm representation would increase from one to three guaranteed seats.[184] NASD also noted that the ''proposed composition of and selection process for the Small Firm Governors and Large Firm Governors are identical, ensuring fairness and balance between those firms that make up the largest percentage of membership and those firms that employ the largest percentage of the registered representative population.''[185]

NASD noted that the ''New SRO intends to maintain additional member involvement in the administration of the New SRO's affairs through representation on District Committees, Standing Committees, the Advisory Council (consisting of the Chairs of the District Committees and the Market Regulation Committee), the Small Firm Advisory Board, disciplinary panels and the National Adjudicatory Council.'' [186] NASD also noted that the amended By-Law changes would maintain a one-member-one-vote-system for all future By-Law changes.[187]

Finally, NASD noted its belief that the presence of no fewer than eleven Public Governors, none of which may have a material relationship with a broker or dealer or registered SRO, satisfies the requirement to have at least one director representative of issuers and investors.[188]

2. Appointed Governors

In response to commenters who objected to the number of Governors who would be appointed rather than elected, NASD believed that these commenters failed to appreciate that the proposed governance structure ''strikes a balance between the necessity of overall independence and the desire for substantial, meaningful and diverse industry representation.'' [189] NASD noted that the proposal provides for the

[169] *Id.* A commenter suggested that, in lieu of this proposed rule change, it would be ''easier for those firms that are currently regulated by NYSE to simply not be regulated by NASD at all and to instead be regulated by NYSE staff using current SEC and NYSE rules which could be supplemented by NYSE adopting many of the current NASD rules to which the large New York Stock Exchange member organizations must currently comply, since they are also NASD members.'' *See* Spindel Letter.

[170] *See* Johnstone Letter, Casady Letter, SIFMA Letter, Moloney Letter, Stringer Letter, Alsover Letter, Robertson Letter, and Pictor Letter.

[171] *See* Moloney Letter.

[172] *See* Harriman-Thiessen Letter and Caruso Letter.

[173] *See* Caruso Letter.

[174] *See* Darcy Letter.

[175] *See* NASD Response Letter and NASD Supplemental Response Letter, *supra* note 5.

[176] *See* RLF Letter and DPW Letter, *supra* note 5.

[177] NASD Response Letter, *supra* note 5, at 4.

[178] *Id.* at 4–5.

[179] *Id.* at 5.

[180] *Id.*

[181] The Commission notes that all of the directors on the Board of NYSE Regulation, with the exception of the Chief Executive Officer, must qualify as independent under the independence policy of the board of directors of NYSE Euronext. *See* Second Amended and Restated By-Laws of NYSE Regulation, Inc., Article III, Section 1.

[182] NASD Response Letter, *supra* note 5, at 5–7. In addition to the 14 directors cited in the NASD Response Letter, the Commission notes that the President and CEO of ISE also serves on the ISE Board of Directors for a total of 15 directors. *See* ISE Constitution, Article III, Section 3.2.

[183] NASD Response Letter, *supra* note 5, at 5.

[184] *Id.*

[185] *Id.*

[186] *Id.* at 6.

[187] *Id.* at 5.

[188] *Id.*

[189] *Id.* at 6.

''Small Firm, Mid-Size Firm, and Large Firm Governors to be elected by firms of corresponding size, each with an equal vote.'' NASD also noted that the proposal exceeds the representation and participation requirements of other SROs whose governance rules have previously been approved by the Commission. Specifically, NASD noted that the business combination between New York Stock Exchange, Inc. (''NYSE Inc.'') and Archipelago Holdings, Inc. satisfied a parallel fair representation standard pursuant to Section 6(b)(3) of the Exchange Act with the requirement that members could elect 20% of the boards of New York Stock Exchange LLC and NYSE Regulation and a provision allowing members to nominate directly candidates for those seats through a petition process.[190] NASD stated that the New SRO By-Laws would allow members to elect at least 28% of the total number of directors on the Board.[191] NASD noted that members may petition to place alternative candidates on the ballot for their respective member-elected seats.

NASD noted that the proposed rule change provides for three additional industry seats, namely, the Investment Company Affiliate Governor, Independent Dealer/Insurance Affiliate Governor, and Floor Member Governor.[192] Moreover, NASD has committed that the Charter of the New SRO's Nominating Committee provides that at least 20% of the Committee will be composed of Industry Governors that are associated with New SRO members.[193] According to NASD, as a trade-off to substantial industry participation on the Board and to maintain its overall independence, ''it is reasonable and sensible to ensure that public members are selected by a nominating committee and that the Board is not dominated by the industry.'' [194] NASD noted that the three appointed Industry Governors represent seats with distinct business models and that are important in informing the Board's deliberations.[195]

B. State Law and Proxy

In response to some commenters who contended that NASD failed to follow its existing procedures for adopting By-Law amendments, specifically obtaining approval within the 30-day timeframe as set forth in Article XVI of the NASD By-Laws,[196] NASD stated that it acted in a manner consistent with state law, which provides alternative means to propose and adopt certain corporate governance changes. NASD stated that Article XVI of the NASD By-Laws is not an exclusive means by which member approval of amendments to the By-Laws can be obtained. NASD noted that ''[m]embers of a Delaware non-stock corporation, including NASD, may take action at an annual or special meeting held pursuant to 8 Del. C. § 211(a) or, unless otherwise restricted by such corporation's certificate of incorporation, by written consent pursuant to 8 Del. C. § 228.'' NASD explained that, under this authority, it convened a special meeting of NASD members pursuant to Article XXI of the NASD By-Laws at which the New SRO By-Law amendments were approved.[197] In addition, to further support its position, NASD submitted an opinion of counsel that, under Delaware law, ''it is within the authority of the Members to approve proposed amendments to the By-Laws * * * at a special meeting held more than thirty days after the proposed By-Laws had been submitted to the Members,'' and that the vote of NASD members ''was a valid exercise'' of the members'' franchise rights and authorized by Delaware law.[198]

NASD took issue with the view of several commenters that the proxy was incomplete or that certain statements by NASD management regarding the potential consequences of failing to approve the proposed By-Law changes were misleading.[199] NASD noted that all the issues raised by the commenters were subject to lively debate in advance of the member vote. Specifically, members received communications from both the NASD and groups opposing the transaction over a five week period that included ''28 town hall meetings, conference calls, mailings, emails, and telephone calls.'' [200] NASD stated that it ''provided access to its members contact list to groups opposing the transaction, and thereby afforded these groups the opportunity to raise all of the issues to the membership,'' who approved the By-Law amendments after considering all of these arguments.[201] In addition, NASD noted that the ''proxy statement contained an extensive discussion of the negotiations with NYSE Group, the rationale for the $35,000 payment, and how the By-Law changes would affect the voting rights of NASD members.'' [202] NASD maintained that the statements made prior to the member vote were consistent with the proxy statement.[203]

In response to commenters' concerns regarding the amount of the $35,000 payment to be made to members upon the Closing of the Transaction, NASD noted that the proxy statement disclosed that the $35,000 payment was based on the expected future incremental cash flows that would result from the regulatory consolidation and was consistent with public guidance from the Internal Revenue Service (''IRS'').[204] In the NASD Supplemental Response Letter, NASD stated that its Certificate of Incorporation prohibits NASD from paying dividends to its members, and that doing so would result in forfeiture of NASD's tax-exempt status under Section 501(c)(6) of the Internal Revenue Code.[205] NASD also explained that the proposed $35,000 member payments did not constitute a prohibited dividend or comparable distribution, because they ''are based on (and limited by) expected future incremental cash flows that would result from the regulatory consolidation.'' [206] Further, NASD stated that ''any direct payment unrelated to those efficiencies would be inconsistent with NASD's tax-exempt status.'' [207] NASD determined that ''$35,000 was the maximum member payment that the IRS could be expected, with a sufficient degree of confidence, to approve within the timeframe

[190] *Id.* at 5.

[191] *Id.*

[192] *Id.* at 7.

[193] NASD Supplemental Response Letter, *supra* note 5, at 4. NASD also noted that the proposal establishes a Nominating Committee that would nominate candidates for each seat other than that of the CEO. The Nominating Committee would be a subset of the Board determined in number and composition by the Board from time to time, provided that the number of Public Governors on the committee must always exceed the number of Industry Governors on it. NASD Response Letter, *supra* note 5, at 6.

[194] NASD Response Letter, *supra* note 5, at 7.

[195] Id.

[196] Article XVI of the NASD By-Laws provides that amendments to the NASD By-Laws could become effective as of a date prescribed by the NASD Board, if the amendment is approved by a majority of the members voting within 30 days after the date of submission to the membership, and is approved by the Commission.

[197] *See* NASD Response Letter, *supra* note 5, at 7.

[198] *See* RLF Letter, *supra* note 5.

[199] *See* NASD Response Letter, *supra* note 5, at 8–9.

[200] *Id.* at 9.

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *See* NASD Supplemental Response Letter, *supra* note 5, at 2 (citing 26 U.S.C. 501(c)(6) (requirement that ''no part'' of an exempt entity's net earnings inure to any private shareholder or individual); I.R.S. Gen. Couns. Mem. 39862 (November 22, 1991) (''There is no *de minimis* exception to the inurement prohibition.''); *see also Spokane Motorcycle Club* v. *United States*, 222 F. Supp. 15 1, 153–54 (E.D. Wash. 1963) (refreshments provided at no cost to club members invalidated tax exemption)).

[206] *See* NASD Supplemental Response Letter, *supra* note 5, at 2.

[207] *Id.* at 3.

contemplated for the transaction.'' [208] NASD requested a private letter ruling from the IRS approving the proposed regulatory consolidation, including the $35,000 payment, and, according to NASD, ''[i]t was on this basis that the IRS agreed to issue such a ruling.'' [209] NASD explained that ''the proxy materials accurately state that member payments in excess of $35,000 could not be possible because such a payment, without the IRS's approval, could 'seriously jeopardize' NASD's tax-exempt status.'' [210] To further support its position, NASD submitted an opinion of its outside tax counsel that described generally the case law, statutory provisions, and guidance published by the IRS relevant to the disclosure in the NASD's proxy statement, and concluded that if NASD had increased the amount of the $35,000 payment, there would have been a ''serious risk'' that the IRS would not have issued the rulings and that NASD could be found to violate the prohibition against private inurement.[211] In addition, NASD's outside Delaware counsel stated that, because the NASD's Certificate of Incorporation contains a prohibition against inurement, any payment that violates the federal tax code prohibition against inurement would also be void under Delaware law.[212]

In response to a commenter's question about the eligibility for the positions of the Investment Company Affiliate Governor and the Independent Dealer/Insurance Affiliate Governor, respectively, NASD stated that the ''proposed rule change is intended to continue the presence on the New SRO Board of representatives from the particular business models of independent dealers/insurance companies and investment companies and to provide the Nominating Committee the flexibility to fill those Board seats with the best available candidates affiliated with a firm from those industry segments.'' [213]

C. Efficiency and Investor Protection

NASD stated that the commenters who stated that the consolidation would result in less investor protection by reducing the number and diversity of regulators overseeing the industry overstated the value of a second, duplicative regulator and understated the benefits of the regulatory consolidation.[214] NASD stated that the combination would achieve ''greater efficiencies, clarity and cost savings in the regulation of the financial markets'' and that the ''investor ultimately would be better protected by a single, more efficient regulator administering a single streamlined set of rules with the combined resources'' of the two organizations.[215]

D. Arbitration

NASD separately addressed comments regarding the merger of the NASD and NYSE arbitration forums.[216] It highlighted the results of studies commissioned by NASD[217] and the Commission[218] during the past decade, which focused on forum users' perceptions of fairness, as well as two General Accounting Office reports.[219] In NASD's view, ''it is the quality of the forum that dictates fairness rather than an investor's ability to select one dispute resolution forum over another.'' [220] NASD also noted that it currently administers over 94% of investor disputes with broker-dealers and that over the past decade the Commission has approved consolidation of the arbitration programs of other SROs with NASD with no adverse effects.[221]

With respect to the independence of its forum—and the suggestion for creating an ''independent'' forum—NASD stated that it ''is an independent forum.'' [222] NASD explained that the majority of its Dispute Resolution Board and its National Arbitration and Mediation Committee are public representatives. It also noted that it is a member of SICA. In addition, NASD stressed that it is financially self-sufficient in that it is funded by fees charged to users of the forum—broker-dealers, their associated persons, and investors.[223] In this regard, NASD also stated that although the consolidation should result in economies of scale and increased efficiencies in administering the New SRO arbitration forum, investors do not contribute toward administrative costs.[224] Rather, NASD stated that investors ''pay only the marginal (that is, direct) costs attached to their particular claim.'' [225]

Responding to the suggestion that NASD rules provide that public investors may choose between resolving their disputes in court or in arbitration, NASD cited *Shearson/American Express, Inc.* v. *McMahon*[226] and subsequent cases in which the Supreme Court upheld the use of pre-dispute arbitration agreements. In NASD's view, the commenter's proposal ''seeks to overturn federal case law dating back 20 years.'' [227] Moreover, NASD stated that ''[w]hen investors (and other parties) were offered a choice of another arbitration forum under the 2000 SICA Pilot, there was little interest.'' [228]

NASD also noted that it ''continues to make significant improvements to the dispute resolution forum to make the process more transparent, fair, and efficient for investors and others who use the forum.'' [229] With respect to a comment on the composition of arbitration panels, NASD noted that current NASD and NYSE rules provide that customer arbitrations are resolved either by a single public arbitrator or by a panel of two public and one non-public arbitrator.[230] Moreover, NASD

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *See* DPW Letter, *supra* note 5.

[212] *See* RLF Letter, *supra* note 5, at 5.

[213] *See* NASD Response Letter, *supra* note 5, at 8.

[214] *Id.*

[215] *Id.*

[216] *See* NASD Dispute Resolution Letters I & II, *supra* note 5.

[217] NASD Dispute Resolution Letter I, *supra* note 5 (citing G. Tidwell, K. Foster and M. Hummell, *Party Evaluations of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations* (August 5, 1999) *http://www.nasd.com/web/groups/med_arb/documents/mediation_arbitration/nasdw_009528.pdf*).

[218] NASD Dispute Resolution Letter I, *supra* note 5 (citing M. Perino, *Report to the SEC Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations* (November 4, 2002) *http://www.sec.gov/pdf/arbconflict.pdf*).

[219] NASD Dispute Resolution Letter I, *supra* note 5 (citing *Actions Needed to Address Problem of Unpaid Awards,* GAO/GGD–00–115 (June 2000); *Securities Arbitration: How Investors Fare,* GAO/GGD–92–74 (May 11, 1992)).

[220] *See* NASD Dispute Resolution Letter I, *supra* note 5.

[221] *Id.* (citing Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (approving consolidation with Nasdaq); Securities Exchange Act Release No. 45094 (November 21, 2001), 66 FR 60230 (December 3, 2001) (International Securities Exchange); Securities Exchange Act Release No. 40622 (October 30, 1998), 63 FR 59819 (November 5, 1998) (American Stock Exchange); Securities Exchange Act Release No. 40517 (October 1, 1998), 63 FR 54177 (October 8, 1998) (Philadelphia Stock Exchange); Securities Exchange Act Release No. 39378 (December 1, 1997), 62 FR 64417 (December 5, 1997) (Municipal Securities Rulemaking Board)).

[222] NASD Dispute Resolution Letter I, *supra* note 5.

[223] *Id.*

[224] NASD Dispute Resolution Letter II, *supra* note 5.

[225] *Id.*

[226] 482 U.S. 220 (1987).

[227] NASD Dispute Resolution Letter I, *supra* note 5.

[228] *Id.* In particular, NASD noted ''[t]he SICA Twelfth Report sums up the pilot's results this way: 'From its inception, few investors (or their attorneys) elected to proceed at a non-SRO forum.' Based upon responses to a survey of investors, SICA reported that investors' main reasons for not using the alternative forums were the higher fees at non-SRO forums, and a general degree of comfort with existing and more familiar procedures.''

[229] *Id.*

[230] NASD Dispute Resolution Letter II, *supra* note 5.

stated that it and NYSE are working to harmonize their definitions of ''public'' and ''non-public'' arbitrators, and any resulting proposed rule changes would be filed with the Commission and subject to public comment at that time.[231] With respect to the comments regarding the use of dispositive motions at NASD and NYSE, NASD stated that it understands that NYSE arbitrators determine whether such motions will be heard at a hearing as well as the timing of the hearing. In contrast, NASD proposed a specific rule regarding dispositive motions.[232] NASD indicated that it will consider the comments pertaining to dispositive motions in the context of that specific rule proposal ''and may further amend the proposal.'' [233]

V. Discussion

After careful review, and consideration of commenters' views and the NASD's correspondence responding to comments, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities association.[234] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(2) of the Exchange Act,[235] which requires a national securities association to be so organized and have the capacity to carry out the purposes of the Exchange Act and to enforce compliance by its members and persons associated with its members with the provisions of the Exchange Act. The Commission also finds that the proposed rule change is consistent with Section 15A(b)(4) of the Exchange Act, which requires that the rules of a national securities association assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.[236] Further, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,[237] in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest.

Self regulation is the cornerstone of the regulatory system governing the U.S. securities markets. Over the years, the self-regulatory system has functioned effectively and has served investors, the securities industry, and the government well. However, NASD and NYSE and many of their members believe that the current self-regulatory system as it applies to member regulation should be simplified and duplicative rules and conflicting interpretations of such rules should be eliminated. To that end, NASD and NYSE Group have agreed to consolidate their regulation of member firms. The proposal before the Commission, which would amend the NASD By-Laws to establish the By-Laws of the New SRO, is a key component in effectuating this regulatory consolidation. These amendments would establish the structure of the New SRO, which, among other things, would be responsible for reviewing and harmonizing the duplicative NASD and NYSE rules governing member firm regulation and conflicting interpretations of those rules. NASD stated that it expects the New SRO to submit to the Commission within one year of the date of the Closing proposed rule changes that would constitute a significant portion of a harmonized rulebook, with the remaining rules being submitted to the Commission within two years of the Closing.[238] The Commission has requested that the New SRO provide the Commission with quarterly progress reports on the harmonization project. In the Commission's view, the consolidation of NASD and NYSE member firm regulation should help reduce unnecessary regulatory costs while, at the same time, increase regulatory effectiveness and further investor protection.

The Commission discusses below the significant aspects of the proposed amendments to the NASD By-Laws.

A. Fair Representation of Members

1. Introduction

Section 15A(b)(4) of the Exchange Act [239] requires that the rules of a national securities association assure the fair representation of its members in the selection of its directors and administration of its affairs. This requirement helps to assure that members have a stake in the governance of the national securities association, which is charged with self-regulatory responsibilities under the Exchange Act. Under the New SRO By-Laws, the New SRO Board initially would consist of eleven Public Governors and ten Industry Governors, including a Floor Member Governor, an Independent Dealer/Insurance Affiliate Governor, an Investment Company Affiliate Governor, three Small Firm Governors, one Mid-Size Firm Governor, and three Large Firm Governors.[240] The CEO of the New SRO and, during the Transitional Period, the CEO of NYSE Regulation, also would be Governors on the New SRO Board.[241] The three Small Firm Governors, the one Mid-Size Firm Governor, and the three Large Firm Governors (collectively, ''Firm Governors'') would be elected by the members of the New SRO.[242] 39 42

2. Board Composition

i. Classification of Member Governors

A number of commenters, who are NASD members, argued that the New SRO should retain the NASD's current ''one firm, one vote'' election process. These commenters contended that they would be disenfranchised by the New SRO By-Laws because, instead of being allowed to elect all Governors, New SRO members would be allowed to elect only those Governors who are from member firms that are comparable in size to their own firm.[243] Other commenters believed that the New SRO By-Laws would provide for effective, diverse representation of all members of the securities industry on the New SRO Board.[244] In response, NASD stated that the proposed governance structure ensures a diversity of member representation on the New SRO Board by guaranteeing certain seats for different size firms and for those firms with particular business models.[245]NASD also noted that small firm representation on the Board would increase from one to three guaranteed

[231] *Id.*

[232] *Id.* (citing Securities Exchange Act Release No. 54360 (August 24, 2006), 71 FR 51879 (August 31, 2006) (File No. SR–NASD–2006–088)).

[233] NASD Dispute Resolution Letter II,*supra* note 5.

[234] In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[235] 15 U.S.C. 78o–3(b)(2).

[236] 15 U.S.C. 78o–3(b)(4).

[237] 15 U.S.C. 78o–3(b)(6).

[238] *See* NASD Supplemental Response Letter, *supra* note 5.

[239] 15 U.S.C. 78o–3(b)(4).

[240] *See* New SRO By-Laws, Article VII, Section 4 and Article XXII, Section 2(a).

[241] *See* New SRO By-Laws, Article VII, Section 4, and Article XXII, Section 2.

[242] *See* New SRO By-Laws, Article I(z), Article I(dd), Article I(xx), and Article VII, Section 4(a).

[243] *See, e.g.*, Lek Letter, Kosinsky Letter, Roberts Letter, RKeenan Letter II, Miller Letters, Blumenschein Letter, Eitel Letter II, de Leeuw Letter, Elish Letter, Patterson Letter, Callaway Letter, Isolano Letter, Hebert Letter, Biddick Letter, John Q Letter, and Schriner Letter.

[244] *See* Castiglioni Letter, FSI Letter, and Bakerink Letter.

[245] *See* NASD Response Letter, *supra* note 5, at 5.

seats.[246] The Commission finds that the structure of the New SRO Board—specifically the requirement that three Governors be elected by Small Firm members, one Governor be elected by Mid-Size Firm members, and three Governors be elected by Large Firm members [247]—is consistent with the fair representation requirement of the Exchange Act. In the Commission's view, this structure is a reasonable method to assure the fair representation of the New SRO's members on the New SRO's Board by affirmatively providing various New SRO constituencies with representation on the New SRO Board.[248] As a result, neither the largest nor the smallest firms would be able to dominate the New SRO Board. Moreover, issues or concerns of a particular New SRO constituency could be brought to the attention of, and considered by, the New SRO Board.

The Commission notes that it has previously approved a governance structure in which members are entitled to elect only those directors that are from the same class as the member.[249] Specifically, Primary Market Makers, Competitive Market Makers, and Electronic Access Members on the ISE are entitled to elect two directors each to represent these categories of ISE's members on the ISE Board.[250] In approving the governance structure of the ISE, the Commission found that the composition of the ISE Board and the selection of directors of ISE satisfied the fair representation requirement of Section 6(b)(3) [251] of the Exchange Act.[252] The Commission believes that New SRO having Governor positions based on the size of a firm is not dissimilar to the governance structure of the ISE, which allocates rights to elect Board seats based on the nature of the member's business.

ii. Appointed Governors

Several commenters expressed concern that, because some Governors would be appointed, member firms would not have the right to elect all New SRO Governors.[253] NASD, however, stated that these commenters ''fail[ed] to appreciate that the proposed governance structure strikes a balance between the necessity of overall independence and the desires for substantial, meaningful and diverse industry representation.'' [254] NASD noted that, under the proposed New SRO By-Laws, members not only would be entitled to elect at least 28% of the total number of Governors, but also would be represented through three additional Industry Governor positions and the potential for member-elected Governors to serve on the Nominating Committee.[255] NASD also noted that the Commission previously approved governance structures that provided for a lower threshold of member representation regarding the selection of an SRO's directors and administration of its affairs than in the proposed New SRO By-Laws. Specifically, NASD noted that the Commission found consistent with the fair representation requirement the governance structure of NYSE LLC, whereby members elect 20% of the wholly independent board of directors of NYSE LLC and have the right to nominate directly candidates through a petition process.[256] NASD also noted that the Commission found that the governance structure of the Nasdaq, whose Board of Directors also is composed of 20% member representatives, satisfies the fair representation standard of the Exchange Act, and that member representation on the proposed New SRO Board would exceed that of the Nasdaq's Board of Directors.[257]

The Commission finds that the structure of the New SRO Board, in which specified Governors are appointed and Firm Governors are elected, is consistent with the Exchange Act. The Commission notes that New SRO members will have the right to elect a total of seven Firm Governors out of 23 Governors (22 after the Transitional Period), or approximately 30% of all Governors. The Commission previously approved structures in which members were not guaranteed the right to elect all directors.[258] For example, the Commission approved ISE governance documents that provide that the holding company for ISE, not ISE members, would elect eight non-industry directors. In addition, Nasdaq's governance documents provide that Nasdaq members would have the right to elect 20% of Nasdaq's directors, while the holding company for Nasdaq would have the right to elect the remaining directors.[259] The Commission does not believe that the statute's standard of fair representation requires

[246] *Id.*

[247] *See* New SRO By-Laws, Article I(z), Article I(dd), Article I(xx), and Article VII, Section 4(a).

[248] NASD noted that the proposed composition of and selection process for the Small Firm Governors and Large Firm Governors are identical, ensuring, according to the NASD, fairness and balance between those firms that comprise the largest percentage of membership and those firms that employ the largest percentage of the registered representative population. *See* NASD Response Letter, *supra* note 5, at 5.

[249] *See* Securities Exchange Act Release No. 53705 (April 21, 2006), 71 FR 25260 (April 28, 2006) (relating to the reorganization of the ISE into a holding company structure, whereby ISE Holdings, Inc. would be the publicly-traded holding company of ISE, the SRO) (''Release No. 53705'').

[250] The holders of ''PMM Rights,'' which Primary Market Makers must hold to obtain trading rights on the ISE, are entitled to elect two directors. The holders of ''CMM Rights,'' which Competitive Market Makers must hold to obtain trading rights on the ISE, are entitled to elect two directors. The holders of ''EAM Rights,'' which Electronic Access Members must hold to obtain trading rights on the ISE, are entitled to elect two directors. *Id.*

[251] 15 U.S.C. 78f(b)(3). Section 6(b)(3) of the Exchange Act is identical to Section 15A(b)(4) of the Exchange Act, except that Section 6(b)(3) applies to national securities exchanges and Section 15A(b)(4) applies to national securities associations.

[252] *See* Securities Exchange Act Release No. 53705 (April 21, 2006), 71 FR 25260 (April 28, 2006) (noting that the ISE's proposed governance structure was substantially the same as that of its predecessor entity). In approving the governance structure of the predecessor entity, the Commission found that the selection of six of the 15 directors on the predecessor entity's board, and the manner in which such directors are nominated and selected, satisfied the fair representation requirement of Section 6(b)(3) of the Exchange Act. *See* Securities Exchange Act Release No. 45803 (April 23, 2002), 67 FR 21306 (April 30, 2002) (approving the predecessor entity's governance structure).

[253] *See* Lek Letter, RKeenan Letter I & II, Hebert Letter, Mayfield Letter, Blumenschein Letter, Eitel Letter II, de Leeuw Letter, Elish Letter, Patterson Letter, Schriner Letter, Roberts Letter, and Biddick Letter. *See also* Johnny Q Member Letters I & II, Benchmark/Standard Letter I, and Benchmark Letter, which referred to the Standard Lawsuit, *supra* note 81.

[254] *See* NASD Response Letter, *supra* note 5, at 6.

[255] *Id.* at 7.

[256] *Id.* at 5 (citing Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (relating to the NYSE's business combination with Archipelago Holdings, Inc.) (''Release No. 53382'')).

[257] *Id.* at 6 (citing Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006)). NASD also stated that member representation on the New SRO Board is comparable to member representation on the Chicago Stock Exchange (twelve directors, of which five are members) and the International Securities Exchange (14 directors, of which six are members). *Id.*

[258] *See, e.g.*, Release No. 53705, *supra* note 249 (approving the proposal to allow ISE Holdings, Inc. to elect eight non-industry directors of ISE, the holders of PMM Rights to elect two directors of ISE, the holders of CMM Rights to elect two directors of ISE, and the holders of EAM Rights to elect two directors of ISE).

[259] *See* Limited Liability Company Agreement of The NASDAQ Stock Market LLC, Section 9.

Similarly, the Board members of the Boston Options Exchange Regulation, LLC (''BOXR'') are not directly elected by options participants at the Boston Options Exchange, LLC (''BOX''). BOXR's by-laws provide that all of the BOXR board of director positions are appointed by the Boston Stock Exchange, Inc. (''BSE'') Board, subject to two of the positions on the BOXR board being nominated by BOX options participants. BOXR has regulatory oversight authority over BOX, which is the exchange facility for BSE for the trading of standardized equity options securities. BSE is the sole shareholder of BOXR. *See* Securities Exchange Release No. 49065 (January 13, 2004), 69 FR 2768 (January 20, 2004) (SR–BSE–2003–04) (approving the creation of BOXR).

that members have the opportunity to vote for all SRO directors.

3. Industry Representation

Several commenters argued that the New SRO Board lacks sufficient industry representation.[260] In contrast, one commenter argued that the New SRO Board would have too many industry representatives,[261] and other commenters supported the proposed balance between Industry Governors and Public Governors.[262] In response, NASD noted that the proposed governance structure ensures that at least 40% of the New SRO Board would be composed of industry representatives, which, according to the NASD, ''ensures substantial industry representation, while still maintaining the overall independence of the New SRO Board and the numerical dominance of Public Governors.'' [263]

The Commission believes that the requirement that the number of Public Governors exceed the number of Industry Governors on the New SRO Board is consistent with the Exchange Act.[264] Specifically, the Commission believes that this requirement represents a reasonable method to permit the New SRO Board to consider the needs of the entire SRO community, including large and small investors, issuers, and securities firms, while at the same time broadly assuring the independence of the regulatory function. The Commission notes that under the by-laws of certain other SROs and the current NASD By-Laws, the number of non-industry Governors must equal or exceed the number of industry governors (excluding the CEO).[265] In fact, the Commission has previously stated its belief that the fair representation requirement would not prohibit exchanges and associations from having boards of directors composed solely of independent directors (other than the CEO), and that in such case, the candidate or candidates selected by members would have to be independent.[266]

4. Nominating Committee

The New SRO would have a Nominating Committee that, during the Transitional Period, would be responsible for nominating persons to fill vacancies in Governor positions for which the full New SRO Board has the authority to fill.[267] Following the Transitional Period, the Nominating Committee would be responsible for nominating persons for appointment or election to the New SRO Board, as well as nominating persons to fill vacancies in appointed or elected Governor positions.[268]

During the Transitional Period, the Nominating Committee would not nominate candidates for the seven Firm Governor positions to be elected at the first annual meeting following the Closing.[269] Instead, the NASD Board as constituted prior to the Closing would make nominations for the Small Firm Governors, the NYSE Group Board as constituted prior to the Closing would make nominations for the Large Firm Governors, and the NASD Board and NYSE Group Board jointly would make the nominations for the Mid-Size Firm Governor. In addition, prior to the Closing, the NASD Board and the NYSE Group Board would identify and appoint the eleven Public Governors and the three remaining Industry Governors. The Commission believes that the process for nominating the Industry Governors to be elected by the New SRO members at the first annual meeting, to be held during the Transitional Period, is a reasonable transitional measure that combines the input of the NASD Board (which includes member representatives) and the NYSE Group Board. Accordingly, the Commission finds that this transitional nominating process is consistent with the fair representation requirements of the Exchange Act.

The Nominating Committee would be composed of a number of Governors that is a minority of the entire New SRO Board.[270] During the Transitional Period, members of the Nominating Committee would be appointed jointly by the New SRO CEO and the CEO of NYSE Regulation as of Closing (or his duly appointed or elected successor as Chair of the New SRO Board), subject to ratification by the New SRO Board.[271] Following the Transitional Period, the composition of the Nominating Committee would be determined by the New SRO Board. The number of Public Governors on the Nominating Committee must equal or exceed the number of Industry Governors on the Nominating Committee.[272]

The Commission believes that, to satisfy the Exchange Act's fair representation requirement, the New SRO must assure that its members have a say in the nomination of Governors for the New SRO Board. Other SROs have satisfied this requirement by having at least 20% member representation on their nominating committees.[273] In this regard, NASD has committed that the Charter of the New SRO's Nominating Committee provides that at least 20% of the Committee will be composed of Industry Governors that are associated with New SRO members.[274] The inclusion on the Nominating Committee of Industry Governors who are New SRO members should help to ensure that the input of members will be considered by the Nominating Committee when selecting nominee(s). Accordingly, the Commission finds that the structure and composition of the Nominating Committee are consistent

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[260] *See, e.g.*, Roberts Letter, Busacca Letter, Blumenschein Letter, Eitel Letter II, and Miller Letters.

[261] *See* Massachusetts Letter.

[262] *See* NAIBD Letter; *see also* FSI Letter.

[263] *See* NASD Response Letter, *supra* note 5, at 5.

[264] *See* New SRO By-Laws, Article VII, Section 4(a).

[265] *See, e.g.*, Philadelphia Stock Exchange (''Phlx'') Certificate of Incorporation, Article FOURTH (b)(iii)(A) and Phlx By-Laws, Article I, Sections 1–1(o) and (p) and Article IV, Section 4–1 (providing that Phlx board will have a total of 23 governors, including twelve independent governors); and ISE Constitution, Article III, Section 3.2 (providing that the ISE Board will consist of 15 directors, including eight non-industry directors, of which two must be public representatives). Article VII, Section 4(a) of the current NASD By-Laws also provides that, if the number of Industry and Non-Industry Governors is 13–15, the Board shall include at least four Public Governors. If the number of Industry and Non-Industry Governors is 16–17, the Board shall include at least five Public Governors. If the number of Industry and Non-Industry Governors is 18–23, the Board shall include at least six Public Governors. In the instant proposal, NASD proposes to eliminate the Non-Industry Governor category and, thus, the New SRO Board would be composed of only Industry Governors, Public Governors, the CEO of the New SRO, and, during the Transitional Period, the CEO of NYSE Regulation.

[266] *See* Release No. 53382, *supra* note 256.

The Commission previously approved NYSE Inc. governance changes that established a fully independent board (other than the CEO), finding that such a board was consistent with the Exchange Act. *See* Securities Exchange Act Release No. 48946 (December 17, 2003), 68 FR 74678 (December 24, 2003) (relating to the amendment and restatement of the NYSE Constitution to reform the governance and management architecture of the NYSE).

[267] *See* New SRO By-Laws, Article XXII, Section 3. During the Transitional Period, the full New SRO Board would have the authority to fill vacancies in the Investment Company Affiliate Governor position and in the Joint Public Governor position.

[268] *See* New SRO By-Laws, Article VII, Section 9.

[269] *See* New SRO By-Laws, Article XXII, Section 4.

[270] NASD represented that a minority of the entire New SRO Board means ''at least one less than half of the New SRO Board.'' *See* NASD Response Letter, *supra* note 5, at 6. In addition, the number of Public Governors on the Nominating Committee must equal or exceed the number of Industry Governors on the Nominating Committee, and the New SRO CEO may not be a member of the Nominating Committee. *See* New SRO By-Laws, Article VII, Section 9(b).

[271] *See* New SRO By-Laws, Article XXII, Section 1.

[272] *See* New SRO By-Laws, Article VII, Section 9.

[273] *See, e.g.*, Securities Exchange Act Release No. 53734 (April 27, 2006), 71 FR 26589 (May 5, 2006) (SR–Phlx–2005–93); Phlx By-Laws Article X, Section 10–19(a).

[274] *See* NASD Supplemental Response Letter, *supra* note 5, at 4.

with the fair representation requirements in Section 15A(b)(4) of the Exchange Act.

5. Petition Process

The New SRO By-Laws contain a petition process that would allow Small, Mid-Size, and Large Firms to nominate one or more candidates whose name(s) would be placed on the ballot in addition to the candidates selected by the Nominating Committee.[275] Specifically, a candidate could be included on the ballot if at least three percent of the members entitled to vote for such candidates' election (in other words, three percent of the members entitled to vote for the Small Firm Governor, Mid-Size Firm Governor, and Large Firm Governor, respectively) petitions for the inclusion of such candidate.[276] In the case of petitions in support of more than one candidate for a Governor position, petitions would be required to be submitted by at least ten percent of the members entitled to vote for such nominees' election. The New SRO By-Laws also provide that the New SRO would provide administrative support to the candidates in a contested election by sending up to two mailings of materials prepared by the candidates.

The Commission notes that other SROs also have comparable petition processes that allow their members to nominate opposing candidates.[277] The Commission finds that the proposed petition process, coupled with the New SRO By-Law provisions on Board and Nominating Committee composition, should help ensure that all New SRO members are assured fair representation in the selection of Governors of the New SRO Board and therefore is consistent with the Exchange Act.

6. Future By-Law Amendments

The New SRO By-Laws contain a provision that would give members a voice in proposing changes to the New SRO By-Laws.[278] Specifically, amendments to the New SRO By-Laws could be proposed by a Governor or a committee appointed by the New SRO Board or any 25 members of the New SRO by petition signed by such members. Any such proposed amendment would be required to be considered by the Board. The Board, upon adoption of any such amendment to the By-Laws (except as to spelling or numbering corrections or as otherwise provided in the By-Laws) by a majority vote of the Governors then in office, would be required to submit the proposed amendments to the New SRO's members for approval. If the amendment was approved by a majority of the members voting within 30 days after the date of submission to the membership, and were approved by the Commission as provided in the Exchange Act, it would then become effective as of a date prescribed by the Board. The Commission believes that the procedures governing amendments to the New SRO By-Laws should help ensure that all New SRO members are assured fair representation in the administration of the New SRO's affairs and therefore is consistent with the Exchange Act.

7. Member Participation on Committees

In addition, the Commission finds that New SRO members' participation on various committees further provides for the fair representation of members in the administration of the affairs of an SRO, particularly with respect to participation on committees relating to rulemaking and relating to the disciplinary process.[279] In this regard, NASD noted that New SRO will continue extensive member involvement in the administration of its affairs through representation on various subject matter committees, disciplinary hearing panels, and the National Adjudicatory Council.[280] Such member participation includes, depending on the particular Committee or group, having input on the New SRO's rulemaking process and involvement in the disciplinary process.[281]

B. Representation of Issuers and Investors

Section 15A(b)(4) of the Exchange Act[282] requires that the rules of an association provide that one or more directors be representative of issuers and investors and not be associated with a member of the association or with a broker or dealer. In the NASD Response Letter, NASD stated that it believes that the presence of no fewer than eleven Public Governors, none of which may have a material relationship with a broker or dealer or registered SRO, satisfies the requirement to have at least one director representative of issuers and investors.[283] The Commission believes that the inclusion of public, non-industry representatives on New SRO Board is critical to an SRO's ability to protect the public interest.[284] Further, public representatives help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the SRO governance process. The Commission believes that the New SRO Board's Public Governors could provide unique, unbiased perspectives that could enhance the ability of the New SRO's Board to address issues in a non-discriminatory fashion.

The Commission finds that the composition of the New SRO Board is consistent with the issuer and investor representation requirement of Section 15A(b)(4) of the Exchange Act.[285]

C. State Law, Proxy, and Other Issues Raised by Commenters[286]

NASD filed the proposed rule change on Form 19b–4, which provides, in Instruction E thereto, that ''[t]he

[275] *See* New SRO By-Laws, Article VII, Section 10.

[276] The Secretary of the New SRO also would be required to certify that: (i) The petitions are duly executed by the Executive Representatives of the requisite number of members entitled to vote for such nominee's/nominees' election, and (ii) the candidate(s) satisfies/satisfy the classification (Large Firm, Mid-Size Firm or Small Firm) of the position(s) to be filled, based on such information provided by the candidate(s) as is reasonably necessary to make the certification. *See* New SRO By-Laws, Article VII, Section 10.

[277] *See, e.g.*, ISE Constitution, Article III, Section 3.10 (providing that persons entitled to elect an ISE director also would be able to nominate rival candidates) and Phlx By-Laws, Article III, Section 3.7 (providing that Phlx member organizations will be permitted to make independent nominations for designated Phlx governors, which consist of the two member governors, the two designated independent governors, and the one Philadelphia Board of Trade governor)

[278] *See* New SRO By-Laws, Article XVI, Section 1.

[279] *See* Release No. 53382, *supra* note 256, at 11260 (stating that the Commission believes that members' participation on various committees, including the Market Performance Committee of the NYSE Market, and the Regulatory Advisory Committee and Committee for Review of NYSE Regulation, further provides for the fair representation of members in the administration of the affairs of the exchange, including rulemaking and the disciplinary process, consistent with Section 6(b)(3) of the Act).

[280] *See* NASD Supplemental Response Letter, *supra* note 5, at 4.

[281] *Id.*

[282] 15 U.S.C. 78o–3(b)(4).

[283] *See* NASD Response Letter, *supra* note 5, at 5.

[284] *See* Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) (stating that ''representation of the public on an oversight body that has substantive authority and decision making ability is critical to ensure that an exchange actively works to protect the public interest and that no single group of investors has the ability to systematically disadvantage other market participants through use of the exchange governance process'').

[285] 15 U.S.C. 78o–3(b)(4).

[286] Commenters also stated that the regulatory consolidation would violate the antitrust laws. *See supra* Section III.B.5. With respect to the alleged violation of the antitrust laws, the Commission notes that NASD and NYSE Group filed notification reports with the Department of Justice and the Federal Trade Commission under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, and the waiting period for such a filing expired on April 6, 2007. *See supra* note 7.

Commission will not approve a proposed rule change before the self-regulatory organization has completed all action required to be taken under its constitution, articles of incorporation, bylaws, rules, or instruments corresponding thereto* * * *'' [287] In addition, Section 19(b)(2) of the Exchange Act [288] requires that the Commission approve an SRO's proposed rule change only if it finds that the proposal is consistent with the requirements of the Exchange Act, and the rules thereunder applicable to the SRO. Among other things, national securities associations are required under Section 15A(b)(2) of the Exchange Act [289] to comply with their own rules. Thus, if NASD has failed to complete all action required to be taken under, or to comply with, its own Certificate of Incorporation or By-Laws, which are rules of the association, the Commission could not approve the proposed rule change under Section 19 of the Exchange Act.[290]

A number of commenters expressed concern about the approval process for the proposed amendments to the NASD By-Laws.[291] Some of these commenters argued that NASD violated various aspects of Delaware law, particularly with respect to obtaining member approval within the 30-day timeframe as set forth in Article XVI of the NASD By-Laws.[292] Other commenters questioned the adequacy of the disclosures in the proxy statement, particularly with respect to the proposed $35,000 payment by NASD.[293] In addition, the plaintiff in the Standard Lawsuit, as well as another entity, Benchmark Financial Services, Inc., through their attorneys, submitted a comment letter contending that, from the perspective of an NASD member, the focus of the proxy statement was ''the fundamental change in members' voting rights and the $35,000 that each member is to receive in exchange for 'surrendering' members' equity valued at as much as $300,000, or more, per NASD member.'' [294] Specifically, the Benchmark/Standard Letter II alleged an inconsistency between the statements in the proxy statement and the statements in the NASD Response Letter regarding the $35,000 payment [295] and concluded that ''[t]he SEC cannot approve the $35,000 payment without determining whether the statements with respect to the Proxy Statement were truthful and complete.'' [296] The Benchmark/Standard Letter II also argued that the discussion of the $35,000 in the proposed rule change was inadequate because neither the proposed rule change nor the Notice ''mentioned or invited comment from the public or NASD members about the $35,000 payment.'' [297] Accordingly, the Benchmark/Standard Letter II argued that the Commission ''should disapprove the rule change, re-notice the issue properly or limit its findings to the issues it noticed.'' [298] The Benchmark/Standard Letter I also quoted a statement in the district court's opinion in the Standard Lawsuit in which the court responded to Standard's contention that its lawsuit should not be dismissed for failure to exhaust administrative remedies because the Commission is an unsuitable forum in which to challenge the truthfulness of the proxy statement. The letter quoted from the district court decision as follows:

> The Court is incredulous that the SEC would endorse proposed SRO rule changes that [as alleged in the Amended Complaint] were approved by the membership pursuant to a ''proxy statement that could not possibly pass [muster] under the nation's securities laws and the disclosure requirements of the SEC's own rules (*see, e.g.*, § 14(a) of the Securities Exchange Act of 1934 and Rule 14a–9 promulgated thereunder by the SEC and applicable Supreme Court precedent).'' (Am. Compl. ¶ [4]) [299]

To the extent the Benchmark/Standard Letters suggested that the proxy statement delivered by the NASD to its members was not in compliance with the federal securities laws, the Commission notes that Rule 14a–9 under the Exchange Act [300] applies only to the solicitation of proxies with respect to securities registered pursuant to Section 12 of the Exchange Act and that none of the membership interests in NASD are so registered.[301]

Whether an SRO failed to complete all action required to be taken under its constitution, articles of incorporation, bylaws, rules, or similar instruments ordinarily is not an issue before the Commission at the time it considers whether to approve a proposed rule change. However, in instances where there is a dispute about whether the SRO has failed to complete all necessary action prior to Commission approval, or where there is an alleged defect in such action, the Commission generally requests the SRO to supplement the proposed rule change to address issues raised by commenters. Accordingly, the Commission requested that NASD provide additional information about the disclosures regarding the $35,000 payment noted in the proxy statement, as well as about the fact that the time period between the submission of the proxy statement to members and the vote by members exceeded 30 days.

In response to the Commission's request, NASD submitted a supplemental response letter providing additional information about its disclosures in the proxy statement regarding the $35,000 payment and the propriety of its decision to call a special meeting of members to amend the NASD By-Laws.[302] Specifically, NASD stated that ''the proxy materials accurately state that member payments in excess of $35,000 would not be possible because such a payment, without the IRS's approval, could 'seriously jeopardize' NASD's tax-exempt status.'' [303] In support of its contention, NASD stated that Section 501(c)(6) of the Internal Revenue Code and its Certificate of Incorporation prohibit it from paying any dividends to its members.[304] NASD explained that

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[287] 17 CFR 249.819. However, the SRO is not required to complete all actions specified in any such constitution, articles of incorporation, bylaws, rules, or instruments with respect to (i) compliance with the procedures of the Exchange Act or (ii) the formal filing of amendments pursuant to state law prior to Commission approval. *Id.*

[288] 15 U.S.C. 78s(b)(2).

[289] 15 U.S.C. 78o–3(b)(2).

[290] 15 U.S.C. 78s.

[291] *See supra* notes 106 through 134 and accompanying text.

[292] *See supra* notes 131 through 134 and accompanying text.

[293] *See, e.g.*, Johnny Q Member Letters I & II, Benchmark/Standard Letters I & II, and Benchmark Letter.

[294] *See* Benchmark/Standard Letter II.

[295] The Benchmark/Standard Letter II noted that the proxy statement ''unequivocally states that a payment larger than $35,000 'is not possible;' that it will be 'funded by—and therefore limited by—the expected value of the incremental cash flows that will be produced by the consolidation transaction' and that if the 'payment was higher, it could seriously jeopardize NASD's status as a tax-exempt organization.'' ' The Benchmark/Standard Letter II then stated that the discussion of the $35,000 payment in the NASD Response Letter—specifically the NASD's statement that the $35,000 ''payments would fall within public IRS guidance, and the proxy statement made clear that the payments would be made by NASD''—is inconsistent with the proxy statement . *See* Benchmark/Standard Letter II.

[296] *See* Benchmark/Standard Letter II.

[297] *Id.*

[298] *Id.*

[299] *See* Benchmark/Standard Letter I (quoting Standard Lawsuit, 2007 WL 1296712 at *8) (first alteration added in the Benchmark/Standard Letter I, second alteration in court decision, third alteration added here to correct the Benchmark/Standard Letter I's omission of paragraph number).

[300] *See* 17 CFR 240.14a–9.

[301] *See also* Rule 14a–2 under the Exchange Act, 17 CFR 240.14a–2.

[302] *See* NASD Supplemental Response Letter, *supra* note 5.

[303] *See* NASD Supplemental Response Letter, *supra* note 5, at 3.

[304] *Id.* In response to the statement that NASD members would be ''surrendering members' equity valued at as much as $300,000'' in the Benchmark

any member payments in connection with the Transaction are ''based on (and limited by) expected future incremental cash flows that would result from the regulatory consolidation.'' [305] Therefore, based on ''public IRS guidance, the terms of the initial agreement between NASD and NYSE Group, Inc., and the importance of preserving NASD's tax-exempt status, NASD concluded that $35,000 was the maximum member payment that the IRS could be expected, with a sufficient degree of confidence, to approve within the timeframe contemplated for the transaction.'' [306] NASD stated that it reached this conclusion, and decided to request the IRS's approval of the regulatory consolidation with a $35,000 payment, ''through the exercise of business judgment by its disinterested Board of Governors.'' [307] According to NASD, NASD Board members ''fully informed themselves concerning the economics of the transaction (in particular the projected cost savings), the practical need for IRS approval, and the likelihood of obtaining that approval before determining that $35,000 was the maximum sum for which NASD could seek and expect to obtain approval from the IRS'' and that ''the Board's decision was taken in good faith and in full compliance with the Board members' fiduciary duties, and the resulting business judgment is entitled to deference.'' [308] NASD then noted that, pursuant to this business judgment, ''NASD requested a private letter ruling from the IRS approving the proposed regulatory consolidation, including a one-time payment [of $35,000] * * * based on the expected future incremental cash flows, examined in conjunction with other costs attributable to the transaction (including future dues rebates to be considered annually by the NASD Board over the following five years).'' [309] NASD further noted that ''[i]t was on this basis that the IRS agreed to issue such a ruling.'' [310] Thus, NASD believes that the proxy materials accurately stated that payments in excess of $35,000 per member would not be possible because any such payment, without IRS approval, could ''seriously jeopardize'' NASD's tax-exempt status.[311]

In addition, NASD furnished two opinions of outside counsel, one from NASD's tax counsel [312] and one from NASD's Delaware counsel.[313] With respect to the $35,000 member payment and pertinent to the commenters' argument that NASD could pay members more than $35,000 based on ''member's equity valued at as much as $300,000, or more, per NASD member,'' [314] NASD's outside tax counsel described generally the case law, statutory provisions, and guidance published by the IRS relevant to the disclosure in the NASD's proxy statement. This letter concluded that if NASD had increased the amount of the proposed $35,000 payment, there would have been a serious risk that the IRS would not have issued the rulings to NASD and NASD Regulation, Inc. that the proposed Transaction, which includes the $35,000 payment, would not affect the tax-exempt status of NASD and NASD Regulation. This letter stated that NASD ''could be found to violate the prohibition against private inurement if it went forward with the proposed [$35,000 payment] without the benefit of a ruling.'' [315] Specifically, NASD's outside tax counsel noted that ''tax law contains an absolute prohibition on a distribution of assets by tax exempt organizations, including the NASD, to their members'' but that there are limited exceptions to that prohibition for rebates of dues or fees,[316] distributions upon liquidation, and reasonable and appropriate expenses.[317] NASD's outside tax counsel discussed each exception and concluded that ''[n]one of these exceptions clearly authorizes the proposed [$35,000 payment]'' and that ''the only way that NASD could make the proposed [$35,000 payment] was by securing a private letter ruling from the IRS.'' [318] With respect to the determination of the amount of the payment to members, NASD's outside tax counsel stated that the proposed payment ''was supported economically by the present value of the expected incremental future cash flows attributable to the Proposed Transaction after taking into account transaction costs, including future rebates and other reductions in fees that were described in the Proxy Statement.'' [319] Thus, according to NASD's outside tax counsel, the IRS approved the proposed Transaction, including the payment, ''because of (i) the importance of the payment to the Proposed Transaction as a whole; (ii) the financial data presented by NASD explaining that the amount of the [$35,000 payment] is expected to be paid out of the value of expected incremental future cash flows, rather than the value of NASD's equity; and (iii) the unique facts and circumstances of the Proposed Transaction, including the [$35,000 payment].'' [320]

NASD's outside Delaware counsel addressed both the comment that a larger member payment could have been made based on ''member's equity'' and the comment that NASD should have obtained approval of the By-Law amendments within the 30-day timeframe as set forth in Article XVI of the NASD By-Laws.[321] With respect to the $35,000 payment, NASD's outside Delaware counsel stated that the language in Article 4 of NASD's Certificate of Incorporation tracks that of the Internal Revenue Code in that no part of the organization's net earnings may inure to the benefit of any private shareholder or individual.[322] NASD's outside Delaware counsel stated that any action in contravention of the Internal Revenue Code's prohibition on inurement would also be in contravention of the prohibition against inurement set forth in NASD's Certificate of Incorporation and thus would be void under Delaware law.[323] With respect to the 30-day timeframe, NASD's outside Delaware counsel confirmed NASD's analysis that Article XVI of the NASD By-Laws provides a

Standard Letter II, NASD stated that the ''combined effect of the prohibition against inurement to members of a tax-exempt organization (as outlined in [DPW Letter, *supra* note 5]) and of the certificate provision [which states that 'no part of its net revenues or earnings shall inure to the benefit of any individual, subscriber, contributor, or member'] (as described in [the RLF Letter, *supra* note 5]) makes such an 'equity' distribution impermissible.'' *See* NASD Supplemental Response Letter, *supra* note 5, at 2.

[305] *See* NASD Supplemental Response Letter, *supra* note 5, at 2.

[306] *Id.* at 3.

[307] *Id.* at 3. NASD stated that (a) a majority of the NASD Board is drawn from outside the securities industry, (b) no NASD Board member had any material conflict in connection with the proposed regulatory consolidation; and (c) no NASD Board member was dominated by anyone else with such a conflict. *Id.*

[308] *Id.*

[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] *See* DPW Letter, *supra* note 5.

[313] *See* RLF Letter, *supra* note 5.

[314] *See supra* note 304.

[315] *See* DPW Letter, *supra* note 5, at 4–5.

[316] NASD's outside tax counsel noted that ''[a]lthough the aggregate amount of the proposed Member Payments fits within the amount of allowable rebates, the rebate exception does not squarely apply here because a $35,000 payment would far exceed the $1,200 of current-year paid-in dues of those NASD members subject to the lowest annual payments'' and ''[u]nder the published rulings, a payment of $35,000 could not be made to those small members without risking the loss of NASD's tax exemption.'' Thus, based on these published rulings, if NASD had utilized the rebate of dues and fees exception, small-firm members would receive a rebate in the range of $1,200, while large-firm members would receive a much larger rebate. *Id.* at 3.

[317] *Id.* at 1–4.

[318] *Id.* at 1–2.

[319] *Id.* at 4.

[320] *Id.* at 4–5.

[321] *See* RLF Letter, *supra* note 5.

[322] *Id.* at 4–5.

[323] *Id.* at 5.

non-exclusive means by which member approval of amendments to the By-Laws can be obtained.[324]

The Commission ordinarily does not make determinations regarding state law issues but, when required to do so because state law necessarily informs its findings under the Exchange Act, it relies on the conclusions of experts or other authorities. In this regard, the Commission has relied on analysis by NASD's Delaware counsel that the vote of NASD's members at the special meeting approving the proposed amendments to the By-Laws ''was a valid exercise of the Member's franchise rights and authorized by Delaware law.'' [325] With respect to the adequacy of the proxy statement, the Commission has considered the NASD's explanation regarding the proxy statement's representations about the $35,000 payment. The Commission believes that NASD has made a prima facie showing that these representations were not misleading and that NASD's explanation is uncontradicted by the commenters' submissions regarding this matter. Accordingly, after reviewing the record in this matter, the Commission believes that NASD has provided sufficient basis on which the Commission can find that, under the Exchange Act, NASD complied with its Certificate of Incorporation and By-Laws with respect to the proxy approval process and that the proposed amendments to its By-Laws were properly approved by NASD members.

D. Approval of NASD Regulation By-Laws

The NASD Regulation By-Laws contain provisions that conflict with the proposed amendments to the NASD By-Laws.[326] Accordingly, NASD proposes to conform those provisions of the NASD Regulation By-Laws to the relevant provisions in the New SRO By-Laws. Because the proposed NASD Regulation By-Law changes conform to and reflect the proposed governance structure set forth in the New SRO By-Laws, the Commission finds that the amendments to the NASD Regulation By-Laws are consistent with the Exchange Act.

E. Efficiency and Investor Protection

Some commenters explicitly questioned the benefits of the proposed consolidation,[327] and other commenters noted that having one less regulator overseeing the securities firms that deal with the public would harm investors.[328] NASD stated that the consolidation is intended, among other things, to increase efficient, effective, and consistent regulation of securities firms, provide cost savings to securities firms of all sizes, and strengthen investor protection and market integrity. NASD also stated that the consolidation would streamline the broker-dealer regulatory system, combine technologies, and permit the establishment of a single set of rules and a single set of examiners with complementary areas of expertise within a single SRO. The Commission believes that NASD's expectations are reasonable. In the Commission's view, the consolidation of NASD and NYSE member firm regulation is intended to help reduce unnecessary regulatory costs while, at the same time, increase regulatory effectiveness and further investor protection. The Commission notes that the Transaction holds the potential to reduce unnecessary regulatory costs because New SRO firms would deal with only one group of examiners and one enforcement staff for member firm regulation.

F. Arbitration

Section 15A(b)(6) of the Exchange Act [329] provides that the rules of an association must be designed, among other things, 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. The Commission finds that NASD's proposal to consolidate the NASD and NYSE arbitration forums is consistent with the Act because it will maintain a fair arbitration forum available for all NYSE arbitration claims, while continuing to maintain a fair forum for NASD claims and claims that it already administers on behalf of other SROs.[330] Merging the NYSE arbitration program with the NASD arbitration program takes advantage of economies of scale, particularly in light of the NYSE's comparatively small caseload. Moreover, as NASD noted, it has a decade of experience in administering arbitrations on behalf of other SROs.

Commenters' suggestions for creating a separate securities arbitration forum, or providing that public investors may choose between resolving their disputes in court or in arbitration, are outside the scope of the proposed rule change. The Commission notes, however, that the Supreme Court upheld the use of pre-dispute arbitration agreements to resolve securities disputes in *Shearson/American Express, Inc.* v. *McMahon* [331] and subsequent cases.

NASD has the ability to impose sanctions against its members for failing to submit a dispute to arbitration, failing to comply with provisions of the NASD Code of Arbitration Procedure for Customer Disputes, and failing to honor an award.[332] In light of the policy supporting arbitration evinced by the Federal Arbitration Act [333] and Supreme Court precedent upholding securities industry arbitration agreements,[334] and the requirements of Section 19(b)(2) of the Exchange Act, the Commission cannot find as a matter of law that consolidation of the NASD and NYSE arbitration forums must be conditioned on providing customers with a choice of another dispute resolution forum.

NASD has committed to consider the comments regarding the use of dispositive motions in connection with its pending rule filing in this area.[335] With respect to other comments

[324] *See* RLF Letter and NASD Response Letter, *supra* note 5.

[325] *See* RLF Letter, *supra* note 5.

[326] *See* Section II.D.6, *supra*, for a description of these provisions.

[327] *See* RKeenan Letter I, Mayfield Letter, and Schooler Letter.

[328] *See* King Letter, Eitel Letter II, de Leeuw Letter, Elish Letter, Patterson Letter, Biddick Letter, and Massachusetts Letter.

[329] 15 U.S.C. 78o–3(b)(6).

[330] In considering proposed arbitration rules and rule changes, the Commission considers their effect on the fairness of the forum. *See generally* Securities Exchange Act Release No. 55158 (January 24, 2007). *See also* Section 15A(b)(6) of the Exchange Act.

[331] 482 U.S. 220 (1987).

[332] NASD Rule IM–12000.

[333] 9 U.S.C. 1–14.

[334] In 1987, the Supreme Court decided *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 222 (1987), which determined that customers who sign predispute arbitration agreements with their brokers may be compelled to arbitrate claims arising under the Exchange Act. In a companion case, *Perry* v. *Thomas*, 482 U.S. 483 (1987), the Court concluded that an employee of a broker-dealer could be compelled to arbitrate disputes by virtue of the employee having signed a Form U–4 and because the NYSE had rule in place requiring arbitration. Two years later, the Supreme Court applied the reasoning of *McMahon* to compel arbitration of claims arising under the Securities Act of 1933. *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

Thereafter, in *Gilmer* v. *Interstate/Johnson Lane, Corp.*, 500 U.S. 20 (1991), the Supreme Court determined that statutory civil rights claims may be subject to compulsory arbitration, provided that a valid arbitration agreement exists between the registered representative and the firm. Specifically, the *Gilmer* Court stated that ''by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.'' *Id.* at 26 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The Court stressed that ''so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'' *Id.* at 28 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

[335] NASD Dispute Resolution Letter II, *supra* note 5.

concerning the classification of arbitrators, NASD stated that it is working with the NYSE to harmonize their rules and that any resulting rule changes will be filed for Commission consideration, subject to notice and comment.[336]

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act, that the proposed rule change (SR–NASD–2007–023) is approved.

By the Commission.

Nancy M. Morris,

Secretary.

EXHIBIT A—List of Comment Letters as of July 16, 2007

1. Letter from Franco Mortarotti, Zermatt Capital Management, dated December 11, 2006 (''Mortarotti Letter'').
2. Letter from Samuel F. Lek, Lek Securities Corporation, to Christopher Cox, Chairman, Commission, dated December 15, 2006 (''Lek Letter'').
3. Letter from Mary S. Darcy, Managing Partner, The Darcy Group LLC, dated December 21, 2006 (''Darcy Letter'').
4. Letter from Michael Jordan, Control Officer/Securities Industry, dated April 4, 2007 (''Jordan Letter'').
5. Letter from Joseph Kosinsky, NASD Member, dated April 2, 2007 (''Kosinsky Letter'').
6. Letter from Judith Schapiro, dated March 30, 2007 (''Judith Schapiro Letter'').
7. Letter from Daniel W. Roberts, NASD District One Committee Member, dated March 29, 2007 (''Roberts Letter'').
8. Letter from Charles Botzum, III, dated March 29, 2007 (''Botzum Letter'').
9. Letter from John B. Busacca, III on behalf of North American Clearing, Inc., The Financial Industry Association, dated March 28, 2007 (''Busacca Letter'').
10. Letters from Robert Keenan, CEO, St Bernard Financial Services, Inc., dated March 28, 2007 and April 13, 2007 (''RKeenan Letter I'' and ''RKeenan Letter II,'' respectively).
11. Letter from Bob and Linda King, dated April 7, 2007 (''King Letter'').
12. Letter from Joel Blumenschein, President, EZ Stocks, Inc., dated March 29, 2007 (''Blumenschein Letter'').
13. Letter from Peter J. Chepucavage, General Counsel, Plexus Consulting, dated March 26, 2007 (on behalf of the International Association of Small Broker Dealers and Advisers) (''IASBDA Letter'').
14. Letter from Donald R. Hawks, Commander, Retired, USN; President, Registered Principal, Alpha Business Control Systems Inc., dated March 28, 2007 (''Hawks Letter'').
15. Letter from the Public Members of the Securities Industry Conference on Arbitration to Christopher Cox, Chairman, Commission, dated January 12, 2007 (''SICA Public Members Letter'').
16. Letter from Gretchen Harriman-Thiessen to Christopher Cox, Chairman, Commission, dated April 4, 2007 (''Harriman-Thiessen Letter'').
17. Letters from Les Greenberg, Attorney, Law Offices of Les Greenberg, to Nancy M. Morris, Secretary, Commission, dated April 8, 2007 and April 11, 2007 (''Greenberg Letter I'' and ''Greenberg Letter II,'' respectively).
18. Letter from Ari Gabinet, Principal, Securities Regulation, The Vanguard Group, Inc., to Nancy M. Morris, Secretary, Commission, dated April 11, 2007 (''Vanguard Letter'').
19. Letter from Douglas W. Schriner, CEO, Harrison Douglas, Inc., dated April 11, 2007 (''Schriner Letter'').
20. Letter from Gary L. Flater, CEO, dated April 12, 2007 (''Flater Letter'').
21. Letter from Chester Hebert, President, CIM Securities, LLC, to the Commissioners, dated April 12, 2007 (''Hebert Letter'').
22. Letter from Luke C. Schunk, Registered Representative, dated April 12, 2007 (''Schunk Letter'').
23. Letter from Eric B. Arnold, President, Fenwick Securities, Inc., dated April 12, 2007 (''Arnold Letter'').
24. Letter from Kevin J. High, Managing Director, dated April 12, 2007 (''High Letter'').
25. Letters from Mary M. Eitel dated April 12, 2007 and April 16, 2007 (''Eitel Letter I'' and ''Eitel Letter II,'' respectively).
26. Letter from Martin J. Cohen, dated April 12, 2007 (''Cohen Letter'').
27. Letter from Sennett Kirk, Kirk Securities Corporation, dated April 12, 2007 (''Kirk Letter'').
28. Letter from Alan Vande Weerd, CFP, Eagle One Investments, LLC, dated April 12, 2007 (''Vande Weerd Letter'').
29. Letters from Jack D. Jester, to Nancy M. Morris, Secretary, Commission, dated April 5, 2007 and June 4, 2007 (''Jester Letter I'' and ''Jester Letter II,'' respectively).
30. Letter from Francis D. de Leeuw, dated April 13, 2007 (''de Leeuw Letter'').
31. Letter from Jerome S. Keenan, Vice President, International Equities Services Inc., dated April 13, 2007 (''JKeenan Letter'').
32. Letter from Wayne A. Schultz, Esq., dated April 13, 2007 (''Schultz Letter'').
33. Letter from Peter M. Elish, President, Elish Elish, Inc., dated April 13, 2007 (''Elish Letter'').
34. Letter from Edward A. H. Siedle, President, Benchmark Financial Services, Inc., to Christopher Cox, Chairman, Commission, dated April 13, 2007 (''Benchmark Letter'').
35. Letter from Jonathan W. Cuneo, and Richard D. Greenfield, dated May 4, 2007 and June 11, 2007, with attachments (''Benchmark/Standard Letter I'' and ''Benchmark/Standard Letter,'' respectively, and, collectively, the ''Benchmark/Standard Letters'').
36. Letter from Tom Hanson, VP of Operations and Compliance, dated April 13, 2007 (''Hanson Letter'').
37. Letter from Warren R. Horney, Vice President, WFP Securities Corporation, dated April 13, 2007 (''Horney Letter'').
38. Letter from Dan Mayfield, dated April 13, 2007 (''Mayfield Letter'').
39. Letter from Sam P. Solomon, dated April 13, 2007 (''Solomon Letter'').
40. Letter from Ronald Patterson, President, Southcoast Investment Group Inc., to Christopher Cox, Chairman, Commission, dated April 13, 2007 (''Patterson Letter'').
41. Letter from Steven B. Caruso, President, Public Investors Arbitration Bar Association, dated April 16, 2007 (''Caruso Letter'').
42. Letter from Mark S. Casady, Chairman and Chief Executive Officer, Linsco/Private Ledger Financial Services, to Nancy M. Morris, Secretary, Commission, dated April 16, 2007 (''Casady Letter'').
43. Letter from Charlie Cray, Director, Center for Corporate Policy, dated April 16, 2007 (''Cray Letter'').
44. Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association (''SIFMA''), to Nancy M. Morris, Secretary, Commission, dated April 16, 2007 (''SIFMA Letter'').
45. Letter from I. P. Daily, dated April 15, 2007 (''Daily Letter'').
46. Letter from Albert Kramer, President of Kramer Securities Corporation, dated April 16, 2007 (''Kramer Letter'').
47. Letter from E. John Moloney, President and Chief Executive Officer, Moloney Securities Co., Inc., dated April 16, 2007 (''Moloney Letter'').
48. Letter from David Stringer, President, Prospera Financial Services, Inc., to Nancy M. Morris, Secretary, Commission, dated April 16, 2007 (''Stringer Letter'').

[336] *Id.*

49. Letter from Deborah Castiglioni, Chief Executive Officer, Cutter & Company, to Nancy M. Morris, Secretary, Commission, dated April 16, 2007 (''Castiglioni Letter'').

50. Letter from Bonnie K. Wachtel, dated April 16, 2007 (''Wachtel Letter'').

51. Letter from Lisa Roth, Chairman, National Association of Independent Broker/Dealers (''NAIBD''), to Nancy M. Morris, Secretary, Commission, dated April 16, 2007 (''NAIBD Letter'').

52. Letter from William C. Alsover, Chairman, Centennial Securities Company, LLC, to Nancy M. Morris, Secretary, Commission, dated April 16, 2007 (''Alsover Letter'').

53. Letter from Craig M. Biddick, President, Mission Securities Corp., dated April 16, 2007 (''Biddick Letter'').

54. Letter from Donald R. Penrod, President, Penrod and Company, dated April 16, 2007 (''Penrod Letter'').

55. Letter from Howard Spindel, Senior Managing Director, Integrated Management Solutions USA, LLC, to Nancy M. Morris, Secretary, Commission, dated April 16, 2007 (''Spindel Letter'').

56. Letter from William A. Johnstone, President and CEO, D.A. Davidson & Co., to Nancy M. Morris, Secretary, Commission, dated April 16, 2007 (''Johnstone Letter'').

57. Letter from David Isolano, Chief Executive Officer, Max International Broker Dealer Corp., dated April 16, 2007 (''Isolano Letter'').

58. Letters from Kathryn L. Lundgren, dated April 16, 2007 (''Lundgren Letter I'') and April 17, 2007 (''Lundgren Letter II'').

59. Letter from Gary L. Haney, Chief Executive Officer, United Insurance Group, Inc., dated April 14, 2007 (''Haney Letter'').

60. Letter from John E. Schooler, President, WFP Securities, dated April 13, 2007 (''Schooler Letter'').

61. Letter from Corey N. Callaway, President, Callaway Financial Services, Inc., dated April 13, 2007 (''Callaway Letter'').

62. Letters from Johnny Q. Member, to Nancy M. Morris, Secretary, Commission, dated April 16, 2007, with attachments (''Johnny Q. Member Letter I'' and ''Johnny Q. Member Letter II,'' respectively).

63. Letter from John Q., NASD Member, dated April 13, 2007 (''John Q. Letter'').

64. Letters from Mike Miller, President, Miller Financial Corp., dated April 15, 2007, with attachment (''Miller Letters'' collectively).

65. Letter from Dale E. Brown, Executive Director and CEO, Financial Services Institute, to Nancy M. Morris, Secretary, Commission, dated April 16, 2007 (''FSI Letter'').

66. Letter from William R. Pictor, President, Trubee, Collins & Co., Inc., to Nancy M. Morris, Secretary, Commission, dated April 16, 2007 (''Pictor Letter'').

67. Letter from Walter S. Robertson, III, President and CEO, Scott & Stringfellow, Inc., to Nancy M. Morris, Secretary, Commission, dated April 16, 2007 (''Robertson Letter'').

68. Letter from M. LaRae Bakerink, CEO, WBB Securities, LLC, to Christopher Cox, Chairman, Commission, dated April 16, 2007 (''Bakerink Letter'').

69. Letter from William F. Galvin, Secretary of the Commonwealth, Commonwealth of Massachusetts, to Nancy M. Morris, Secretary, Commission, dated April 18, 2007 (''Massachusetts Letter'').

70. Letter from Joseph P. Borg, President, North American Securities Administrators Association, Inc., and Director, Alabama Securities Commission, to Nancy M. Morris, Secretary, Commission, dated April 17, 2007 (''NASAA Letter'').

71. Letter from Joan Hinchman, Executive Director, President and CEO, National Society of Compliance Professional Inc., to Nancy M. Morris, Secretary, Commission, dated April 26, 2007 (''NSCP Letter'').

72. Letter from Michael J. Mungenast, CEO and President, Proequities, to Nancy M. Morris, dated April 23, 2007 (''Mungenast Letter'').

[FR Doc. E7–14855 Filed 7–31–07; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56146; File No. SR–NASD–2007–053]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to the Restated Certificate of Incorporation of National Association of Securities Dealers, Inc.

July 26, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 24, 2007, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change to amend the Restated Certificate of Incorporation of NASD (''Certificate'') as described in Items I and II below, which Items have been substantially prepared by NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is simultaneously approving the proposal on an accelerated basis.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD proposes to amend its Certificate to reflect the governance and related changes proposed by NASD to accommodate the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. and to conform the Certificate to the amended NASD By-Laws. The proposed amendments to the Certificate also reflect NASD's change in corporate name to Financial Industry Regulatory Authority, Inc. (''FINRA'') as of the closing of the Transaction (defined below). The text of the proposed rule change, including the Certificate, is available at NASD, the Commission's Public Reference Room, and *http://nasd.complinet.com.*

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 III 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

On November 28, 2006, NASD and the NYSE Group, Inc. (''NYSE Group'') announced a plan to consolidate their member regulation operations into a combined organization (''Transaction'') that will be the sole U.S. private-sector provider of member firm regulation for securities firms that conduct business with the public. This consolidation will streamline the broker-dealer regulatory system, combine technologies, permit the establishment of a single set of rules

and group examiners with complementary areas of expertise in a single organization—all of which will serve to enhance oversight of U.S. securities firms and help ensure investor protection. Moreover, NASD notes that the new organization will be committed to reducing regulatory costs and burdens for firms of all sizes through greater regulatory efficiency.

On January 19, 2007, NASD held a special meeting of the members of NASD eligible to vote on amendments to the NASD By-Laws. A quorum of members entitled to vote on the matter was present, in person or by proxy, at such meeting, and a majority of the quorum approved the amendments to the NASD's By-Laws. On March 19, 2007, NASD filed with the Commission a proposed rule change to amend the NASD By-Laws to implement the governance and related changes to accommodate the consolidation of the member regulatory functions of NASD and NYSE Regulation, Inc.[3]

The purpose of this proposed rule change is to make the necessary amendments to the Certificate to reflect the governance and related changes in connection with the Transaction, the related changes to the NASD By-Laws, and NASD's change in corporate name to FINRA as of the date of closing of the Transaction.[4]

The effective date of the proposed rule change will be the closing of the Transaction. The proposed rule change will not become effective if the Transaction does not close.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A of the Act,[5] including section 15A(b)(2) of the Act,[6] in that it will permit FINRA to carry out the purposes of the Act, to comply with the Act, and to enforce compliance by FINRA members, and persons associated with FINRA members, with the Act, the rules and regulations thereunder, and FINRA rules.

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.

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. 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–2007–053 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASD–2007–053. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal 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 File Number SR–NASD–2007–053 and should be submitted on or before August 22, 2007.

IV. Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities association.[7] Specifically, the Commission believes that the proposal is consistent with section 15A(b)(2) of the Act[8] in that it will permit FINRA to be so organized to carry out the purposes of the Act, to comply with the Act and to enforce compliance by FINRA members and persons associated with members with the Act, the rules and regulations thereunder, and FINRA rules. Further, the Commission finds that the proposed rule change is consistent with section 15A(b)(6) of the Act[9] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The proposed rule change amends the Certificate to conform to the changes in the NASD By-Laws that the Commission is approving today, and to reflect the NASD's new name, FINRA.[10] Specifically, the amended Certificate incorporates the governance structure in FINRA's By-Laws, as approved today, including with respect to the three-year transitional period and thereafter. The proposed revisions to the Certificate do not make changes to the governance of FINRA not already contemplated by the proposed changes to FINRA's By-Laws, which were published for comment and

[3] *See* Securities Exchange Act Release No. 55495 (March 20, 2007), 72 FR 14149 (March 26, 2007) (SR–NASD–2007–023). Today, the Commission approved the amendments to NASD's By-Laws proposed in connection with the Transaction. *See* Securities Exchange Act Release No. 56145 (July 26, 2007) (''Release No. 34–56145'').

[4] Article XXII, Section 3 of the NASD By-Laws, as amended in Release 34 –56145, *supra* note 3, addresses the term of office of Governors for a transitional period commencing on the date of closing of the Transaction and ending on the third anniversary of the date of closing. Among other things, Article XXII, Section 3 provides that ''* * * in the event the remaining term of office of any Large Firm, Mid Size Firm or Small Firm Governor position that becomes vacant is for more than 12 months, *nominations shall be made as set forth above in this paragraph,* but such vacancy shall be filled by the members entitled to vote thereon at a meeting thereof convened to vote thereon (emphasis added).'' Article Eleventh of the Certificate does not reiterate the applicable nomination process in such instances, insofar as the text solely restates those persons entitled to make nominations as reflected elsewhere in Article Eleventh. In short, in filling any such vacancies, NASD represents that the nominations will be made in accordance with the provisions of Article XXII, Section 3 of the amended NASD By-Laws.

[5] 15 U.S.C. 78*o*–3.

[6] 15 U.S.C. 78o–3(b)(2).

[7] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78*o*–3(b)(2).

[9] 15 U.S.C. 78*o*–3(b)(6).

[10] *See* Release No. 34–56145, *supra* note 3.

approved by the Commission.[11] The Commission believes that the proposed changes to the Certificate are consistent with the Act.

The Commission finds good cause to approve the proposal prior to the thirtieth day after the proposal was published for comment in the **Federal Register**. This approval allows the proposed rule change to take effect without delay. The proposed revisions to the Certificate do not make changes to the governance of FINRA not already contemplated by the proposed changes to FINRA's By-Laws, which were published for comment and approved by the Commission.[12] Therefore, interested persons were provided the opportunity to submit comments on essentially identical changes. For this reason, the Commission finds good cause, consistent with section 19(b)(2) of the Act, to grant accelerated approval to the proposed changes to the Certificate.

The Commission finds good cause, consistent with section 19(b)(2) of the Act, to grant accelerated approval to the proposed change of the NASD's name to FINRA because it is technical and does not impact members or other market participants.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (SR–NASD–2007–053) is hereby approved on an accelerated basis.[13]

By the Commission.

Nancy M. Morris,

Secretary.

[FR Doc. E7–14856 Filed 7–31–07; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56125; File No. SR–NSCC–2007–09]

Self-Regulatory Organizations; The National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Use of the National Settlement Service

July 24, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on May 1, 2007, The National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by NSCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change permits NSCC to use the Federal Reserve Bank's National Settlement Service (''NSS'') for the settlement of net-net credit balances.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In 2003, as part of a larger initiative to create a centralized settlement system with its affiliate, The Depository Trust Company (''DTC''), NSCC required the use of NSS as the vehicle for all Settling Banks to satisfy their end of day net-net debits.[3] In an effort to increase the efficiencies afforded by NSS, NSCC in conjunction with DTC is now modifying its rules to permit NSCC's use of NSS to distribute net-net credits.[4] Utilizing NSS as the payment mechanism for net-net credits will eliminate the need for NSCC to initiate wire payments for settlement monies owed by NSCC. However, should NSS not be available for any reason, NSCC will retain the capability to satisfy its settlement obligations using wire transfer.

The proposed rule change is consistent with the requirements of section 17A of the Act and the rules and regulations thereunder because it will not affect the safeguarding of funds or securities in NSCC's custody and control or for which it is responsible.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe that the proposed rule change would have any impact or impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments relating to the proposed rule change have not yet been solicited or received. NSCC will notify the Commission of any written comments received by NSCC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(iii) of the Act[5] and Rule 19b–4(f)(4)[6] promulgated thereunder because the proposal effects a change in an existing service of NSCC that (A) does not adversely affect the safeguarding of securities or funds in the custody or control of NSCC or for which it is responsible and (B) does not significantly affect the respective rights or obligations of NSCC or persons using the service. At any time within sixty days of the filing of the proposed rule change, the Commission could have summarily abrogated such rule change if it appeared to the Commission that such action was necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NSCC–2007–09 on the subject line.

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[11] *Id.*

[12] *Id.*

[13] 15 U.S.C. 78s(b)(2).

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified parts of these statements.

[3] Securities Exchange Act Release No. 48744 (November 10, 2003), 68 FR 63831 (November 4, 2003) (File Nos. SR–NSCC–2003–19 and SR–DTC–2003–11).

[4] DTC has submitted a similar proposed rule change (File No. SR–DTC–2007–08) providing for the use of NSS for the distribution of net credits.

[5] 15 U.S.C. 78s(b)(3)(A)(iii).

[6] 17 CFR 240.19b–4(f)(4).

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NSCC–2007–09. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NSCC. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2007–09 and should be submitted on or before August 22, 2007.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14835 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56140; File No. SR–NYSE–2007–55]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to Rule 106 (Specialists' Contact With Listed Companies and Member Organizations)

July 26, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 28, 2007, the New York Stock Exchange LLC (''NYSE'' 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 substantially prepared by the Exchange. NYSE filed the proposal 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. On July 25, 2007, the Exchange submitted Amendment No. 1 to the proposed rule change. 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 amend NYSE Rule 106 (Specialists' Contact with Listed Companies and Member Organizations). The text of the proposed rule change is available at NYSE, the Commission's Public Reference Room, and *http://www.nyse.com.*

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange seeks to amend NYSE Rule 106 in order to modify the requirements related to specialist contact with listed companies and with Exchange member organizations. The proposal takes into consideration the reality that a listed company's, or a member organization's, access to electronic information may result in such listed company or member organization declining to have meetings with the specialist. Therefore, the Exchange seeks to amend the rule to require the specialist unit to make itself available for contact with its listed companies and with certain Exchange member organizations.

NYSE Rule 106 was adopted at a time when orders entered with the specialist were handled manually, and contact between a specialist unit and its listed companies was necessary to ensure that such listed companies were informed about the trading in its listed security on the Exchange trading floor.[5] As a result, NYSE Rule 106(a) mandates interaction between a specialist unit and representatives of its listed companies. The rule is very specific as to the frequency of contact (quarterly) and the status of the issuer representative with whom the contact must be had (Secretary or higher). Further, the rule mandates that at least one of the quarterly meetings be in person. NYSE Rule 106(a) was intended to help foster a better understanding of the specialist function, the operations of the Exchange market, and the markets that are maintained in the listed company's stock.

The Exchange is mindful of the busy schedules kept by the highest ranking corporate employees in listed companies. As such, the Exchange believes that NYSE Rule 106 no longer takes into consideration the possibility that in today's world of electronic messaging, Internet connectivity, and automated trading, a listed company may not need or want the type of contact with their specialist unit that is currently required by NYSE Rule 106(a).

In addition to the listed companies' ability to access public information, specialist units have internal departments that are responsible for

[1] 15 U.S.C. 78s(b)(1).

[2] 7 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Securities Exchange Act Release No. 27292 (September 26, 1989), 54 FR 41193 (October 5, 1989) (SR–NYSE–89–13).

communicating with its listed companies during the trading day. Specifically, specialist units have corporate relations groups that serve to provide its listed companies with information and are available to answer questions from such listed companies during the trading day. As such, the requirements of NYSE Rule 106(a) are unnecessary since the specialist units are in contact with their listed companies on a daily basis as part of its regular course of business.

NYSE Rule 106(a) places the responsibility of contact between the specialist unit and the listed company solely on the proverbial ''shoulders'' of the specialist unit. If the current requirements of NYSE Rule 106(a) are not met by a specialist unit, it is the specialist unit, and not the listed company, that is in violation of the rule and potentially subject to disciplinary action.

Accordingly, the Exchange proposes that NYSE Rule 106(a) be amended to require a specialist unit to make itself available for contact with its listed companies. The proposal would continue to afford listed companies with opportunities for contact with its specialist unit, while removing potential for disciplinary action against a specialist unit that acts as the registered specialist for such listed company that declines to meet or have contact with the specialist unit.

Similarly, while NYSE Rule 106(b) was originally designed to foster a better understanding between the specialist units and the Exchange's fifteen largest member organizations through required, semi-annual ''off the Exchange Trading Floor'' contact, the Exchange believes that NYSE Rule 106(b) no longer reflects the needs of the member organizations. In today's world of electronic messaging, Internet connectivity, and 24-hour news coverage of market activity, a member organization may not want or need the type of contact with a specialist unit that is currently required by NYSE Rule 106(b). The interpersonal relationships between specialists and member organizations that once took front stage in the marketplace have been significantly replaced by automated trading initiatives and computerized market data reports. Moreover, the specialist units are generally in contact with member organizations on a regular basis through electronic and/or telephonic means, which render the requirements of NYSE Rule 106(b) unnecessary.

As does the current version of NYSE Rule 106(a), NYSE Rule 106(b) currently places the responsibility of the semi-annual ''off the Exchange Trading Floor'' contact on the specialist unit, not on the member organization, and if the member organization is unable or chooses not to have such contact with the specialist unit, the specialist unit may be in violation of NYSE Rule 106(b) and potentially subject to disciplinary action. Accordingly, the Exchange proposes to amend NYSE Rule 106(b) to require a specialist unit to ''make itself available'' semi-annually for ''off the Exchange Trading Floor'' contact with the fifteen largest member organizations of the Exchange and certain other members.

Finally, given the current frequency of contact as described above, the Exchange does not believe that it is necessary for specialist units to provide the Exchange with a record of their contacts. As such, the Exchange further proposes to amend NYSE Rule 106(c) to have the specialist report such contacts to the Exchange upon request of the Exchange.

2. Statutory Basis

The proposed rule change is consistent with the requirements of section 6(b) of the Act,[6] in general, and furthers the objectives of section 6(b)(5) of the Act,[7] 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

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing 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) by its terms does not become operative for 30 days after the date of this filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act[8] and Rule 19b–4(f)(6) thereunder.[9]

A proposed rule change filed under Rule 19b–4(f)(6) normally does not become operative for 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with 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.[10]

The Exchange has asked the Commission to waive the 30-day operative delay to allow the Exchange to immediately implement the proposed rule change and avoid any rule violations by specialist units that are unable to fulfill the current obligations of NYSE Rule 106. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest[11] because the proposed rule change to amend NYSE Rules 106(a) and (b) would continue to foster contact and interaction between the specialist units and the Exchange's listed companies and member organizations, respectively, taking into consideration the contemporary, real-time means of communication, connectivity, and access to information. In addition, the Commission believes that the proposed amendment to NYSE Rule 106(c) is consistent with the requirements of the Act, and the Commission notes that, as proposed, the Exchange would still be able to obtain information regarding contact between the specialist units and their listed companies and certain member organizations upon request.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78s(b)(3)(A).

[9] 17 CFR 240.19b–4(f)(6).

[10] As required under Rule 19b–4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing date. *See* 17 CFR 240.19b–4(f)(6)(iii).

[11] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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.[12]

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–NYSE–2007–55 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NYSE–2007–55. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing 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 No. SR–NYSE–2007–55 and should be submitted on or before August 22, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[13]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14843 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

[12] For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change, as amended, under section 19(b)(3)(C) of the Act, the Commission considers the period to commence on July 25, 2007, the date on which the Exchange submitted Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56142; File No. SR–NYSE–2007–22]

Self-Regulatory Organizations; New York Stock Exchange, LLC.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Harmonization of NYSE and NASD Regulatory Standards, the Updating of Certain NYSE Terminology, and the Reorganization and Clarification of Certain NYSE Rules in Connection With the Harmonization Process

July 26, 2007.

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 February 27, 2007, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. On July 26, 2007, NYSE filed Amendment No. 1 to the proposed rule change. 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 proposed rule change consists of amendments to NYSE rules, organized categorically, that would advance the process of harmonizing the regulatory standards of the Exchange and the National Association of Securities Dealers, Inc. (''NASD''). In addition, the proposed rule change would update certain terminology and otherwise reorganize and clarify current NYSE regulatory standards. The text of the proposed rule change is available on the Exchange's Web site (*http://www.nyse.com*), at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NYSE 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 NYSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing amendments to certain NYSE Rules pursuant to its SRO Rule Harmonization initiative. In connection with this filing, the Exchange is also separately submitting to the Commission a report that provides an overview of the Exchange's approach in this regard.

Introduction

Relative to the approval of the NYSE/ARCA merger,[3] the Exchange agreed to initiate a comparison of its regulatory requirements (as prescribed by the NYSE Rulebook and associated interpretive materials) to corresponding NASD regulatory provisions. The purpose of the process was to achieve, to the extent practicable,[4] substantive harmonization of the two regulatory schemes. To that end, this filing proposes amendments to an extensive range of NYSE rules which have been divided into four categories. In addition to organizing the rules conceptually, this serves to distinguish the review and recommendation process that has been applied to each category, discussed more fully below.

The categories are arranged as follows: Category 1 addresses Member Firm Organization/Structure and Governance; Supervision; Registration, Qualification and Continuing

[1] 15 U.S.C 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 53382 (February 27, 2006) 71 FR 11251 (March 6, 2006) (order approving SR–NYSE–2005–77).

[4] The review process recognized the appropriateness of differing standards based upon the differences between the markets and membership of NYSE and NASD.

Education; and Sales Practice (collectively, the ''Sales Practice Rules''); Category 2 addresses the Financial/Operational Rules; Category 3 addresses the Buy-In Rules; and Category 4 addresses the selective deletion of the term ''member'' and the complete deletion of the term ''allied member'' from the NYSE rules (''Member'' and ''Allied Member'' Rules).

Global Amendments

Category 4 includes rules for which the only substantive proposed change is deletion of the terms ''member'' and/or ''allied member.'' Note, however, that the selective deletion of the term ''member'' and the complete deletion of the term ''allied member'' is proposed throughout the other three categories as well.

These amendments are discussed more fully below under Category 4 (''Member'' and ''Allied Member'' Rules). In brief, the Exchange is proposing to delete, where appropriate, the term ''member'' throughout the NYSE rules to reflect its revised meaning in light of the recent merger/reorganization of the Exchange. While ''member'' is still recognized as a categorical designation, its current definition [5] is substantively different from its pre-merger definition, rendering its use in many NYSE rules outdated. Thus, many regulatory requirements that once pertained specifically to NYSE members no longer apply at all, or apply to members only in their capacity as member organization employees.

The ''allied member'' designation is a regulatory category based on a person's ''control'' over a member organization.[6] It is proposed that the term be simply deleted in rules where a person's control status is not relevant to the rule's application. In contexts where an individual's status as a member organization ''control person'' has regulatory relevance, the Exchange proposes to substitute the newly defined category of ''principal executive'' (*see* proposed Rule 416A amendments, below). Unlike the ''allied member'' designation, the ''principal executive'' designation would not require a registration process, but would be used only for regulatory reporting and notification purposes.

[5] The term ''member'' currently refers to an employee of a member organization authorized to effect transactions on the Floor of the Exchange on behalf of such member organization, which holds a license to so trade.

[6] *See* subsection (b) of NYSE Rule 304 (''Allied Members and Approved Persons'').

Category 1 (''Sales Practice Rules'')

Background

In order to initiate the rule harmonization process, the Exchange enlisted, through its Compliance Advisory Group (''CAG''),[7] the assistance of several securities industry regulatory professionals from member organizations who volunteered to participate in various subcommittees in order to conduct an initial review of all relevant materials and to report their findings and recommendations to the Exchange and the NASD (collectively, the ''SROs''). The SROs were charged with the responsibility of considering the appropriateness of the committees' recommendations and working together to amend their respective rules accordingly.

The review process formally began in February 2006 when the Exchange's Member Firm Regulation (''MFR'') Division, in conjunction with the CAG, organized four subcommittees and assigned each a group of rules within a specified regulatory category. The following four subcommittees were thus established: (1) Member Firm Organization/Structure and Governance; (2) Supervision; (3) Registration, Qualification and Continuing Education; and (4) Sales Practice. Representatives from the Exchange, the NASD, and the Securities Industry Association (''SIA'') [8] participated throughout this review process in a consultative role.[9] The recommendations that resulted from these subcommittees' comparison of NYSE and NASD rules are, in large part, the basis for the Category 1 amendment proposals presented herein.

The subcommittee review process essentially consisted of identifying inconsistencies between the NYSE rules and the NASD rules, determining which SRO standard made more regulatory sense, and then recommending rule changes that would either conform an NYSE standard to its NASD counterpart or vice versa. In some instances, the subcommittees recommended a hybrid approach that included amendments to corresponding rules of both SROs.

[7] The Exchange's Compliance Advisory Group is a committee consisting of representatives from the Exchange Member Firm Regulation Division as well as legal and compliance personnel from a cross-section of the NYSE member organization community. CAG meets on a periodic basis, generally monthly, to discuss regulatory and compliance matters of interest to the securities industry.

[8] Note that SIA has since combined with the Bond Market Association to form the Securities Industry and Financial Markets Association (''SIFMA'').

[9] NASD did not participate in the Member Firm Organization/Structure and Governance Subcommittee.

Each of the recommendations has been reviewed with the CAG Group and the NASD. These subsequent discussions allowed further exploration of the issues raised by the subcommittees and provided a better sense for which recommendations clearly warrant redress via the formal rule amendment process and which require further consideration.[10]

The Exchange has also taken the opportunity, where appropriate, to reorganize and clarify rule text related to the subcommittees' recommendations and to otherwise update, refine and clarify its regulatory standards.

Rule 311 Formation of Member Organizations

NYSE Rule 311 governs the formation and approval of member organizations by the Exchange. The proposed amendments to Rule 311(b) would extend the application of the rule, which currently addresses partnerships and corporations, to include any type of entity (*e.g.*, a limited liability company) applying to the Exchange to become a member organization.

The proposed amendments would delete subsection (b)(7) of Rule 311 which requires every employee who is associated as a member with a member organization to be designated with a title, such as vice president, consistent with such person's responsibilities and the usage of titles within such organization. Additionally, the amendments propose the deletion of subsection (h) which prescribes the number of partners to be named in a member organization in order for it to conduct business. These two provisions are being deleted as they are outdated and no longer necessary in light of the current spectrum of NYSE member organizations business models.

Rule 313 Submission of Partnership Articles—Submission of Corporate Documents

NYSE Rule 313 requires member organizations to submit to the Exchange for approval certain documents which establish a partnership's or corporation's existence. The proposed amendments to Rule 313 add limited liability agreements to the enumeration of documents required to be submitted to and approved by the NYSE in order for an entity to be a member organization. The proposed amendments to Rule 313 also amend .23 of the supplementary material to provide that all corporations, not just

[10] *See* NYSE Report submitted in conjunction with this filing for a further discussion and enumeration of such rules.

those organized under the laws of the State of New York, shall subject themselves to the restrictions set forth in .23.

Rule 322 (Guarantees by, or Flow Through Benefits for Members or Member Organizations)

Rule 322.10 currently requires each member organization to provide written notice to the Exchange prior to: (1) Guaranteeing, endorsing or assuming, directly or indirectly, the obligations of another person or (2) receiving flow-through capital benefits. The practice by member organizations of guaranteeing the liabilities of other persons has long been recognized as a matter that gives rise to special risks with respect to the member organization's capital. Accordingly, as a matter of practice, the Exchange has carefully reviewed and vetted such submissions such that the ''prior notice'' requirement has effectively been treated as a ''prior approval'' requirement.

The proposed amendments would codify this well-established approach by replacing the present requirement that ''notice'' of at least 10 business days be given to the Exchange prior to entering into an arrangement prescribed by the rule with an explicit requirement that written Exchange approval be obtained prior to the finalization of any such arrangement.

The NASD does not currently have an analogue to Rule 322. The Member Firm Organization/Structure and Governance Subcommittee recommended that NASD adopt a similar rule and NASD has taken the recommendation under advisement.

Rule 342 (Offices—Approval, Supervision and Control) and its Interpretation

Rule 342.13—Acceptability of Supervisors

NYSE Rule 342.13(a) currently requires that persons who are to be assigned certain prescribed supervisory responsibilities [11] have a ''creditable'' three year record as a registered representative or have three years of ''equivalent experience'' before functioning as a supervisor.[12]

The Exchange proposes that Rule 342.13(a) be amended to eliminate the prescribed three-year experience requirement for supervisory personnel and conform with the standard outlined in NASD Rule 1014(a)(10)(D) with respect to firms that are submitting an application to become registered as a broker dealer. In addition, as under NASD 1014(a)(10)(D), the proposed amendments would require that supervisory candidates have one year of ''direct experience'' or two years of ''related experience'' in the subject area to be supervised.

With respect to existing broker dealers, the Exchange believes that, given a member organizations' first hand knowledge of their supervisory candidates, it is reasonable to provide greater flexibility than Rule 342.13(a) currently allows. Accordingly, the proposed amendments would allow member organizations to make informed determinations, on a case-by-case basis, as to the length and type of experience and training required for each supervisory candidate before he or she is deemed sufficiently prepared to assume particular responsibilities.

In order to ensure regulatory jurisdiction over all principal executives, and to more closely conform with the standard prescribed under subsection (a) of NASD Rule 1021 (Registration Requirements) the Exchange proposes new Rule 342.13(c) which would require each person designated by a member organization as a ''principal executive,'' as that term is defined in Rule 416A, to pass an examination appropriate to the functions to be performed by such person.

Rule 342.19—Supervision of Producing Manager

NYSE Rule 342.19 currently requires that a person designated to supervise the business of a Producing Manager (a branch office manager, regional/district sales manager, or a person who performs similar functions and that conducts a public business) must be senior to, or otherwise independent of, such Producing Manager. Currently, a component of determining whether such designated person is ''otherwise independent'' of a Producing Manager is whether the designated person receives an override or other income derived from the Producing Manager's customer activity that represents more than 10% of the designated person's gross income derived from the member organization over the course of a rolling twelve-month period. If the designated person exceeds the 10% threshold, Rule 342.19 requires that ''alternate senior or otherwise independent supervision'' of the Producing Manager be established.

Member organizations have indicated that the ''10% override'' standard is difficult to calculate within the context of certain compensation models (*e.g.*, where an override or other compensation may be tied to a formula applicable to the business of the entire branch office and not distinguishable from the Producing Manager's customer activity).

Consequently, the Exchange proposes to delete the current Rule 342.19 standard and offer the following alternative: If a designated supervisor receives an override or other income from the production of registered persons subject to his or her supervision, and the gross revenues of any Producing Manager under his or her supervision exceed 10% of the total gross revenue of all registered persons subject to his or her supervision, then the producing manager would be ''flagged'' for either alternate supervision (as currently required by Rule 342.19) or ''heightened supervision,'' which is the standard currently utilized by the NASD 3012(a)(C). The Exchange also proposes amending Rule 342.19(a) to add the NASD Rule 3012(a)(2)(C) definition of ''heightened supervision.'' Thus, proposed Rule 342.19(a) would define ''heightened supervision'' to mean: ''those supervisory procedures that evidence supervisory activities that are designed to avoid conflicts of interest that serve to undermine complete and effective supervision because of the economic, commercial, or financial interests that the supervisor holds in the associated persons and businesses being supervised.''

Rule 342.23—Internal Controls

The Exchange proposes repositioning text, from Rule 401 to Rule 342.23, which requires internal controls over certain prescribed business activities (*e.g.*, activities pertaining to the transmittal of funds and securities from customer accounts, changes in customer address, and changes in customer investment objectives). Since Rule 401 text currently refers back to requirements outlined in Rule 342.23, it makes sense to integrate the Rule 401 text into Rule 342.23 for purposes of easy reference and comprehension.

Rule 345 (Employees—Registration, Approval, Records) and its Interpretation

Adoption of ''Assistant Representative'' Registration Category

The Exchange is proposing amendments to Rule 345(a) and its Interpretation to adopt ''assistant

[11] In this regard, Rule 342.13(a) references Rule 342(d) which requires that ''[q]ualified persons acceptable to the Exchange shall be in charge of: (1) Any office of a member or member organization, (2) any regional or other group of offices, (3) any sales department or activity.''

[12] Rule 342.13(a) also requires that persons assigned supervisory responsibility pursuant to Rule 342(d) must pass a qualification examination acceptable to the Exchange that demonstrates competence relevant to assigned responsibilities.

representative'' as a registration category and to recognize the Series 11 as its prerequisite qualification examination.[13] This is being done to establish a registration category that would allow for the performance of functions not permitted to be performed by a non-registered sales assistant without requiring full Series 7 registration. Specifically, as defined in proposed Rule 345.10, a person registered as an ''assistant representative'' would be a member organization employee who could accept unsolicited orders for execution by the member organization. An assistant representative would not be permitted to solicit transactions or new accounts on behalf of the member organization, render investment advice, make recommendations to customers regarding the appropriateness of securities transaction, or effect transactions in securities markets on behalf of the member organization.

Further, persons registered in this category may not be registered concurrently in any other category. Member organizations may only compensate assistant representatives on an hourly wage and may not directly or indirectly relate their compensation to the number or size of customer transactions effected. This provision would also prohibit assistant representatives from receiving bonuses or other like compensation related to a member organization's transaction-based activity.

Elimination of Prescribed Training Periods for Certain Registered Persons

NYSE Rule 345 currently prohibits member organization employees from performing the functions of a registered representative unless such employee is registered, qualified and meets a designated four-month training period.[14]

Further, the Interpretation[15] of Rule 345 currently provides that exam-qualified ''registered representatives'' and ''registered options representatives'' will not receive Exchange approval to perform functions pursuant to such qualifications without first completing a four-month training period. NASD Rules do not require such training periods.

In order to harmonize Rule 345 with the NASD regulatory structure, and to provide member organizations the flexibility to train their registered personnel in a manner appropriate to the duties they will be assuming, the Exchange is proposing amendments to Rule 345 and its Interpretation to eliminate the prescribed four-month training period for registered representatives and for registered options representatives. The proposed amendments would allow member organizations to make informed decisions as to the extent and duration of training for such registered persons before they are permitted to perform functions requiring registration.

Similarly, the Exchange is also proposing the elimination of the currently required two-month training period for ''limited registration'' candidates.[16]

Rule 345(b)

Rule 345(b) currently prohibits any natural person, other than a member or allied member, to assume the duties of an officer with the power to legally bind such member or member organization unless such member or member organization has filed an application with and received the approval of the Exchange. The Exchange proposes to delete Rule 345(b) in its entirety. Proposed amendments to Rule 416A (see below) would require member organizations to notify the Exchange of all principal executives (defined as the designated principal executive officers of a member organization pursuant to NYSE Rule 311(b)(5) or their functional equivalents). There would no longer be a requirement that the Exchange approve such persons (which is consistent with NASD's regulatory structure). New Rule 345(b) would clarify that no person shall undertake any active duties whose performance requires a qualification examination until such person has satisfactorily met such examination requirement. This is included, in part, to reaffirm the exam qualification requirements applicable to such control persons.[17]

Training Requirement for Members and Substitute Members

The Exchange is proposing new Rule 345(c) which would prohibit any person from becoming active on the Floor as a member or a substitute thereof unless such person has been sufficiently trained under the guidance of an experienced member for such period of time as may be necessary before being permitted to execute orders without supervision. This requirement is proposed to help ensure that persons who will be performing the duties of a member are sufficiently prepared to do so.

Adoption of ''Qualified Investor'' Standard

The Interpretation of Rule 345[18] currently allows Floor members and Floor clerks who have successfully completed the Series 7A examination to conduct a public business limited to accepting orders from ''professional customers'' as that term is defined in the Interpretation. The Exchange is proposing substituting the more generally recognized ''qualified investor'' standard, as that term is defined under section 3(a)(54)[19] of the Act.

Clarification of Employee Background Check Requirements

The Exchange is also proposing revised language[20] that reorganizes and clarifies member organization requirements with respect to investigating the background of persons they contemplate employing.

Rule 346 (Limitations—Employment and Association With Members and Member Organizations)

Rule 346(b) Inclusion of Rule 407 Materials Related to ''Private Securities Transactions''

NYSE Rule 407 (Transactions—Employees of Members, Member Organizations and the Exchange) provides, in part, that no employee of a member organization shall establish or maintain a securities or commodities account or enter into a private securities transaction without the prior written consent of his or her member organization. The Exchange is proposing amendments to 346 to more logically reposition current Rule 407 requirements[21] with respect to ''private securities transactions'' (*e.g.*, interests in oil or gas ventures, real estate syndications, tax shelters, etc.) and to harmonize the standards applicable to such transactions with those of NASD

[13] The Commission notes that NASD currently has a similar rule that governs Assistant Representatives. *See* NASD Rules 1041 (Registration Requirements for Assistant Representatives) and 1042 (Restrictions for Assistant Representatives).

[14] *See* Rule 345(a) and Supplementary Material section .15(b)(2).

[15] *See* Rule 345.15/2 (''Qualifications—Categories of Registration'') in the *NYSE Interpretation Handbook.*

[16] Limited registration candidates' activities are limited to the solicitation or handling of the sale or purchase of instruments such as investment company securities and variable contracts, insurance premium finding programs, direct participation programs and municipal securities. (*See* Rule 345.15/02 in the *NYSE Interpretation Handbook*).

[17] *See,* for example, Rule 311 and its Interpretation.

[18] *See* Rule 345.15/02 in the *NYSE Interpretation Handbook.*

[19] 15 U.S.C. 78c(a)(54).

[20] *See* Rule 345.11 in the Supplementary Material.

[21] *See* Rule 407(b) and section .11 in the Supplementary Material.

Rule 3040 (Private Securities Transaction of an Associated Person).

Specifically, the Exchange proposes repositioning requirements pertaining to ''private securities transactions'' from Rule 407 to Rule 346(b) since Rule 346 more directly addresses issues related to the outside activities of registered persons. Further, definitions of the terms ''private securities transactions'' and ''selling compensation'' are proposed that are substantially similar to the definitions found in corresponding NASD Rule 3040.[22]

Proposed Deletion of Rule 346(c)

The Exchange proposes deleting Rule 346(c) which currently requires that prompt written notice be given to the Exchange ''whenever any member or member organization knows, or in the exercise of reasonable care should know, that any person, other than a member, allied member or employee, directly or indirectly, controls, is controlled by or is under common control with such member or member organization.'' This provision is redundant in light of the FORM BD requirement, pursuant to its question number 10, that each broker dealer disclose such control relationships. The proposed amendment would be consistent with the NASD regulatory structure which has no corresponding requirement.

Proposed Amendments to Rule 346(e), Rule 346(f) and 476A (Imposition of Fines for Minor Violation(s) of Rules)

Rule 346(e) currently requires that persons who are assigned or delegated supervisory authority pursuant to Rule 342 must devote their entire time during business hours to their member organization, unless otherwise permitted by the Exchange. Over the past several years, the Exchange has had extensive experience reviewing and responding to approval requests pursuant to Rule 346(e) and has noted an increasing number of member organizations that have interrelated business arrangements with sister corporations active in various areas of the financial services industry. Also noted has been the corresponding increase in experience member organizations have gained in the allocation of supervisory responsibility when supervisory persons are assigned functions across corporate lines.

Accordingly, the Exchange proposes amendments to Rule 346 that would eliminate the requirement of Exchange approval in order for supervisory persons to devote less than their entire time to the business of their member organization. In lieu thereof, the amended rule would require the prior written approval of the member organization, pursuant to the exercise of appropriate due diligence, for such arrangements. The amendments recognize that member organizations are best positioned to make such determinations.

The proposed amendments[23] would require the identification of any entity for which the supervisory person will be performing services during business hours and a description of such services. The member organization's written approval would be required to set forth the approximate amount of time the supervisory person is expected to devote to each entity, with particular attention paid to the approximate time expected for the person, based upon qualifications and experience, to be able to effectively discharge his or her supervisory responsibilities on behalf of the member organization. In addition, the amendments would require documentation that the member organization has made a good faith determination that the arrangement will not compromise the protection of investors or the public interest, compromise the supervisor's duties at the member organization, or give rise to a material conflict of interest. These provisions have been repositioned from Rule 346(e) to Rule 346(c).

The nearest corresponding NASD requirement is found in NASD Rule 3030 (Outside Business Activities of an Associated Person) which generally states that no registered associated person of a member shall be employed by, or accept compensation from, any other person as a result of any other business activity without providing prompt written notice to the member. This standard is similar to that currently outlined in NYSE Rule 346(b) which applies only to non-supervisory member organization employees. While this standard continues to be appropriate for non-supervisory persons, the Exchange believes that, given the responsibilities attendant to persons who have been delegated supervisory duties, a heightened standard of control such as that prescribed by the proposed amendments remains advisable.

It is proposed that the Interpretation of Rule 346(e) be deleted since its application is specific to the regulatory standard being deleted, and would thus be rendered irrelevant upon approval of the proposed amendments to the Rule.

Further, Rule 476A, which lists violations of Exchange rules that are subject to a fine not to exceed $5,000, includes Rule 346(e) as a ''failure to obtain Exchange approval'' violation. Since the Exchange is proposing the elimination of the Exchange approval requirement under this provision (and since Rule 346, as amended, no longer contains a subsection (e), it is proposed that the reference to Rule 346(e) within Rule 476A be deleted as well.

Proposed Amendments to Rule 346(f)

Rule 346(f) currently requires that, except as otherwise permitted by the Exchange, ''no member, allied member, approved person, employee or any person directly or indirectly controlling, controlled by or under common control with a member or member organization shall have associated with him or it any person who is known, or in the exercise of reasonable care should be known, to be subject to any 'statutory disqualification.'''[24] As written, this provision is overly broad in that its prohibitive reach ostensibly extends to persons not subject to the jurisdiction of the Exchange. Thus, amendments are proposed to Rule 346(f) to reasonably clarify that its reach is limited to persons subject to the Exchange's jurisdiction. The amended language has also been repositioned as Rule 346(d). As violations of current Rule 346(f) are subject to Rule 476A, corresponding amendments to that rule that reflect this repositioning are proposed as well.

Rules 351 (Reporting Requirements) and 401A (Customer Complaints)

NYSE Rule 351(d) requires each member organization to report to the Exchange statistical information regarding customer complaints relating to such matters as may be specified by the Exchange.[25] Current Exchange policy requires that all complaints, including oral complaints, be reported pursuant to this provision.[26]

Amendments to Rule 351(d) are proposed that would limit reportable complaints to those that are ''written,'' consistent with NASD Rule 3070(c). Furthermore, proposed new NYSE Rule 351.15 limits the definition of the term ''customer complaint'' to written statements of a customer, or any person acting on behalf of a customer, other than a broker or dealer, alleging a

[22] *See* Rule proposed Rule 346 Supplementary Material sections .10, .11 and .12, respectively.

[23] *See* proposed Rule 346(c).

[24] *See* Section 3(a) (39) of the Act for the definition of statutory disqualification.

[25] *See* NYSE Information Memo Nos. 06–28 (May 4, 2006), 05–29 (April 22, 2005), 04–11 (March 9, 2004), 03–38 (September 19, 2003), 03–36 (August 25, 2003), and 98–16 (April 14, 1998).

[26] *See* NYSE Information Memo No. 03–38 dated September 19, 2003.

grievance involving the activities of those persons under the control of a member organization.

NYSE Rule 401A currently requires that member organizations acknowledge and respond to all complaints subject to the reporting requirements of Rule 351(d). As noted above, the Exchange is proposing to limit Rule 351(d) reportable complaints to those that are written. However, the Exchange believes that both written and oral complaints should be acknowledged and responded to pursuant to Rule 401A. Thus, it is proposed that the Rule 401A reference to Rule 351(d) be deleted to clarify that verbal complaints remain within the scope of Rule 401A. Note that Rule 401A requires member organizations to maintain written records of such acknowledgements, responses and other prescribed complaint-related follow-up activities, and further requires that such records be retained in accordance with NYSE Rule 440 (Books and Records).

Rule 352 (Guarantees, Sharing in Accounts, and Loan Arrangements)

Rule 352 restricts the extent to which member organization personnel may share in customer account profits or losses. Rule 352(b) generally prohibits member organizations, allied members and registered representatives from sharing profits or losses in any customer account. However, Rule 352(c) permits such sharing in proportion to financial contributions made to a joint account.

Rule 352(c)

The Exchange proposes to amend Rule 352(c) to exempt from the proportional contribution requirement joint accounts with immediate family members held by principal executives or registered representatives of a member organization. This amendment would avoid intrusive regulation into accounts that may naturally entail profit and loss participation on a disproportionate basis, as with joint accounts between husband and wife, while retaining coverage of the rule for other accounts. Similarly, NASD Rule 2330(f)(1)(A) generally permits an NASD member or a person associated with an NASD member to share in profits and losses with a customer, provided such sharing is proportionate to the financial contributions of each account holder while NASD Rule 2330(f)(1)(B) exempts from this proportionality requirement accounts shared between an associated person and a customer who is an immediate family member of such associated person.

The amendments make clear that any sharing arrangement entered into pursuant to Rule 352(c) is subject to the Rule 352(a) provision that no member organization shall guarantee or in any way represent that it will guarantee any customer against loss in any account or on any transaction; and no employee of such member organization shall guarantee or in any way represent that either he or she, or his or her employer, will guarantee any customer against loss in any customer account or on any customer transaction.

The amendments define the term ''immediate family'' in Rule 352(c) to include parents, mother-in-law or father-in-law, husband or wife, children or any relative to whose support the principal executive or registered representative contributes directly or indirectly. This definition harmonizes with the standard under NASD Rule 2330(f)(1)(B). The existing definition of ''immediate family'' in Rule 352(g) is retained for other provisions in the Rule, essentially allowing persons acting in the capacity of a registered representative or principal executives to lend to or borrow from a more extensive range of family members. Accordingly, it is proposed that Rule 352(g) be amended to confirm that its provisions are not applicable to Rule 352(c). The broader Rule 352(g) standard is also consistent with the corresponding NASD standard.[27]

Rule 352(d)

The Exchange is also proposing non-substantive amendments to Rule 352(d) that streamline the reference to the exemption from the rule's general prohibition against sharing in profits. Specifically the revised provision would read that, notwithstanding the general prohibition against sharing in profits under paragraph (b), a person acting as an investment adviser (whether or not registered as such) may receive compensation based on a share of profits or gains in an account if all of the conditions in Rule 205–3 of the Investment Advisers act of 1940 (as may be amended from time to time) are satisfied. The provision retains its notice that all advisory compensation arrangements should be reviewed by member organizations and their counsel in light of applicable State and Federal law (*e.g.*, ERISA).

Rule 353 (Rebates and Compensation)

First proposed in 1978 and adopted in 1979,[28] Rule 353(a) enacted into Exchange regulations anti-rebate provisions which had previously been contained in the Registered Representative Agreement.[29] In pertinent part, the Rule provides:

> No member, allied member, registered representative or officer shall, directly or indirectly, rebate to any person, firm, or corporation, any part of the compensation he receives for the solicitation of orders for the purchase or sale of securities or other similar instruments for the accounts of customers of his member organization employer * * *

The Rule has for some time been consistently interpreted by the Exchange to prohibit rebate arrangements directly between natural persons (without the knowledge or involvement of the broker dealers carrying such persons' registration) but not to prohibit arrangements when payments are made broker dealer to broker dealer and remitted to duly registered individuals. The Exchange has, upon request, provided ''good business practice'' safeguards regarding how to best structure such arrangements pursuant to Rule 353.

Amendments to the Rule are proposed that would incorporate those safeguards and clarify relevant regulatory requirements applicable to these arrangements. The amendments would also re-title the rule from ''Rebates and Compensation'' to ''Rebates and Commission Sharing Arrangements'' to better reflect the focus of the amended text. NASD has no analogue to Rule 353.[30]

Proposed amendments to Rule 353(a) would reaffirm that the rule prohibits rebate arrangements ''directly'' to natural persons. Specifically, the revised text states that ''[n]o employee of any member organization shall, directly remit to or receive from any person, firm, or corporation, any part of the compensation received for effecting transactions in securities or other similar instruments for a customer account, or directly pay or receive such compensation, or any part thereof, as a bonus, commission, fee or other consideration for business sought or procured for the employee or for any member organization of the Exchange.''

Proposed Rule 353(b) would clarify that registered employees of member organizations may participate in the remittance or receipt of such

[27] *See* subsection (c) of NASD Rule 2370 (Borrowing From or Lending to Customers).

[28] *See* Securities Exchange Act Release No. 15811 (May 11, 1979).

[29] *See* NYSE Information Memo 79–42 (July 16, 1979).

[30] NASD Rule 2420 (Dealing with Non-Members) states that no member may deal with a non-member unless at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public. NASD IM–2420–2 (Continuing Commissions Policy) states that continuing commissions are permitted so long as the person receiving them is registered with the NASD.

compensation pursuant to an agreement which provides that:

(1) All remittances or payments to or from the registered employee are made pursuant an arrangement between the member organization and another registered broker-dealer;

(2) the terms of the payment arrangement are memorialized in a written agreement signed by authorized officers of both broker dealers;

(3) all such remittances or payments are duly recorded on the respective organizations' books and records; and

(4) affected customers receive prior, specific, plain language written disclosure of the payment arrangement. (Such disclosure must provide payment parameters and methods; mere ''boiler plate'' disclosure would not satisfy the provisions of this subsection).

These provisions are intended to prevent improper payment arrangements between individuals that are under the broker dealers' ''regulatory radar.'' They are further meant to assure that sharing in commission-based income is limited to registered persons, as well as to assure the transparency of such arrangements not only to the broker dealers but also to affected customers.

Proposed Rule 353.10 distinguishes other permissible arrangements that could be interpreted as types of commission sharing. Specifically noted are payments made pursuant to a carrying agreement under Rule 382, since such agreements: May involve netting of commissions by the carrying firm; are by definition limited to broker-dealers; are made under an arrangement disclosed to the customers; and are in writing. Also included is a reference to Section 28(e) of the Act which provides a safe harbor that protects money managers from liability for breach of fiduciary duty solely on the basis that they paid more than the lowest commission rate in order to receive brokerage and research services provided by a broker-dealer if a manager determines in good faith that the amount of commissions was reasonable in relation to the brokerage and research services received.

Proposed Rule 353.10 also makes clear that any commission-sharing arrangements established pursuant to Rule 353 must comply with all other applicable SRO rules and federal regulations and may not otherwise compromise services to affected customers (*e.g.*, with respect to ''best execution'' obligations).

Rule 388 (Prohibition Against Fixed Rates of Commission)

Rule 388 currently states that the Exchange does not require its members to charge fixed or minimum rates of commission, and provides that nothing in the Rules of the Exchange shall be construed as authorizing the charging of fixed rates.

The Exchange adopted Rule 388 on April 3, 1975 in response to Rule 19b–3 [31] of the Act and in conjunction with the Securities Acts Amendments of 1975,[32] which moved the securities industry toward fully negotiated commission rates. The Commission rescinded Rule 19b–3 in 1988 upon the enactment of Section 6(e)(1) [33] of the Act which specifically prohibited exchanges from imposing fixed rates of commissions. Since the purpose of Rule 388 has been achieved by Section 6(e)(1), it has been rendered redundant and serves no practical purpose. Accordingly, it is proposed that it be rescinded. The NASD has no comparable rule.

Rule 401 (Business Conduct) [34]

Rule 401 states, in part, that each member organizations shall at all times adhere to the principles of good business practice in the conduct of its business affairs. The Exchange is proposing to add supplementary material to Rule 401 [35] that would codify the understanding that principles of good business conduct extend to compliance with all regulatory provisions to which a member organization is subject (including applicable provisions of federal securities law, the rules and regulations of any SRO of which a member organization is a member, state securities law, ERISA, etc.). This would clarify that the principles of good business practice required by Rule 401 extend, for example, to the product-specific provisions of NASD Rule 2210 (Communications with the Public) and its interpretive material [36] which are not specifically addressed in corresponding NYSE Rule 472 (Communications with the Public) as well as to NASD Rule 2440 (Fair Prices and Commissions) and NASD IM–2440 (Mark-up Policy).

Rule 407 (Transactions—Employees of Members, Member Organizations and the Exchange)

The proposed amendments to Rule 407 are discussed above in the context of the ''Rule 346'' amendments.

Rule 408 (Discretionary Power in Customers'' Accounts)

NYSE Rule 408 provides, in part, that no employee of a member organization shall exercise discretionary power in any customer's account or accept orders for an account other than the customer without first obtaining written authorization of the customer. The Exchange is proposing amendments to Rule 408(a) that would require member organizations to obtain the signature of any person or persons authorized to exercise discretion in such accounts, of any substitute so authorized, and the date such discretionary authority was granted. The proposed amendment would conform Rule 408(a) to corresponding requirements in NASD Rule 3110(c) and would promote better member organization controls to ensure that exercise of discretionary power over accounts is properly authorized.

Rule 408(c) prohibits effecting purchases or sales which are excessive in size or frequency in view of the financial resources of such customer. It is proposed that Rule 408(c) be amended to harmonize it with NASD 2510(a) which prohibits transactions that are excessive in size or frequency in light of the ''financial resources and character'' of the account. Specifically, the Exchange proposes amending Rule 408(c) to take into consideration the ''character'' of an account by requiring consideration of the customer's ''account history, investment objectives and age.''

In addition, The Exchange proposes amendments to Rules 408(d) and 408.11 that would delete the term, ''institutional account'' and replace it with the term, ''qualified investors'' as the latter is a readily identifiable standard under the federal securities laws.

Rules 409A (SIPC Disclosures) and 436 (Interest on Credit Balances)

The Exchange is proposing the deletion of Rule 436 and its Interpretation and the repositioning of their substance into Rule 409A. The purpose is to both clarify the intent of Rule 436 and place the revised text in a more suitable context.

Rule 409A currently provides, in part, that member organizations must advise

[31] 17 CFR 240.19b–3.

[32] Elements of the SEC rule were enacted in amendments to the Act at Section 6(e)(1).

[33] 15 U.S.C. 78f(e)(1).

[34] *See also* discussion under ''Rule 342'' above of the repositioning of Rule 401(b) text into Rule 342.23.

[35] *See* proposed Rule 401.10.

[36] For example, unlike NYSE Rule 472 and its interpretation, NASD IM–2210–2 addresses ''communication with the public'' issues specific to Variable Life Insurance and Variable Annuities. Likewise, NASD IM–2210–8 addresses communications issues specific to Collateralized Mortgage Obligations.

each customer in writing, upon the opening of an account and at least annually thereafter, that they may obtain information about the Securities Investor Protection Corporation (SIPC), including the SIPC Brochure, by contacting SIPC, and shall provide the Web site address and telephone number of SIPC. The proposed amendments to Rule 409A would add that member organization account statements must contain a disclosure to the effect that free credit balances not maintained for purposes of reinvestment in securities will be ineligible for SIPC coverage.

The purpose of consolidating Rule 436 and its Interpretation into Rule 409A is to position all of our provisions relating to SIPC and its consequences for customers in one rule for easier application and more logical placement. During the course of our rule review, we have attempted to align kindred and related rules into a more coherent structure. Rule 436, as it presently exists, was created to implement certain aspects of the Banking Act of 1933 (generally referred to as the Glass Stiegel Act). Specifically, Rule 436 and its Interpretation 436/01 provide that no member organization, unless subject to supervision by State banking authorities, shall pay interest on any credit balance created for the purpose of receiving interest thereon, however, interest may be paid on ''free'' credit balances left with a member organization for the purpose of reinvestment or temporarily being held awaiting investment. Accordingly, the Interpretation provides that member organizations should devise a method for determining whether the credit balance is left for investment or reinvestment purposes to ensure that such funds are fully protected by SIPC. Rule 436 has been interpreted to mean that free credit balances are to be used for reinvestment purposes, which falls fore square to the proposed change in Rule 409A(2) regarding SIPC not covering balances that are not being used for reinvestment purposes.

Rule 412 (Customer Account Transfer Contracts)

Background

NYSE Rule 412 regulates the process by which member organizations transfer customer accounts through the Automated Customer Account Transfer Service (''ACATS'').[37] NYSE Rule 412 generally requires that, in order for a customer's account to be transferred to another firm through ACATS, the customer must formally initiate the transfer process by providing ''authorized notice'' to the receiving organization. In the context of Rule 412, authorized notice means the customer's signature on a transfer initiation form (*i.e.*, a signed ''TIF''). However, in certain circumstances (notably, bulk transfers) obtaining a signed TIF from each and every customer may not be practicable. Thus, Rule 412(f) permits member organizations to seek an exemption from the authorized notice requirement and to effect bulk transfers using ''negative consent letter'' notice to affected customers in lieu of individually executed TIFs. Currently, such exemptions are granted by the Exchange on a case-by-case basis.

Proposed Amendments

Amendments to NYSE Rule 412(f) are proposed that would allow member organizations to effect a bulk transfer of customer accounts through the use of negative consent letters without first obtaining approval from the NYSE. The standards the Exchange proposes to codify and apply to this process are the same as those currently applied by the Exchange pursuant to its case-by-case review procedures and are essentially consistent with the NASD's regulatory guidance in this area.[38] The Exchange believes that codification of bulk transfer standards will better enable membership to standardize and coordinate their bulk transfer procedures. Exchange staff will, of course, remain available to provide interpretive guidance and practical advice when needed.

In order for a member organization to qualify for the proposed ''bulk transfer'' exemption, two sets of standards must be met. First, the transfer in question must involve a large enough number of accounts such that it would be impracticable to obtain each customer's authorized notice as otherwise required by NYSE Rule 412(a). In addition, the circumstances necessitating the transfer must be an extraordinary, firm-driven corporate event outside the delivering[39] firm's ordinary course of business (*e.g.*, a merger, the sale of a branch office or business division from one firm to another, an introducing firm moving their business to a new clearing firm, etc.).

Second, the delivering firm would be required to provide affected customers with notice regarding the prospective bulk transfer through the use of a negative consent letter.[40] The proposed amendments set forth the disclosure requirements to be contained in such letters. Specifically, an acceptable negative consent letter would be required to include: A synopsis of the circumstances necessitating the transfer (a merger, the sale of a branch office from one firm to another, an introducing firm moving their business to a new clearing firm, etc.); notification of the customer's right to opt out of the transfer; sufficient notice (generally, a minimum of 30 calendar days) for customers to opt out of the transfer; disclosure of any previously established fees associated with the transfer; information explaining the manner in which the customer can effect a transfer to another broker-dealer, if the customer so chooses; and a statement regarding the compliance of both the delivering and receiving firm with SEC Regulation S-P.[41]

The proposed amendments would also require that both the delivering and the receiving firms agree in writing to any bulk transfer pursuant to Rule 412(f). This is to ensure that the proposed provisions are not used, for example, by a registered representative who is moving to another firm to take his customers with him via bulk transfer without the knowledge or consent of the delivering firm. Absent the explicit approval of both firms, any transfer of customer accounts under such circumstances must be effected pursuant to each customer's authorized notice and would be fully subject to the provisions of Rule 412. As noted above, only extraordinary, firm-driven corporate events outside the delivering firm's ordinary course of business can serve as the basis for a Rule 412(f) exemption. The proposed amendments would preclude member organizations from transferring customer accounts

[37] ACATS is an automated system, administered by the National Securities Clearing Corporation (''NSCC'') that standardizes the transfer of customer accounts from one broker dealer to another. *See also* NYSE Information Memo No. 04–20 (April 8, 2004).

[38] *See* NASD Notice to Members 02–57 (Bulk Transfer of Customer Accounts).

[39] In the context of Rule 412(f), the term ''delivering firm'' refers to the broker-dealer with which the customer has a direct business relationship (*i.e.*, the ''introducing'' or ''correspondent'' firm if the delivering firm is not self-clearing.) Likewise, in the context of Rule 412(f), the term ''receiving firm'' refers to the ''introducing'' or ''correspondent'' firm (or self-clearing firm) on the receiving end of the transfer.

[40] The rationale behind requiring that the negative consent letter be sent by the delivering firm is that it is the organization that the customers ''know'' (*i.e.*, the firm most prominently featured on the customers'' statements and with whose personnel (*e.g.*, their registered representative) they generally interact. The presumption is that customers are more likely to open mail from a firm they know rather than from a firm with which the customer has no business relationship (the ''receiving firm''), in which case the mail might be disregarded as an advertisement or solicitation.

[41] *See* Securities Exchange Act Release No. 42974 (June 22, 2000), 65 FR 40334 (June 29, 2000) (''Privacy of Consumer Financial Information'').

pursuant to Rule 412(f) at the behest of individual brokers who have been terminated or who have resigned from the firm. Any such customer account transfer would require the affirmative consent of each customer pursuant to a duly executed TIF and would be fully subject to Rule 412 and its Interpretation.[42]

Rule 416A (Member and Member Organization Profile Information Updates and Quarterly Certifications Via the Electronic Filing Platform

Rule 416A requires member organizations to establish and regularly maintain firm profile information via the Exchange's Electronic Filing Platform (''EFP''). It further requires member organizations to comply with any Exchange request for such information. Information is recorded on an EFP template.

In light of the proposed elimination of the ''allied member'' designation, the Exchange proposes amending Rule 416A to create a new reporting designation to be known as ''principal executives'' which would capture each member organization's control persons. The proposed[43] designation would be defined to include persons designated by a member organization as a ''principal executive officer,'' as such terms is defined in subsection (b)(5) of NYSE Rule 311 (Formation and Approval of Member Organizations), or their functional equivalents. Thus, the ''principal executives'' designation would encompass each Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Compliance Officer, Chief Legal Officer, or any person assigned comparable functions or responsibilities (*e.g.*, a person in a Limited Liability Company with principal executive responsibilities but with other than a principal executive title).

The proposed amendments would essentially codify existing Exchange EFP reporting requirements[44] with respect to these key personnel contacts, which are also required to be reported via FORM BD.[45] A key benefit of reporting these key contact persons to the Exchange as well as on FORM BD is that the EFP system has interactive functionalities that allow the Exchange to specifically target one or more contact persons to receive ''e-mail blasts'' with time-sensitive instructions or regulatory information. The proposed rule would also allow for requiring the designation of other categories of persons as otherwise directed by the Exchange.

Unlike the ''allied member'' designation, there would be no exam qualification requirement particular to the ''principal executive'' designation per se (*see also* the deletion of ''allied member'' examination requirement from Rule 304A) though, of course, each principal executive would be required to take and pass any qualification examinations necessary to perform their assigned functions.

Rule 445 (Anti-Money Laundering Compliance Program)

Background

NYSE Rule 445 requires each member organization to develop and implement an anti-money laundering (''AML'') program consistent with ongoing obligations under the Bank Secrecy Act.[46] The prescribed AML program obligations include the development of internal policies, procedures and controls; the designation of a person or persons to implement and monitor the day-to-day operations and internal controls of the program (commonly referred to as the ''AML Officer''); ongoing training for appropriate persons; and an independent testing function for overall compliance.

The Exchange is proposing amendments to NYSE Rule 445 to clarify the term ''prompt notice'' and to harmonize other aspects of its AML program requirements with those prescribed by NASD.[47]

Proposed Amendments

Prompt Notice

In addition to requiring that each member organization designate a person or persons to implement and monitor the day-to-day operations and internal controls of its AML compliance program, NYSE Rule 445(4) further requires that ''prompt notice'' be given to the Exchange regarding any change in such designation. The Exchange proposes amending NYSE Rule 445(4) to clarify that the term ''prompt notice'' means not later than 30 days following any change in such information, consistent with the requirements prescribed under NYSE Rule 416A(b).[48] NASD IM–3011–2 (''Review of Anti-Money Laundering Compliance Person Information'') requires that the updating of such designation be within ''17 business days after the end of each calendar quarter. * * *'' The Exchange believes that the more stringent requirement herein proposed is reasonable and will provide more current information regarding AML contact persons.

Prior Written Approval

The Exchange proposes deleting the first sentence of NYSE Rule 445(4)(C), which sets forth a ''prior written approval requirement'' for member organizations in instances where the designated person under Rule 445(4) is employed not by the member organization, but by an affiliate of the member organization.[49] NASD Rules do not have a comparable approval requirement.[50] Similarly, the Exchange proposes deletion of Rule 445.30, as this section, which provides an exemption to the approval requirement, would be rendered irrelevant.

Independent Testing

NYSE Rule 445.20 sets forth three categories of persons who are currently deemed insufficiently independent to conduct the required testing requirement pursuant to NYSE Rule 445(3). Specifically, the Rule prohibits such testing from being conducted by (1) A person who performs the functions being tested, or (2) the designated AML compliance officer, or (3) a person who reports to either the person performing the functions being tested or the AML compliance officer.

The Exchange proposes to amend NYSE Rule 445.20 to harmonize it with corresponding NASD IM 3011–1[51] by adding an exception which would allow a person categorized in subsections (1) or (2) to conduct the testing when four conditions are satisfied. First, the member organization must have no other qualified internal personnel to conduct the testing. Second, the member organization must establish written policies and procedures to address conflicts that may arise from allowing the testing to be conducted by a person who reports to the person(s) whose activities are the subject of the

[42] *See* proposed Rule 412.40.

[43] *See* proposed .10 of the rule's ''Supplementary Material.''

[44] *See* NYSE Information Memo No. 01–11, dated June 19, 2001.

[45] *See* item 2(a) in Schedule A of FORM BD (Direct Owners and Executive Officers).

[46] 31 U.S.C. 5311 *et seq.*

[47] *See* NASD Rules 3011, IM–3011–2 and IM–3011–2.

[48] *See* section (b) of NYSE Rule 416A (''Member and Member Organization Profile Information Updates and Quarterly Certifications Via the Electronic Filing Platform''), which requires member organizations to update their required membership profile information promptly, but in any event not later than thirty days following any change in such information.

[49] *See* NYSE Rule 445(4) (B), which provides that a person may be designated under 445(4) when the person is employed by an entity that directly or indirectly controls, or is controlled by, or is under common control with the member organization.

[50] *See* also NASD IM–3011–2. *See* also NASD Notice to Members 06–07.

[51] *See* also NASD Notice to Members 06–07.

testing. Third, the person who conducts the testing must, to the extent possible, report the test results to a person at the member organization who is senior to the person described in Rule subsections (1) and (2). If the person does not report the results consistent with this provision, the member organization must document a reasonable explanation for not doing so. Fourth, the member organization must document its rationale, which is required to be reasonable, for determining that it has no alternative than reliance on these conditions to comply with the testing requirement.

This exception to the general ''independent testing'' standard is proposed to allow small firms the flexibility to use appropriate internal personnel to conduct the testing required by Rule 445, while requiring that controls be in place to retain the effectiveness of the testing process.

Category 2 (''Financial/Operational Rules'')

Background

In order to address certain Financial/Operational Rules not encompassed by the CAG subcommittee review process, the Exchange organized an in-house Financial/Operations Rule Committee and enlisted the participation of volunteers from SIFMA's Capital, Operations and Clearing Firms Committees and the NASD.

Proposed Amendments

Rule 325 (Capital Requirements for Member Organizations)

Restructuring of the Rule

NYSE Rule 325 requires member organizations subject to Rule 15c3–1 [52] under the Act to comply with the capital requirements prescribed therein and with the additional net capital requirements established by the NYSE. The Exchange is proposing to restructure the text of Rule 325 into two separate sections: General Provisions [53] and Notification Provisions.[54] This non-substantive change will separate the net capital notification requirements contained in current Rule 325(b)(1) and (b)(2) from the other provisions of Rule 325.

Rule 325(c)

NYSE Rule 325(c)(1) currently provides that a long put option or a long call option, which is not an obligation of a clearing agency or has not been endorsed or guaranteed by a member organization, has no net capital value under any provision of Rule 325. The Exchange is proposing to rescind this provision because the substance of this requirement is covered in Rule 15c3–1 under the Act.

Subsection (c)(2) of current Rule 325 provides for net capital requirements on certain proprietary day trading positions subject to a special margin requirement. The Exchange is proposing to rescind Rule 325(c)(2). This provision is no longer necessary because the SEC's capital rule requires firms to be in compliance on a moment to moment basis.

Additionally, the Exchange is proposing to adopt, as new Rule 325(c), a provision from NASD Rule 3130(e) which will require a member organization to suspend all business operations during any period of time during which the member organization is not in compliance with applicable net capital requirements as set forth in Rule 15c3–1 under the Act.

Rule 326 (Growth Capital Requirement, Business Reduction Capital Requirement, Unsecured Loans and Advances)

NYSE Rule 326(a) currently sets forth the conditions that trigger restrictions on business growth for member organizations. NYSE Rule 326(b) requires reduction of business by member organizations if certain conditions exist, as prescribed by the rule. The Exchange is proposing to expand the application of Rule 326(a) and (b) to apply to all broker-dealers, not just those which carry customer accounts. However, the proposed amendments clarify that non-carrying firms will not be subject to the automatic and self operative Rule 326(a) and (b), unless specifically directed by the Exchange.

The Exchange is also proposing to amend Rule 326(a)(1) and (b)(1). The current provisions require a condition triggering a growth restriction or business reduction to be known to the Exchange for five consecutive business days. The five day period is intended to provide breathing room so that these conditions can be corrected. The proposed amendments to Rule 326(a)(1) and (b)(1) provide that the condition must be known to either the member organization or the Exchange for five consecutive business days. The Exchange is proposing this change so that there is no benefit in not advising the Exchange about these conditions.

NYSE Rule 326(a)(2) provides for restrictions on the growth of a member organization's business at the discretion of the Exchange, much as subsection (b)(2) of Rule 326 allows for the mandated reduction in business at the discretion of the Exchange. Amendments to these provisions are proposed to clarify that the Exchange may exercise its discretion with respect to financial or operational conditions relating to a member organization's business.

Further, the proposed new Rule 326(a)(3) clarifies that ''expansion of business'' may include: Net increase in the number of registered representatives or other producing personnel; exceeding average commitments over the previous three months for market making or block positioning; initiation of market making in new securities or any new firm trading or other commitment in securities or commodities in which a market is not made (other than riskless trades associated with customer orders); exceeding average commitments over the previous three months for underwritings; opening of new branch offices; entering into any new line of business or deliberately promoting or expanding any present lines of business; making unsecured or partially secured loans, advances, drawings, guarantees or other similar receivables; and such other measures as the Exchange deems appropriate under the circumstances in the public interest or for the protection of investors and member organizations.

The Exchange proposes to reposition the provisions in current Rule 326.10 which define ''expansion of business'' into subsection (a)(3) of Rule 326. In addition, the Exchange is proposing to reposition the provisions of current Rule 326.11, which define ''Business Reduction,'' into subsection (b)(3) of the rule. The Exchange is also proposing to add certain conditions contained in NASD IM–3130(e) into new subsection (b)(3) to harmonize the SROs' examples of business reductions by member organizations. The additions include: Promptly paying all free credit balances to customers; promptly effecting delivery to customers of all fully-paid securities in the member's possession or control; accepting no new customer accounts; restricting the payment of salaries or other sums to partners, officers, directors, shareholders, or associated persons of the member; and accepting unsolicited customer orders only.

Current NYSE Rule 326(c) restricts all member organizations from making unsecured loans or advances to certain individuals or entities associated with the member organization when certain conditions are met. Current Rule 326(d) requires all member organizations to recall unsecured loans or advances when certain business reduction criteria

[52] 17 CFR 240.15c3–1.

[53] *See* proposed Rule 325(a), (b) and (c).

[54] *See* proposed Rule 325(e).

are met. The Exchange is proposing to reposition the requirements in current Rule 326(c) and (d) regarding unsecured loans and advances in subsections (a)(3) and (b)(3), as part of the enumeration of examples of ''expansion of business'' and ''business reduction,'' and to afford their application to all such loans regardless of counterparties.

Current NYSE Rule 326.12 imposes an automatic restriction on member organizations that introduce accounts on a fully disclosed basis to, or clear on an omnibus basis through, a restricted member organization. The Exchange is proposing to reposition Rule 326.12 into 326.10 in light of other proposed amendments to the rule and to amend this provision so that the restrictions will not flow automatically to the introducing firm when its clearing firm is restricted. The proposed rule provides that the Exchange may apply this requirement at its discretion.

NYSE Rule 326.13 currently allows member organizations to enter into subordination agreements, which are not allowable as good capital under NYSE Rule 325, to increase the member organization's total subordinated liabilities and capital available, and for the protection of customers. The Exchange is proposing to rescind .13 inasmuch as recourse to non-allowable capital has not been utilized.

The Exchange is proposing to add new Rule 326.11 that illustrates conditions under which the Exchange may exercise its discretion to reduce or limit a member organization's business. These conditions are contained in NASD IM–3130(e) and include situations such as non-current and/or inaccurate books and records, lack of full compliance with Rule 15c3–3 [55] under the Act and the inability to promptly clear and settle transactions.

Lastly, the Exchange is proposing to change the title of Rule 326 to ''Business Growth Restrictions and Business Reduction Requirements'' and to make certain changes to the subheadings within the Rule.

Rule 382 (Carrying Agreements)

NYSE Rule 382 governs Exchange requirements for carrying agreements and provides for the contractual allocation of key functions involved in the opening and operation of customer accounts and the settlement and clearance of transactions in such accounts.

The Exchange is proposing to amend subsection (a) to provide that standardized forms of agreements between member organizations and introducing firms that are registered broker-dealers, which have been previously approved by the Exchange, need not be submitted to the Exchange for approval.

Additionally, the Exchange is proposing to amend Rule 382(a) to provide that carrying arrangements previously approved by another SRO with a comparable rule to NYSE Rule 382, *e.g.*, NASD Rule 3230, will not require submission to and approval by the Exchange.

The Exchange is proposing amendments to Rule 382(b) to address third party piggy-back arrangements by requiring that carrying agreements for accounts held on a fully disclosed basis specifically identify and allocate respective functions and responsibilities of each introducing and carrying organization that is directly or indirectly a party to such agreements.

Amendments to Rule 382(b) are proposed that will clearly delineate which functions and responsibilities must be allocated to the carrying organization and will require that the carrying agreements so state.

Amendments to Rule 382(b) are also proposed to state that the carrying agreement may provide that the opening and approval of accounts in a manner consistent with NYSE Rule 405, the maintenance of books and records in a manner consistent with Rules 17a–3 and 17a–4 under the Act and the transmission of orders to the carrying organization for execution may be allocated to an introducing organization, which is other than a registered broker or dealer. Such amendments would, in recognition of present industry practice, permit entities which are other than registered brokers or dealers, as the introducing party which directly interfaces with the customer, to undertake the mechanical aspects of order transmission and the ministerial aspects of bookkeeping and of opening and approving accounts.

The term ''opening and approving'' is intended to limit the scope of the amended rule to the acceptance of new accounts, but only in circumstances where it has gathered sufficient information to satisfy the Exchange's Rule 405 precept as the standard for recording investment objectives and other basic documentation. By establishing Rule 405 as the norm to follow (even by a person not formally subject to its fiat) and by asserting it as a prerequisite to an acceptable Rule 382 agreement, it is believed that investor protection is reasonably served. Under the proposed amendments, more continuous and stringent regulatory requirements such as ''monitoring of accounts'' would not be permitted to be allocated to an entity which is not a registered broker or dealer.

The Exchange is proposing to add to current Rule 382(c), which requires written notification to customers whose accounts are held on a fully disclosed basis, that upon the opening of such account, the customer shall be notified in writing by the party designated by the agreement to make such notification of the responsibilities allocated to each respective party, and of any subsequent material change to such allocation or to the relationship of the parties, if any, promptly upon the occurrence of any such change. The proposed amendments to the Rule reposition this provision into new subsection (b)(4).

The Exchange is proposing to add Rule 382(e)(2) which provides that carrying agreements may provide for the receipt of customer funds or securities by the introducing organization and delivery thereof to the carrying organization in a manner consistent with Rules 15c3–1 and 15c3–3 under the Act, provided that the introducing organization maintains appropriate procedures and systems for the receipt and delivery of such funds or securities to ensure compliance with all relevant rules under the Act.

Additionally, amendments are proposed to codify current Exchange practice by adding a new subsection (f) to Rule 382 to require that each carrying organization provide the Exchange with written notice 10 business days prior to its commencement of the carrying the accounts of any new correspondents, identifying such new correspondents and furnishing such additional information as may be requested by the Exchange. Moreover, each such carrying organization must, contemporaneously, represent to the Exchange that it has the financial and operational resources and support staff to take on such additional correspondent activity.

The proposed amendments also codify the principle that, to the extent that a particular function is allocated to one of the parties, the other parties to the agreement shall supply to the responsible organization all data in its possession pertinent to the proper performance and supervision of that function. The agreement shall include an acknowledgement by each relevant party of this obligation.

Rule 416 (Questionnaires and Reports)

NYSE Rule 416(b) requires that, unless a specific temporary extension of time has been granted, a fee of $500 shall be imposed for each day that such report is not filed in the prescribed time. Requests for such extensions of time

[55] 17 CFR 240.15c3–3.

must be submitted to the Exchange at least three business days prior to the due date. The Exchange is proposing to amend subsection (b) to clarify that each ''day'' means each ''business day'' for purposes of determining whether a report is filed in the prescribed time. The proposed amendments also provide that the fee imposed by the Exchange when reports are not filed on time may be waived by the Exchange, in whole or in part.

The Exchange is proposing to add a new subsection .25 to the Supplementary Material of Rule 416 which will consist of language moved from current NYSE Rule 418.25.[56] This provision requires member organizations, approved to use an alternative method of computing net capital under Appendix E of Rule 15c3–1 under the Act, to file supplemental and alternative reports, as may be prescribed by the Exchange. The NASD does not currently have such a provision but stated that it may propose to adopt a similar requirement.

Rule 418 (Audit)

Under current NYSE Rule 418, the Exchange may require member organizations, at any time, to conduct an audit of its financial statements in accordance with Exchange Rules and Rule 17a–5 under the Act.[57] The Exchange is proposing to amend this provision by removing the reference to Exchange Rules and replacing it with language that allows the Exchange to require an audit or other similar procedure as the Exchange may deem necessary for the protection of investors or in the public interest. The Exchange is also proposing to rescind subsection .10 of Rule 418, which requires member organizations that are subject to this rule to file with the Exchange an agreement covering its annual audit during the following year because the substance of this provision is covered by Rule 17a–5 under the Act.

NYSE Rule 418.12 requires member organizations that fail to file an audited financial and operational report in the time period prescribed by the Exchange to pay a $200 penalty for each day of delayed filing. The Exchange is proposing to amend this provision to clarify that each ''day'' means each ''business day.''

In light of proposed amendments to the NYSE Rules to remove the terms ''allied member'' and ''member'' (where appropriate) from the rulebook, the Exchange is proposing to amend Rule 418.15 to require that the financial statements be signed by two principal executives of the member organization and that such financial statements be made available to all principal executives of the member organization. NASD has expressed that it may propose to adopt a similar provision to NYSE Rule 418.15.

The Exchange is proposing to rescind Rule 418.20 which requires, in part, that all pertinent audit working papers and underlying documentation be retained for at least three years and that it be available for review by a representative of the Exchange at the office of the respondent or at the office of the independent public accountant. This provision is not required under Act rules and the NASD does not have a similar provision in their rules. Further, this provision has not been exercised during the time that this rule has been in effect. As noted above, Rule 418.25 has been repositioned into .25 of Rule 416.

Rule 420 (Reports on Borrowing and Subordinated Loans for Capital Purposes)

Currently, the NYSE and the NASD use subordinated loan forms which reflect the requirements of Appendix D to Rule 15c3–1 under the Act but differ in minor provisions and in certain procedural ways. The Exchange is proposing to unify the procedures of NYSE and NASD in this area. Specifically, the Exchange is proposing to consolidate paragraphs (a) and (b) of Rule 420 to combine the subordination agreement requirements for the lending of both cash and notes collateralized by securities. The proposed amendments also add that loans of cash or collateralized notes made to a member organization are subject to the requirements of Rule 420(a). In addition, Rule 420(a)(2), which calls for an opinion of counsel as required by NYSE Rule 313(d), will be modified to provide that an opinion will no longer be required when the loan is made by a holding company or principal executive of a member organization or by a bank, as defined in Section (3)(a)(6)[58] of the Act, unless so directed by the Exchange.

NYSE Rule 420(c) requires a general partner of a member organization to promptly report to the NYSE any borrowings of cash or securities, the proceeds of which will be contributed to the net capital of the member organization. The rule further imposes certain standards for the documents evidencing such borrowings as the Exchange deems appropriate and requires that such documents be submitted to and approved by the Exchange before the cash or securities involved may qualify as net capital. The Exchange is proposing to codify current Exchange practice by amending this provision to apply to borrowings of participants in LLC's. The NASD does not have a similar rule to NYSE Rule 420 but has indicated it may propose to adopt similar requirements for carrying firms only.

Rule 422 (Loans of and to Directors, etc.)

NYSE Rule 422 prohibits unsecured loans between members of the Board or of employees of the NYSE and member organizations, absent the prior consent of the NYSE board of directors. This provision was amended post-merger to include subsidiaries of NYSE Group. The Exchange is proposing to rescind Rule 422 in its entirety because the substance of this provision is contained in the supplementary guidelines to NYSE's internal ethics code.

Rule 431 (Margin Requirements)

Staff is proposing to amend Rule 431(e)(8)(C)(ii) to clarify that, for purposes of this subsection, amounts agreed to be extended by a member organization shall be deducted in determining capital under Rule 326 if the loan commitment is irrevocable; amounts agreed to be extended shall be presumed irrevocable commitments, unless a broker-dealer can evidence otherwise.

Rule 440 (Books and Records)

NYSE Rule 440 requires member organizations to make and preserve books and records as the Exchange may prescribe, and as prescribed by Rule 17a–3[59] under the Act. The recordkeeping format, medium and retention period is to comply with Rule 17a–4 under the Act.[60] The Exchange is proposing to rescind Rule 440.10(2), which requires member organizations, at a minimum of once per month, to account for all U.S. government bearer instruments by physical examination and comparison with its books and records. This provision is outdated, as there are few, if any, U.S. government instruments in bearer form and the requirement to account for any physical instruments is included in Rule 17a–13[61] under the Act and is generally referenced in subsection .10 of the rule.

[56] *See* Securities Exchange Act Release No. 52269 (August 16, 2005) 70 FR 49349 (August 23, 2005) (SR–NYSE–2005–19). *See also* NYSE Information Memo 05–62.

[57] 17 CFR 240.17a–5.

[58] 15 U.S.C. 78c(3)(a)(6).

[59] 17 CFR 240.17a–3.

[60] 17 CFR 240.17a–4.

[61] 17 CFR 240.17a–13.

Category 3 (''Buy-In Rules'')

Background

In order to address the operational ''Buy-In Rules'' not encompassed by the CAG subcommittee review process, the Exchange organized an in-house committee and enlisted the participation of the NASD and the Ad Hoc Buy-in Subcommittee of the SIFMA Securities Operations Division. The SIFMA subcommittee, which predates the SRO Rule Harmonization Initiative, was established to identify and standardize various Buy-in rules and procedures in conjunction with Street Side contracts including Stock Loans.[62] The proposed amendments discussed below result from the combined recommendations of these participants.

The NYSE Buy-In Rules apply to transactions in Exchange-listed securities that are not subject to the rules of a Qualified Clearing Agency such as the Depository Trust Clearing Corporation (''DTCC'') [63] or the National Securities Clearing Corporation (''NSCC''),[64] including the Continuous Net Settlement (''CNS'') [65] transactions that settle through them.

In an effort to promote harmonization of the SRO Operational, Clearing and Settlement Rules (collectively referred to as the ''Buy-In Rules) the Exchange is proposing amendments to NYSE Rules 140 (Members Closing Contracts—Conditions), 282 (Buy-in Procedures); 283 (Members Closing Contracts—Procedure); 285 (Notice of Intention to Successive Parties); 286 (Closing Portion of Contract); 287 (Liability of Succeeding Parties); 288 (Notice of Closing to Successive Parties); 289 (Must Receive Delivery); and 290 (Defaulting Party May Deliver After 'Buy-in' Notice).

Proposed Amendments

The Exchange proposes to reposition Rules 140, 283, 285, 286, 287, 288, 289, and 290 into Rule 282 so that Rule 282 will serve as a complete repository for all requirements and procedures related to buy-ins.[66] The substance of the repositioned rules is not being altered. In addition to making these requirements more readily accessible, the amendments will bring the rule closer to the format of its NASD Rule 11810 (Buying-In) and IM–11810 (Sample Buy-In Forms).

In addition to this consolidation, the following amendments to Rule 282 are proposed in order to clarify certain technical requirements with respect to buy-in processes:

Rule 282(1)(b) requires that the defaulting member organization receiving a buy-in notice must send a signed, written response to the initiating organization stating its position with respect to the resolution of the item no later than 5 p.m. ET on the date of issuance of the buy-in notice. The Exchange proposes the addition of Supplementary Material section .15 that would clarify that ''[f]or purposes of Rule 282(b), e-mail and electronic systems shall be acceptable as the functional equivalent of a writing, in lieu of paper form, provided that it is retainable and susceptible of acknowledgement to the same degree and extent as the written response.'' [67]

NYSE Rule 282(c) states that if the ''buy-in'' notice has not been returned by 5 p.m. ET on the ''buy-in'' notice date, or the ''buy-in'' notice is returned as ''DK'd,'' or the ''buy-in'' notice is returned with the indication that the contract is known but that delivery cannot be made, a ''buy-in'' shall be executed on the ''effective date'' by the initiating member organization by purchasing all or part of the securities necessary to satisfy the amount requested in the ''buy-in'' notice. Proposed amendments to Rule 282(c) would clarify that if a notice of buy-in is not acknowledged by the failing party by 5 p.m. ET on the day of issuance, the notice will be deemed accepted. However, prior to the proposed execution date, the seller has a right to request proof of fail obligation in order to prove otherwise. This conforms with the NASD's current requirement.

Rule 282(1)(h) requires that the initiating member organization executing the buy-in shall immediately upon execution, but no later than 5 p.m. ET, notify the defaulting member organization as to the quantity purchased and the price paid. The Exchange is proposing to amend Rule 282(1)(h) to clarify that if there is a system outage at the Clearing Firm or the Depository, then notification by the initiating member organization executing a buy-in must take place prior to the opening on the next business day.

The Exchange proposes the addition of provision Rule 282(2) to clarify that fails that are subject to the rules of a Qualified Clearing Agency must comply with the procedures or requirements of the Qualified Clearing Agency.''

It is also proposed that Rule 282 be amended to adopt certain provisions of NASD IM 11810 (Sample Buy-In Forms) because these provisions are applicable to both NYSE and NASD membership. Specifically, the Exchange proposes adding section (f) (Securities in Transit) as new Rule 282.60; section (h) ('Close-Out' Under Committee or Exchange Rulings) as new Rule 282.65; section (i) (Failure to Deliver and Liability Notice Procedures) as new Rule 282.70; section (j) (Contracts Made for Cash) as new Rule 282.75; section (l) (Buy-In' Desk Required) as new Rule 282.80; and section (m) (Buy-In of Accrued Securities) as new Rule 282.85.

Background/Reference Rule Synopses

Rule 140 (''Members Closing Contracts—Conditions'')

Rule 140 states that a member organization may close a contract as provided in Rule 283 in the event that the other party to the contract does not recognize the contract or the other party to the contract neglects or refuses to exchange written contracts pursuant to Rule 137.

Rule 283 (''Members Closing Contracts—Procedure'')

Rule 283 refers to the procedure for closing contracts. According to Rule 283, oral or written notice must be provided to the other party at least thirty minutes prior to closing.

Rule 285 (''Notice of Intention to Successive Parties'')

According to Rule 285, a member organization that receives notice that a contract is to be closed for its account for non-delivery shall immediately re-transmit notice to any other member organization from whom the securities involved are due.

[62] The Exchange previously worked with this committee to amend and harmonize its rules with those of other SROs. *See* Securities Exchange Release No. 52842 (November 28, 2005), 70 FR 72321 (December 2, 2005) (SR–NYSE–2005–50). *See also* NYSE Information Memo 05–100.

[63] The Depository Trust Clearing Corporation is a member of the U.S. Federal Reserve System, a limited-purpose trust company under New York State banking law and a registered clearing agency with the SEC.

[64] NSCC, is a central counterparty that provides centralized clearance, settlement and information services for broker-to-broker equity, corporate bond and municipal bond, exchange-traded funds and unit investment trust trades in the United States. NSCC provides clearing and settlement, risk management, central counterparty services and a guarantee of completion for trades. NSCC also nets trades and payments among its participants, reducing the volume of securities and payments that need to be exchanged each day.

[65] CNS is an automated accounting system that centralizes the settlement of compared security transactions and maintains an orderly flow of security and money balances. CNS nets daily transactions, including open positions to create a single long or short position for each participant, minimizing security movements and associated costs.

[66] *See* proposed Rules 282.25, .30, .35, .40, .45, .50, and .55.

[67] *See* Rules 17a–3 and 17a–4 under the Act and NYSE Rules 440 (Books and Records).

Rule 286 (''Closing Portion of Contract'')

According to Rule 286, when notice of intention to close a contract, or re-transmitted notice thereof, is given for less than the full amount due, it shall be for not less than one trading unit.

Rule 287 (''Liability of Succeeding Parties'')

According to Rule 287, the closing of a contract must be for the account and liability of each succeeding party in interest, and, if notice of such contract being closed is transmitted, then such closing shall automatically close all contracts with respect to which such re-transmitted notice shall have been delivered prior to the closing.

Rule 288 (''Notice of Closing to Successive Parties'')

Under Rule 288, if a contract, other than a contract the close-out of which is governed by the rules of a Qualified Clearing Agency, has been closed, the member organization who closed, or gave order to close, the contract shall notify the member organization for whose account the contract was closed. In addition, the rule requires the member organization receiving such a notification, or receiving such notice that a contract has been closed pursuant to the rules of a Qualified Clearing Agency, shall immediately notify each succeeding party in interest and other member organizations to which re-transmitted notice pursuant to Rule 285 has been sent. The rule also requires any statements of resulting money differences to be rendered immediately.

Rules 289 (''Must Receive Delivery'') and 290 (''Defaulting Party May Deliver After 'Buy-in' Notice'')

Rules 289 and 290 clarify the requirements and timeframes upon which a defaulting member organization may deliver against a ''buy-in'' notice. Rule 289 requires an initiating member organization to accept physical delivery of some or all of the securities that are the subject of a buy-in, thereby halting the buy-in execution for those securities if those securities are tendered prior to the buy-in. Rule 290 permits a defaulting member organization to deliver securities subject to a notice of buy-in until 3 p.m. Eastern Time on the day of the execution of the buy-in.

Rule 282 (''Buy-in Procedures'')

Rule 282 describes procedures to be followed when a securities contract, except a contract where its close-out is governed by the rules of a Qualified Clearing Agency (such as DTC and NSCC), which has not been completed by the seller in accordance with its terms, may be closed-out by the buyer (*i.e.*, the initiating member organization). According to the Rule, the close-out may not be sooner than three business days after the due date for delivery. Rule 282 allows the member organization failing to receive the securities to execute the buy-in.

The Supplementary Material of Rule 282 is intended to ensure that member organizations comply with the closeout requirements of Regulation SHO.[68] Specifically, member organizations are obligated to comply with the marking, locate, and delivery requirements of Regulation SHO for sales of equity securities under the Act. Member organizations are required to have policies and procedures in place to comply with these rules, including closeout procedures.[69]

Rule 430 (Partial Delivery of Securities to Customers on C.O.D Purchases)

Rule 430 prescribes that no member organization ''may accept for a customer a purchase order for any security, other than obligations of the United States Government, unless it has first ascertained that the customer placing the order or its agent will receive against payment securities in an amount equal to any execution confirmed to the customer, even though such an execution may represent the purchase of only a part of a larger order.'' The Exchange proposes deleting Rule 430 in its entirety as the substance of the rule is incorporated in NYSE Rule 387(a)(4).

Rule 387(a)(4) prohibits a member organization from accepting an order from a customer pursuant to an arrangement whereby payment for securities purchased or delivery of securities sold is to be made to or by an agent of the customer unless the member organization ''has obtained an agreement from the customer that the customer will furnish his agent instructions with respect to the receipt or delivery of the securities involved in the transaction promptly upon receipt by the customer of each confirmation, or the relevant data as to each execution, relating to such order (even though such execution represents the purchase or sale of only a part of the order)'' and that in any event the customer will assure that such instructions are delivered to his agent no later than as prescribed by Rule 387(a)(4).

Category 4 (''Member'' and ''Allied Member'' Rules)

As noted above, amendments are proposed throughout this filing that update terminology in light of the Exchange's current organizational structure. Of particular significance is the proposed deletion, where appropriate, of the term ''member'' and the elimination of the term ''allied member'' as a regulatory category.[70] The selective deletion of the term ''member'' reflects the fact that it has been redefined in the context of the NYSE/ARCA business model.[71] The term ''allied member,'' which is a regulatory category based on a person's ''control'' over a member organization is being eliminated because it, has likewise been rendered outdated. Category 4 includes those rules for which the only proposed substantive change is the deletion of either or both of these terms.

Member

NYSE Rule 2(a) provides that the term ''member,'' when used to denote a natural person approved by the Exchange, means a natural person associated with a member organization who has been approved by the Exchange and designated by such member organization to effect transactions on the Floor of the Exchange or any facility thereof.

This definition reflects the fact that, since the creation of NYSE Group, Inc. in 2006, ''members'' are not, by virtue of their membership, equity owners of NYSE Group or any of its subsidiaries. Thus, the term ''member'' no longer has the same regulatory meaning in the context of the NYSE/ARCA business model.

Background

Following the NYSE/ARCA merger, NYSE Market issued Trading Licenses that entitled their holders to have physical and electronic access to the trading facilities of NYSE Market, subject to the limitations and requirements specified in the rules of the Exchange. An organization may

[68] 17 CFR 242.200 through 242.203.

[68] At the same time the changes noted above were being developed, the SEC implemented Regulation SHO—Regulation of Short Sales, which shares a similar purpose with the buy-in rules—the reduction of fails to deliver. Rule 203 to Regulation SHO imposes locate and borrowing/delivery requirements on broker-dealers that sell equity securities, including closeout requirements on certain open fail to deliver positions.

[70] Note that there are pending amendments to certain NYSE Rules which propose deletion of the terms ''allied member'' and/or ''member'' and thus, are not included in this filing (SR–NYSE–2006–50 deletes term ''member'' from NYSE Rules 726 and 791; SR–NYSE–2006–111 deletes the terms ''allied member'' and ''member'' from NYSE Rule 421; and SR–NYSE–2007–06 deletes the terms ''allied member'' and ''member'' from NYSE Rule 440A.

[71] For additional information, *see* Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (Order Approving SR–NYSE–2005–77).

acquire and hold a Trading License only if and for so long as such organization is qualified and approved to be a member organization of the Exchange. Organizations that obtain licenses to trade on NYSE Market (''Trading Licenses'') are member organizations. In addition, broker-dealers that submit to the jurisdiction and rules of the Exchange, without obtaining a Trading License and thus without having rights to directly access the trading facilities of NYSE Market, will be member organizations.[72]

A member organization holding a Trading License may designate a natural person, known as a member, to effect transactions on its behalf on the floor of NYSE Market, subject to such qualification and approvals as may be required in the rules of the Exchange.

Proposed Amendments

The Exchange is proposing, where applicable, to delete references to the term ''member'' as a category of Exchange association except to the extent its usage distinguishes, from a regulatory perspective, a natural person who is licensed to trade on the Floor of the Exchange on behalf of a member organization. All other references to members will be deleted. If necessary, the term ''employee'' is added to rules where the current text does not otherwise capture persons acting as members.

Allied Member

Background

In 1939, the Exchange created the category of ''allied member'' to make a non-member general partner of a member organization directly responsible to the Exchange and directly subject to Exchange control and discipline. The allied member designation identifies an individual who is a ''control'' person, including but not limited to, a principal executive officer of the member organization. Allied membership status was intended to remedy situations where disciplinary action was taken by the Exchange against member organizations because of actions of their non-member general partners for which the member organization was not entirely responsible, and over which they could not have exercised full control.

NYSE Rule 2(c) currently defines the term ''allied member'' as a natural person who is a general partner of a member organization or other employee of a member organization who controls,[73] or is a principal executive officer of, such member organization and who has been approved by the Exchange as an allied member.[74] There currently are approximately 1,393 allied members of the Exchange. Allied membership, especially as presently administered, has no direct analogue at the NASD.

Proposed Amendments

The Exchange is proposing that the term ''allied member'' be deleted from both the NYSE rulebook and as a category of Exchange association as it has become outdated within the context of the new NYSE corporate structure. The Exchange is proposing to replace the term in the NYSE rulebook with the term ''principal executive'' to retain a means of identifying each member organization's control ''persons.'' The proposed designation would be defined to include persons designated by a member organization as a ''principal executive officer,'' as such terms is defined in subsection (b)(5) of NYSE Rule 311 (Formation and Approval of Member Organizations) or their functional equivalents.[75]

Rule 311(b)(5) currently states that a member organization may not be approved by the NYSE Board of Directors unless, among other things, the Board of Directors of such member organization designates its principal executive officers who shall be members or allied members and shall exercise senior principal executive responsibility over the various areas of business of such corporation in such areas that the rules of the Exchange shall prescribe, including: Operations, compliance with rules and regulations of regulatory bodies, finances and credit, sales, underwriting, research and administration.

The Exchange is proposing to modify the Rule 311(b)(5) definition of principal executive officer by deleting the requirement that a principal executive officer be a member or allied member of the Exchange.

Generally, throughout this filing, in instances where the provisions of a rule apply to an allied member in his or her capacity as a principal executive officer (or functional equivalent, *e.g.*, ''senior officer'' or ''partner'') of the member organization, it is proposed that the term ''principal executive'' be substituted. In instances where the provisions of a rule apply to an allied member in his or her capacity as an employee of a member organization, it is proposed that the rule text be amended accordingly.

The Exchange is aware that the elimination of the allied member designation raises certain issues with respect to Exchange registration requirements as well as its jurisdiction over certain member organization personnel. Specifically, once the allied member category is eliminated, the Chief Financial Officer (CFO) and Chief Operations Officer (COO), designations which require qualification pursuant to the Series 27 (Financial and Operations Principal) or Series 28 (Broker/Dealer Financial and Operations Principal) examinations, may not be registered with the Exchange because the Exchange does not have a registration category for the Series 27 or Series 28.[76] In order to address this concern, the Exchange is proposing to recognize the NASD's requirement to use the Financial and Operations Principal CRD registration categories, Series 27/28,[77] for such exam-qualified individuals.

Further, Chief Executive Officers (CEO) are not required by Exchange rules to pass an examination; their only current qualification requirement is that they be members or become allied members. As noted above, in order to ensure regulatory jurisdiction over all principal executives, and to conform with the standard prescribed under NASD Rule 1021(a), the Exchange has proposed amendments to Rule 342 that would require each person designated by a member organization as a ''principal executive,'' as that term is defined in Rule 416A, to pass an examination appropriate to the

[72] *See* Footnote 71, *supra.*

[73] *See* NYSE Rule 2(f). The term ''control'' means the power to direct or cause the direction of the management or policies of a person whether through ownership of securities, by contract or otherwise. A person shall be presumed to control another person if such person, directly or indirectly: (i) Has the right to vote 25 percent or more of the voting securities; (ii) is entitled to receive 25 percent or more of the net profits; or (iii) is a director, general partner or principal executive officer (or person occupying a similar status or performing similar functions) of the other person. Any person who does not so own voting securities, participate in profits or function as a director, general partner or principal executive officer of another person shall be presumed not to control such other person. Any presumption may be rebutted by evidence, but shall continue until a determination to the contrary has been made by the Exchange.

[74] NYSE Rule 304 sets forth the eligibility requirements for allied membership. NYSE Rule 304A sets forth the examination/registration requirements for allied membership.

[75] *See* also proposed new Rule 416A.10 which defines the term ''principal executive.''

[76] Rule 345(b) requires natural persons other than members or allied members who assume the duties of an officer with the power to bind the member or member organization to file Form U4 and receive approval of the Exchange.

[77] *See* Rule 311(b)(5) interpretation in the *NYSE Interpretation Handbook* which delineates the requirements for CFO/COO of Introducing and Clearing Firms.

functions to be performed by such person.[78]

Forms U4 and U5 (among other forms) will require updating in order to delete allied member registrations and to replace it with another classification for principal executive officers (or persons occupying similar status or having similar functions), voting stockholders, and employee directors.

The deletion of the ''allied member'' category of Exchange association will not hinder the Exchange's enforcement and disciplinary efforts with respect to individuals who fall into this category. Specifically, the NYSE Division of Enforcement can assert jurisdiction absent allied member status under NYSE Rule 476 and may bring disciplinary matters based on a predicate violation pursuant to the individual's supervisory position within the member organization. An employee's status as an allied member has not been and will not be the sole or preferred route to enforcement or disciplinary actions against these individuals.

Additionally, NYSE Market Surveillance, in conducting its investigations, looks at the supervision of the member organizations, its supervisory procedures and the capacity in which the individual is employed (*i.e.*, supervisory position), not necessarily the employee's status as an allied member of the Exchange.

2. Statutory Basis

The Exchange believes the statutory basis for proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with the requirements of Section 6(b)(5)[79] of the Act. Section 6(b)(5) requires, among other things, that the rules of an 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 national market system, and in general, to protect investors and the public interest. The proposed changes will provide greater harmonization between Exchange and NASD rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for dual-member organizations. Where proposed amendments do not entirely conform to existing NASD rules, the Exchange believes the standards they would establish otherwise further the objectives of Section 6(b)(5) by providing greater regulatory clarity and practicality.

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.

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 NYSE 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–NYSE–2007–22 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSE–2007–22. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such 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–2007–22 and should be submitted on or before August 22, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[80]

Florence E. Harmon,

Deputy Secretary.

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[78] *See* proposed new Rule 342.13(c).

[79] 15 U.S.C. 78f(b)(5).

[80] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56133; File No. SR–NYSEArca–2007–66]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change As Modified by Amendment No. 1 Relating to Exchange Fees and Charges

July 25, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 10, 2007, NYSE Arca, Inc. (''NYSE Arca'' 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 substantially prepared by the Exchange. On July 25, 2007, the Exchange filed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Amendment No. 1 to the proposed rule change. This order provides notice of the proposed rule change, as modified by Amendment No. 1, and approves the proposed rule change, as amended, on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Schedule of Fees and Charges for Exchange Services in order to extend until July 31, 2008 the current pilot program regarding transaction fees charged for trades executed through the intermarket options linkage (''Linkage''). The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

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 III 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 this proposed rule change is to extend for one year the pilot program establishing an NYSE Arca fee for Principal Orders (''P Orders'') and Principal Acting as Agent Orders (''P/A Orders'') executed through Linkage. Fees imposed on Linkage Orders are subject to an Exchange Pilot Program that will expire July 31, 2007. This filing proposes to extend the fee through July 31, 2008. The fee that NYSE Arca charges for P Orders and P/A Orders is the basic execution fee for trading on NYSE Arca. This is the same fee that all NYSE Arca Option Trading Permit Holders pay for non-customer transactions executed on the Exchange. The Exchange does not charge for the execution of Satisfaction Orders sent through Linkage and is not proposing to charge for such orders.

2. Statutory Basis

The Exchange believes that the proposal is consistent with section 6(b) of the Act [3] in general, and section 6(b)(4) of the Act [4] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities for the purpose of executing P Orders and P/A Orders that are routed to the Exchange from other market centers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change will not 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.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2007–66 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2007–66. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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–NYSEArca–2007–66 and should be submitted on or before August 22, 2007.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful consideration, 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,[5] and, in particular, the requirements of section 6(b) of the Act [6] and the rules and regulations thereunder. The Commission finds that the proposed rule change is consistent with section 6(b)(4) of the Act,[7] which requires that the rules of the Exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Commission believes that the extension of the Linkage fee pilot until July 31, 2008 will give the Exchange and the Commission further opportunity to evaluate whether such fees are appropriate.

The Commission also finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of the notice of filing thereof in the **Federal Register**. The Commission believes that granting accelerated approval of the proposed rule change will preserve the Exchange's existing pilot program for Linkage fees without interruption as the Exchange and the Commission continue considering the appropriateness of Linkage fees. Therefore, the Commission finds good cause, consistent with

[3] 15 U.S.C. 78f(b).

[4] 15 U.S.C. 78f(b)(4).

[5] In approving this rule change, the Commission notes that it has considered the proposal's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4).

section 19(b)(2) of the Exchange Act,[8] to approve the proposed rule change on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[9] that the proposed rule change (SR–NYSEArca–2007–66), as modified by Amendment No. 1, be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56131; File No. SR–NYSEArca–2007–57]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To List and Trade Currency Trust Shares

July 25, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on June 21, 2007, NYSE Arca, Inc. (the ''Exchange''), through its wholly-owned subsidiary, NYSE Arca Equities, Inc. (''NYSE Arca Equities''), filed with the Securities and Exchange Commission (''Commission'') the proposed rule change (''Exchange Notice'') as described in Items I and II below, which Items have been substantially prepared by the Exchange. This order provides notice of the proposed rule change and approves the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares (''Shares'') of the following trusts: (1) CurrencyShares℠ Australian Dollar Trust; (2) CurrencyShares℠ British Pound Sterling Trust; (3) CurrencyShares℠ Canadian Dollar Trust; (4) CurrencyShares℠ Euro Trust (formerly, Euro Currency Trust); (5) CurrencyShares℠ Japanese Yen Trust; (6) CurrencyShares℠ Mexican Peso Trust; (7) CurrencyShares℠ Swedish Krona Trust; and (8) CurrencyShares℠ Swiss Franc Trust (individually, a ''Trust,'' and collectively, the ''Trusts''),[3] pursuant to NYSE Arca Equities Rule 8.202. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and *http://www.nyse.com.*

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 III 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 Exchange proposes to list and trade the Shares pursuant to NYSE Arca Equities Rule 8.202, which permits the trading of Currency Trust Shares[4] either by listing or pursuant to unlisted trading privileges (''UTP''). The Shares are currently listed on the New York Stock Exchange LLC (''NYSE''),[5] and the Exchange currently trades the Shares pursuant to UTP.[6] The Shares of the Trusts will transfer their listing from NYSE to the Exchange.[7]

Each Trust holds the applicable foreign currency[8] and is expected from time to time to issue Baskets[9] in exchange for deposits of the foreign currency and to distribute the foreign currency in connection with redemptions of Baskets. The Shares, which are issued by their corresponding Trust, represent units of fractional undivided beneficial interest in, and ownership of, such Trust. The investment objective of the Trusts is for the Shares to reflect the price (U.S. dollars) of the applicable foreign currency owned by the specific Trust, *plus* accrued interest, *less* the expenses and liabilities of such Trust. The Shares are intended to provide institutional and retail investors with a simple, cost-effective means of hedging their exposure to a particular foreign currency and otherwise implement investment strategies that involve foreign currencies (*e.g.*, diversify generally against the risk that the U.S. dollar would depreciate).

Rydex Specialized Products LLC is the sponsor of the Trusts (''Sponsor''); The Bank of New York is the trustee of the Trusts (''Trustee''); JPMorgan Chase Bank, N.A., London Branch, is the depository for the Trusts (''Depository''); and Rydex Distributors, Inc. is the distributor for the Trusts (''Distributor'').[10] A detailed discussion

[8] 15 U.S.C. 78s(b)(2).

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Exchange represents that the Trusts are formed under the laws of the State of New York and are not registered under the Investment Company Act of 1940.

[4] As defined in NYSE Arca Equities Rule 8.202(c), ''Currency Trust Shares'' are securities that: (1) Are issued by a trust that holds a specified non-U.S. currency deposited with the trust; (2) when aggregated in some specified minimum number, may be surrendered to such trust by the beneficial owner to receive the specified non-U.S. currency; and (3) pay to the beneficial owners interest and other distributions on the deposited non-U.S. currency, if any, declared and paid by the Trust. *See* Securities Exchange Act Release No. 53253 (February 8, 2006), 71 FR 8029 (February 15, 2006) (SR–PCX–2005–123) (approving the adoption of generic listing and trading standards for Currency Trust Shares and the trading of shares of the CurrencyShares℠ Euro Trust pursuant to UTP).

[5] *See* Securities Exchange Act Release Nos. 55268 (February 9, 2007), 72 FR 7793 (February 20, 2007) (SR–NYSE–2007–03) (approving the listing and trading of shares of the CurrencyShares℠ Japanese Yen Trust); 54020 (June 20, 2006), 71 FR 36579 (June 27, 2006) (SR–NYSE–2006–35) (approving the listing and trading of shares of the CurrencyShares℠ Australian Dollar Trust, CurrencyShares℠ British Pound Sterling Trust, CurrencyShares℠ Canadian Dollar Trust, CurrencyShares℠ Mexican Peso Trust, CurrencyShares℠ Swedish Krona Trust, and CurrencyShares℠ Swiss Franc Trust); and 52843 (November 28, 2005), 70 FR 72486 (December 5, 2005) (SR–NYSE 2005–65) (approving the listing and trading of shares of the CurrencyShares℠ Euro Trust) (collectively, the ''NYSE Approval Orders'').

[6] *See supra* note 4; Securities Exchange Act Release Nos. 55320 (February 21, 2007), 72 FR 8828 (February 27, 2007) (SR–NYSEArca–2007–15) (approving the trading of shares of the CurrencyShares℠ Japanese Yen Trust pursuant to UTP); and 54043 (June 26, 2006), 71 FR 37967, (July 3, 2006) (SR–NYSEArca–2006–26) (approving the trading of shares of the CurrencyShares℠ Australian Dollar Trust, CurrencyShares℠ British Pound Sterling Trust, CurrencyShares℠ Canadian Dollar Trust, CurrencyShares℠ Mexican Peso Trust, CurrencyShares℠ Swedish Krona Trust, and CurrencyShares℠ Swiss Franc Trust pursuant to UTP).

[7] E-mail from Timothy J. Malinowski, Director, NYSE Group, Inc., to Edward Cho, Special Counsel, Division of Market Regulation, Commission, dated July 11, 2007 (confirming the listing status of the Shares).

[8] The Trusts do not hold any derivative products.

[9] A ''Basket'' is defined as an aggregation of 50,000 Shares.

[10] The Exchange represents that the Sponsor, Trustee, Distributor, and Depository are not affiliated with the Exchange or one another, with the exception that the Sponsor and Distributor are affiliated. The Exchange further represents that no compensation is paid by the Sponsor to the Distributor in connection with services performed by the Distributor for the Trusts.

of the foreign exchange industry and markets, foreign currency liquidity and regulation, role and responsibilities of the Sponsor, Trustee, Distributor, and Depository, fees and expenses of the Trusts, distributions, voting and approvals, risk factors, clearance and settlement, and the procedures for creations and redemptions, and other details pertaining to the Shares, can be found in the Exchange Notice, the NYSE Approval Orders, and the Trust Prospectus (as defined below).[11]

Quotations and last sale price information for the Shares are disseminated over the Consolidated Tape,[12] as is the case for all equity securities traded on the Exchange (including shares of exchange-traded funds). In addition, there is a considerable amount of foreign currency price and market information available on public Web sites and through professional and subscription services. As is the case with equity securities and exchange-traded funds, in most instances, real-time information is only available for a fee, and information available free-of-charge is subject to delay (typically, 15 to 20 minutes).

Currently, the Consolidated Tape does not provide for dissemination of the spot price of a foreign currency over the Consolidated Tape. However, investors may obtain on a 24-hour basis foreign currency pricing information based on the foreign currency spot price of each applicable foreign currency from various financial information service providers. Current spot prices are also generally available with bid/ask spreads from foreign exchange dealers. In addition, the Trusts' Web site (*http://www.currencyshares.com*) provides ongoing pricing information for the applicable foreign currency spot prices and the Shares.[13] The Exchange states that complete, real-time data for foreign currency futures and options prices traded on the Chicago Mercantile Exchange (''CME'') and the Philadelphia Stock Exchange, Inc. (''Phlx'') are also available by subscription from information service providers, and that CME and Phlx also provide delayed futures and options information on current and past trading sessions and market news free of charge on their respective Web sites.

There are a variety of other public Web sites available at no charge that provide information on the foreign currencies underlying the Shares. Such service providers provide spot price or currency conversion information about the foreign currencies. Many of these sites offer price quotations drawn from other published sources, but because the information is supplied free-of-charge, it is generally subject to time delays. In addition, major market data vendors regularly report current currency exchange pricing for a fee for the Japanese yen and other currencies.[14]

The Trustee calculates, and the Sponsor publishes, each Trust's net asset value, or ''NAV,'' and NAV per Share each business day. The Sponsor publishes the NAV and NAV per Share for each Trust on each day that the Exchange is open for regular trading on the Trusts' Web site.[15] In addition, the Trusts' Web site provides the following information: (1) The spot price for each applicable foreign currency,[16] including the bid and offer and the midpoint between the bid and offer for the foreign currency spot price, updated every 5 to 10 seconds; [17] (2) an intraday indicative value (''IIV'') per Share, calculated by multiplying the indicative spot price of the applicable foreign currency by the quantity of foreign currency backing each Share, updated at least every 15 seconds; [18] (3) a delayed indicative value (subject to a 20 minute delay), which is used for calculating premium/discount information; (4) premium/discount information, calculated on a 20 minute delayed basis; (5) accrued interest per Share; (6) the daily Federal Reserve Bank of New York Noon Buying Rate; [19] (7) the Basket Amount [20] for each applicable foreign currency; and (8) the last sale price of the Shares as traded in the U.S. markets, subject to a 20-minute delay.[21] On the Trusts' Web site, the foreign currency spot price is available and disseminated at least every 15 seconds, and the IIV per Share will be calculated and disseminated at least every 15 seconds during NYSE Arca Marketplace's Opening, Core Trading, and Late Trading Sessions.[22] The Exchange states that it will provide on its own Web site (*http://www.nyse.com*) a link to the Trusts' Web site.

The Exchange states that the Shares are subject to the criteria for initial and continued listing of Currency Trust Shares under NYSE Arca Equities Rule 8.202. A minimum of 100,000 Shares would be required to be outstanding when the Shares begin to trade. This minimum number of Shares required to be outstanding is comparable to requirements that have been applied to

[11] *See supra* note 5; *see also* Prospectus Supplement No. 4, dated March 19, 2007, and Prospectus Supplement No. 2, dated January 29, 2007, for each of the CurrencyShares℠ Australian Dollar Trust, CurrencyShares℠ British Pound Sterling Trust, CurrencyShares℠ Canadian Dollar Trust, CurrencyShares℠ Mexican Peso Trust, CurrencyShares℠ Swedish Krona Trust, and CurrencyShares℠ Swiss Franc Trust (Registration Nos. 333–132362, 333–132361, 333–132363, 333–132367, 333–132366, and 333–132364, respectively); Prospectus Supplement No. 11, dated March 19, 2007, and Prospectus Supplement No. 7, dated January 29, 2007, for the CurrencyShares℠ Euro Trust (Registration No. 333–125581); and Prospectus Supplement No. 3, dated April 3, 2007, for the CurrencyShares℠ Japanese Yen Trust (Registration Nos. 333–138881 and 333–141821) (collectively, the ''Trust Prospectus''). E-mail from Timothy J. Malinowski, Director, NYSE Group, Inc., to Edward Cho, Special Counsel, Division of Market Regulation, Commission, dated July 18, 2007 (confirming that additional information on the foreign currency markets, the Trust, and the Shares can be found in the Exchange Notice, NYSE Approval Orders, and the Trust Prospectus, as supplemented).

[12] E-mail from Timothy J. Malinowski, Director, NYSE Group, Inc., to Edward Cho, Special Counsel, Division of Market Regulation, Commission, dated July 18, 2007 (confirming the information being disseminated over the Consolidated Tape).

[13] The Sponsor has represented that the spot price will be available on the Trust's Web site without interruption 24 hours per day, seven days per week.

[14] The Exchange notes that there may be incremental differences in the foreign currency spot price among the various information service sources. While the Exchange believes the differences in the foreign currency spot price may be relevant to those entities engaging in arbitrage or in the active daily trading of the applicable foreign currency or derivatives thereon, the Exchange believes such differences are likely of less concern to individual investors intending to hold the Shares as part of a long-term investment strategy.

[15] The Sponsor for the Trusts has represented to the Exchange that the NAV and the Basket Amount (as defined herein) for the Trust will be available to all market participants at the same time.

[16] The Trusts' Web site's foreign currency spot prices will be provided by FactSet Research Systems (*http://www.factset.com*). FactSet Research Systems is not affiliated with the Trusts, Trustee, Sponsor, Depository, Distributor, or the Exchange.

[17] The Sponsor calculates the midpoint price. The midpoint is used for the purpose of calculating the premium or discount of the Shares.

[18] The IIV of the Shares is analogous to the intraday optimized portfolio value (sometimes referred to as ''IOPV'') and indicative portfolio value associated with the trading of exchange-traded funds. The Exchange further represents that the IIV is equivalent to the Indicative Trust Value, as referenced in NYSE Arca Equities Rule 8.202(e)(2)(v), with respect to Currency Trust Shares. E-mail from Timothy J. Malinowski, Director, NYSE Group, Inc., to Edward Cho, Special Counsel, Division of Market Regulation, Commission, dated July 25, 2007 (confirming that the IIV is equivalent to the Indicative Trust Value).

[19] The Federal Reserve Bank of New York Noon Buying Rate is used for the purpose of determining the NAV of each Trust.

[20] A ''Basket Amount'' is the total deposit amount of the applicable foreign currency required to purchase a Basket of Shares.

[21] The last sale price of the Shares in the secondary market is available on a real-time basis for a fee from regular data vendors.

[22] Pursuant to NYSE Arca Equities Rule 7.34(a), the NYSE Arca Marketplace trading hours for exchange-traded funds are as follows: (1) Opening Session, 4 a.m. to 9:30 a.m. Eastern Time (''ET''); (2) Core Trading Session, 9:30 a.m. to 4:15 p.m. ET; and (3) Late Trading Session, 4:15 p.m. to 8 p.m. ET. E-mail from Timothy J. Malinowski, Director, NYSE Group, Inc., to Edward Cho, Special Counsel, Division of Market Regulation, Commission, dated July 11, 2007 (confirming that the IIV per Share will be calculated and disseminated at least every 15 seconds during the Exchange's three trading sessions).

previously listed series of exchange-traded funds. The Exchange believes that the proposed minimum number of Shares outstanding at the start of trading is sufficient to provide market liquidity.[23]

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. The trading hours for the Shares on the Exchange are the same as those set forth in NYSE Arca Equities Rule 7.34 (Opening, Core Trading, and Late Trading Sessions, 4 a.m. ET to 8 p.m. ET).[24]

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These reasons may include (1) The extent to which trading is not occurring in the applicable underlying foreign currency, or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. In addition, trading in the Shares could be halted pursuant to the Exchange's ''circuit breaker'' rule.[25] The Exchange further notes that, if the IIV or the value of an underlying foreign currency is not being calculated or widely disseminated as required, the Exchange may halt trading during the day in which the interruption to the calculation or wide dissemination of the IIV or the value of the underlying foreign currency occurs. If the interruption to the calculation or wide dissemination of the IIV or the value of the underlying foreign currency persists past the trading day in which it occurred, the Exchange would halt trading no later than the beginning of the trading day following the interruption.

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules. The Exchange's current trading surveillance focuses on detecting when securities trade outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations. The Exchange may also obtain information via the Intermarket Surveillance Group (''ISG'') from other exchanges that are members or affiliate members of ISG. Specifically, the Exchange can obtain key trading information from Phlx in connection with foreign currency options trading and from CME in connection with foreign currency futures trading.[26] Furthermore, the Exchange states that the Shares are subject to NYSE Arca Equities Rule 8.202(g)–(i), which set forth certain restrictions on ETP Holders[27] acting as registered market makers in the Shares to facilitate surveillance. The Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Prior to listing and trading the Shares, the Exchange will inform its ETP Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (a) The procedures for purchases and redemptions of Shares in Baskets (and that Shares are not individually redeemable); (b) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (c) how information regarding the IIV and applicable foreign currency values is disseminated; (d) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (e) other trading information.

In addition, the Bulletin will reference that the Trust is subject to various fees and expenses, the number of units of the applicable foreign currency required to create a Basket or to be delivered upon redemption of a Basket may gradually decrease over time in the event that a Trust is required to withdraw or sell units of foreign currency to pay the Trust's expenses, and that if done at a time when the price of the applicable foreign currency is relatively low, it could adversely affect the value of the Shares, and that there is no regulated source of last-sale information regarding foreign currency. The Bulletin will also discuss any exemptive, no-action, and/or interpretive relief granted by the Commission from the requirements of the Act and any rules thereunder.[28]

2. Statutory Basis

The proposal is consistent with section 6(b) of the Act,[29] in general, and section 6(b)(5) of the Act,[30] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange 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 purpose of the Act.

[23] *See* NYSE Arca Equities Rule 8.202(e) (setting forth the initial and continued listing standards applicable to the Shares). *See also* Exchange Notice (providing further discussion regarding the initial and continued listing standards applicable to the Shares).

[24] *See supra* note 22. *See also* Exchange Notice (providing further discussion regarding the trading rules applicable to the Shares).

[25] *See* NYSE Arca Equities Rule 7.12 (Trading Halts Due to Extraordinary Market Volatility).

[26] The Exchange states that Phlx is a member of ISG and CME is an affiliate member of ISG.

[27] An ETP Holder is a registered broker or dealer that has been issued an Equity Trading Permit (ETP) by NYSE Arca Equities.

[28] *See* letter from Racquel L. Russell, Branch Chief, Office of Trading Practices and Processing, Division of Market Regulation, Commission, to George T. Simon, Esq., Foley & Lardner LLP, dated June 21, 2006 (''June 21, 2006 Letter'') (granting relief from certain rules under the Act for certain of the Trusts) and letter from James A Brigagliano, Assistant Director, Division of Market Regulation, Commission, to Michael Schmidtberger, Esq., Sidley Austin Brown & Wood LLP, dated January 19, 2006 (''January 19, 2006 Letter'') (granting relief from certain rules under the Act for the DB Commodity Index Tracking Fund). The Sponsor is relying on: (a) The June 21, 2006 Letter regarding Rule 10a–1 under the Act (17 CFR 240.10a–1), Rule 200(g) of Regulation SHO (17 CFR 242.200(g)), and Rules 101 and 102 of Regulation M under the Act (17 CFR 242.101 and 102); and (b) the January 19, 2006 Letter regarding Section 11(d)(1) of the Act (15 U.S.C. 78k(d)(1)) and Rule 11d1–2 thereunder (17 CFR 240.11d1–2). In addition, the Exchange represents that the Trusts will not be subject to the Exchange's corporate governance requirements and the Sponsor has received guidance from the Commission regarding the application of the certification rules for periodic reporting under the Act. *See* Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003) (SR–NYSE–2002–33, *et al.*) (noting that the corporate governance standards will not apply to, among others, passive business organizations in the form of trusts). *See also* Securities Exchange Act Release No. 47654 (April 29, 2003), 68 FR 18788 (April 16, 2003) (File No. S7–02–03) (noting that SROs may exclude from Rule 10A–3's requirements issuers that are organized as trusts or other unincorporated associations that do not have a board of directors or persons acting in a similar capacity and whose activities are limited to passively owning or holding securities, rights, collateral, or other assets on behalf of or for the benefit of the holders of the listed securities).

[29] 15 U.S.C. 78f(b).

[30] 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 written comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–NYSEArca–2007–57 on the subject line.

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NYSEArca–2007–57. 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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2007–57 and should be submitted on or before August 22, 2007.

IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[31] In particular, the Commission finds that the proposed rule change is consistent with section 6(b)(5) of the Act,[32] which requires that an exchange have rules designed, among other things, 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. The Commission notes that it previously approved the original listing and trading of the Shares on NYSE, and the instant proposal is substantively identical to the previous NYSE proposals.[33]

The Commission further believes that the proposal is consistent with section 11A(a)(1)(C)(iii) of the Act,[34] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotations and last sale price information for the Shares are disseminated over the Consolidated Tape.[35] The Trust disseminates the foreign currency spot prices for each of the Trusts and the IIV per Share at least every 15 seconds on its Web site during the Opening, Core Trading, and Late Trading Sessions of the Exchange. In addition, the Sponsor publishes the NAV and NAV per Share for each Trust on each day that the Exchange is open for regular trading on the Trusts' Web site. Investors may obtain on a 24-hour basis foreign currency pricing information based on the foreign currency spot price of each applicable foreign currency from various financial information service providers. Current spot prices are also generally available with bid/ask spreads from foreign exchange dealers. In addition, the Trusts' Web site provides ongoing pricing information for the applicable foreign currency spot prices and the Shares. The Exchange represents that complete, real-time data for foreign currency futures and options prices traded on CME and Phlx are also available by subscription from information service providers. CME and Phlx also provide delayed futures and options information on current and past trading sessions and market news free of charge on their respective Web sites. There are a variety of other public Web sites available at no charge that provide information on the foreign currencies underlying the Shares, including spot price or currency conversion information about the foreign currencies. In addition, the Trusts' Web site provides the following information: (1) The spot price for each applicable foreign currency, including the bid and offer and the midpoint between the bid and offer for the foreign currency spot price, updated every 5 to 10 seconds; (2) a delayed IIV (subject to a 20 minute delay), which is used for calculating premium/discount information; (3) premium/discount information, calculated on a 20 minute delayed basis; (4) accrued interest per Share; (5) the daily Federal Reserve Bank of New York Noon Buying Rate; (6) the Basket Amount for each applicable foreign currency; and (7) the last sale price of the Shares as traded in the U.S. markets, subject to a 20-minute delay. The Exchange states that it will provide on its own Web site a link to the Trusts' Web site.

Furthermore, the Commission believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately. The Commission notes that the Sponsor has represented that, prior to listing, the NAV for each Trust would be calculated daily and made available to all market participants at the same time.[36] NYSE Arca Equities Rule 8.202(i) provides that, in connection with trading in the applicable foreign currency, options, futures or options on futures on such currency, or any other derivatives based on such currency, including Currency Trust Shares, an ETP Holder acting as a Market Maker (as defined in NYSE Arca Equities Rule 1.1(u)) in the Shares is restricted from using any material non-public information received from any person associated with such ETP Holder who is trading such foreign currency, options, futures or options on futures on such currency, or any other derivatives

[31] In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[32] 15 U.S.C. 78f(b)(5).

[33] *See supra* note 5.

[34] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[35] *See supra* note 12 and accompanying text.

[36] *See supra* note 15.

based on such currency. In addition, NYSE Arca Equities Rule 8.202(g) prohibits an ETP Holder acting as a registered Market Maker in the Shares from being affiliated with a market maker in the applicable foreign currency, options, futures or options on futures on such currency, or any other derivatives based on such currency, unless adequate information barriers are in place, as provided in NYSE Arca Equities Rule 7.26.

The Commission also believes that the Exchange's trading halt rules are reasonably designed to prevent trading in the Shares when transparency is impaired. NYSE Arca Equities Rule 8.202(e)(2) provides that, when the Exchange is the listing market, if the value of the underlying foreign currency or IIV is no longer calculated or available on at least a 15-second delayed basis, the Exchange would consider suspending trading in the Shares.[37] NYSE Arca Equities Rule 8.202(e)(2) also provides that the Exchange may seek to delist the Shares in the event the value of the applicable foreign currency or IIV is no longer calculated or available as required.

The Commission further believes that the trading rules and procedures to which the Shares will be subject pursuant to this proposal are consistent with the Act. The Exchange has represented that any securities listed pursuant to this proposal will be deemed equity securities, and subject to existing Exchange rules governing the trading of equity securities.

In support of this proposal, the Exchange has made the following representations:

(1) The Exchange represents that it intends to utilize its existing surveillance procedures applicable to derivative products to monitor trading in the Shares and that such procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules. The Exchange may obtain information via ISG from other exchanges who are members or affiliates of ISG. Specifically, the Exchange can obtain such information from Phlx in connection with foreign currency options trading on Phlx and from CME in connection with foreign currency futures trading on CME.

(2) The Exchange represents that if the interruption to the calculation or wide dissemination of the value of the underlying foreign currency or IIV persists past the trading day in which it occurred, the Exchange would halt trading no later than the beginning of the trading day following the interruption.

(3) Prior to listing and trading the Shares, the Exchange represents that it will inform its ETP Holders in the Bulletin of the special characteristics and risks associated with trading the Shares.

This approval order is based on the Exchange's representations.

The Commission finds good cause for approving this proposal before the thirtieth day after the publication of notice thereof in the **Federal Register**. As noted above, the Commission previously approved the original listing and trading of the Shares on NYSE and the trading of the Shares pursuant to UTP on the Exchange.[38] The Commission presently is not aware of any regulatory issue that should cause it to revisit those findings or would preclude the listing and trading of the Shares on the Exchange. Accelerating approval of this proposed rule change would allow the Shares to be listed on the Exchange without undue delay and continuously traded without interruption, to the benefit of investors.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[39] that the proposed rule change (SR–NYSEArca–2007–57) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[40]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14836 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

[37] *See supra* note 22.

[38] *See supra* notes 5 and 6.

[39] 15 U.S.C. 78s(b)(2).

[40] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–56141; File No. SR-Phlx-2007–53]

Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change as Modified by Amendment No. 1 Thereto Relating to the Extension of a Pilot Program to Quote and Trade Options in Penny Increments

July 24, 2007.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 24, 2007, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change asescribed in Items I and II below, which Items have been substantially prepared by the Phlx. On July 25, 2007 the Exchange filed Amendment No. 1 to the proposal. The Exchange filed the proposal as a ''non-controversial'' proposed rule change pursuant to section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6) thereunder,[4] which rendered the proposal effective upon filing with the Commission. 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 extend a pilot (the ''Pilot'') that permits certain options series to be quoted and traded in increments of $0.01. The text of the proposed rule change is available at Phlx, the Commission's Public Reference Room, and *http://www.phlx.com.*

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 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 continue to permit specified options series to be quoted and traded in increments of $0.01 by extending the Pilot through September 27, 2007.

[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).

The Pilot began on January 26, 2007.[5] All series in options included in the Pilot (''Pilot Options,'' listed below) trading at a price of less than $3.00 are currently quoted and traded in minimum increments of $0.01, and Pilot Options with a price of $3.00 or higher are currently quoted and traded in minimum increments of $0.05, except that options overlying the Nasdaq-100 Index Tracking Stock (''QQQQ'')[6] are quoted and traded in minimum increments of $0.01 for all series regardless of the price. A list of all Pilot Options was communicated to membership via Exchange circular.

The options included in the Pilot are:

Symbol	Underlying security
IWM	Ishares Russell 2000.
QQQQ	QQQQ.
SMH	SemiConductor Holders.
GE	General Electric.
AMD	Advanced Micro Devices.
MSFT	Microsoft.
INTC	Intel.
CAT	Caterpillar.
WFMI	Whole Foods.
TXN	Texas Instruments.
A	Agilent Tech Inc.
FLEX	Flextronics International.
SUNW	Sun Micro.

Report to the Commission

Phlx Rule 1034(a)(i)(B)(2) required the Exchange to prepare and submit an analytical report (''Report'') to the Commission that addressed the impact of the first three months of the Pilot on the quality of the Exchange's markets and option quote traffic and capacity on or before the last day of the fourth month of the Pilot. The Exchange submitted the Report on May 31, 2007, within the timeframe specified in the rule. The Exchange proposes to delete Phlx Rule 1034(a)(i)(B)(2) because it is no longer applicable, and to make a technical numbering change to the rule.

The Exchange anticipates that it will submit further reports as the Pilot continues. The Exchange will amend its rules accordingly.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act[7] in general, and furthers the objectives of section 6(b)(5) of the Act[8] 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 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 by the Exchange.

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) of the Act[9] and Rule 19b–4(f)(6) thereunder,[10] because the foregoing proposed 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.

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30-days after the date of filing.[11] However, Rule 19b–4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest.[12] The Exchange has requested that the Commission waive the 5-day notice requirement and the 30-day operative delay. The Commission believes that waiving the 5-day notice requirement and the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver will ensure continuity of the Exchange's rules and will allow the Pilot to remain in effect without interruption. For these reasons, the Commission designates the proposal to be operative upon filing with the Commission.[13]

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.[14]

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR-Phlx-2007–53 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR-Phlx-2007–53. This file number should be included on the

[5] *See* Securities Exchange Act Release No. 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR-Phlx-2006–74). In that filing, the Exchange also made conforming amendments to various Exchange rules in order to be consistent with the pilot. These conforming changes were also approved on a six-month pilot basis. Therefore, the Exchange is proposing to extend the effective date for these rules through September 27, 2007.

[6] The Nasdaq-100®, Nasdaq-100 Index®, Nasdaq®, The Nasdaq Stock Market®, Nasdaq-100 Shares℠, Nasdaq-100 Trust℠, Nasdaq-100 Index Tracking Stock℠, and QQQ℠ are trademarks or service marks of The Nasdaq Stock Market, Inc. (Nasdaq) and have been licensed for use for certain purposes by the Philadelphia Stock Exchange pursuant to a License Agreement with Nasdaq. The Nasdaq-100 Index® (the Index) is determined, composed, and calculated by Nasdaq without regard to the Licensee, the Nasdaq-100 Trust℠, or the beneficial owners of Nasdaq-100 Shares℠. Nasdaq has complete control and sole discretion in determining, comprising, or calculating the Index or in modifying in any way its method for determining, comprising, or calculating the Index in the future.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6).

[11] 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to give the Commission 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.

[12] 17 CFR 240.19b–4(f)(6)(iii).

[13] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[14] 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 the period to commence on July 25, 2007, the date on which Phlx submitted Amendment No. 1. *See* 15 U.S.C. 78s(b)(3)(C).

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, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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–2007–53 and should be submitted on or before August 22, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14844 Filed 7–31–07; 8:45 am]

BILLING CODE 8010–01–P

SMALL BUSINESS ADMINISTRATION

[License No. 02/72–0625]

Founders Equity SBIC I, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Founders Equity SBIC I, L.P., 711 Fifth Avenue, 5th Floor, New York, New York 10022, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under section 312 of the Act and section 107.730, Financings which Constitute Conflicts of Interest of the Small Business Administration (''SBA'') rules and regulations (13 CFR 107.730). Founders Equity SBIC I, L.P. proposes to provide convertible preferred equity security financing to Richardson Foods, Inc. (''Richardson''), 101 Erie Blvd., Canajoharie, NY 13317. The financing is contemplated to provide the company with working capital and cash to replace damaged assets.

The financing is brought within the purview of Sec. 107.730(a)(1) of the Regulations because Founders Equity NY, L.P., and Associate of Founders Equity SBIC I, L.P. owns 27% of Richardson. Therefore, this transaction is considered a financing of an Associate requiring prior SBA approval.

Notice is hereby given that any interested person may submit written comments on the transaction, within 15 days of the date of this publication, to the Associate Administrator for Investment, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

Dated: July 23, 2007.

Harry Haskins,

Acting Associate Administrator for Investment.

[FR Doc. 07–3753 Filed 7–31–07; 8:45 am]

BILLING CODE 8025–01–M

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. OST–2004–16951]

Notice of Request for Renewal of a Previously Approved Collection

AGENCY: Office of the Secretary, DOT.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended), this notice announces the U.S. Department of Transportation's (DOT) intention to request renewal of a previously approved information collection.

DATES: Comments on this notice must be received by October 1, 2007.

ADDRESSES: You may submit comments [identified by DOT DMS Docket Number OST–2004–16951] by any of the following methods:

- *Web site: http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading of the **SUPPLEMENTARY INFORMATION** section of this document. Note that all comments received will be posted without change to *http://dms.dot.gov* including any personal information provided. Please see the Privacy Act heading under Regulatory Notes.

Docket: For access to the docket to read background documents or comments received, go to *http://dms.dot.gov* at any time or to W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Lauralyn Remo, Air Carrier Fitness Division (X–56), Office of Aviation Analysis, Office of the Secretary, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–9721.

SUPPLEMENTARY INFORMATION:

Title: Aircraft Accident Liability Insurance, 14 CFR Part 205.

OMB Control Number: 2106–0030.

Type of Request: Renewal without change, of a previously approved collection.

Abstract: 14 CFR Part 205 contains the minimum requirements for air carrier accident liability insurance to protect the public from losses, and directs that certificates evidencing appropriate coverage must be filed with the Department.

Respondents: U.S. and foreign air carriers.

Estimated Number of Respondents: 4,606.

Estimated Total Burden on Respondents: 5,988 hours.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (b) the accuracy of the Department's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the

[15] 17 CFR 200.30–3(a)(12).

burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Issued in Washington, DC on July 25, 2007.

Todd M. Homan,

Director, Office of Aviation Analysis.

[FR Doc. E7–14885 Filed 7–31–07; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Research and Innovative Technology Administration

[RITA–2007–28836]

Nationwide Differential Global Positioning System (NDGPS) Program

AGENCY: Research and Innovative Technology Administration, DOT.

ACTION: Notice; request for public comments.

SUMMARY: The Research and Innovative Technology Administration (RITA), on behalf of the U.S. Department of Transportation (DOT), is assessing the current user needs and systems requirements of the inland (terrestrial) component of NDGPS. This assessment is in preparation for making a recommendation to the National Space-Based Positioning, Navigation and Timing (PNT) Executive Committee (*http://www.pnt.gov*) on the need to continue to operate the inland component of the NDGPS system, and to make a decision on funding the NDGPS. The assessment may recommend other funding sources for future maintenance or enhancement of NDGPS, or shared sponsorship with other Federal and non-Federal agencies and entities, including the private sector. If no transportation requirements or other federal user requirements are identified as a result of the needs assessment, and if there are no other Federal or other funding sources willing to sponsor or partner in sponsoring NDGPS, DOT would develop a decommissioning plan for NDGPS.

DATES: Comments and related material must reach the Docket Management Facility on or before October 1, 2007. Late filed comments will be considered to the maximum extent practicable.

ADDRESSES: You may submit comments identified by RITA docket number RITA–2007–28836 to the Docket Management Facility at the U.S. Department of Transportation. To avoid duplication, please use only one of the following methods:

(1) *Web site: http://dms.dot.gov* (electronic submission).

(2) *Mail:* U.S. Department of Transportation, Docket Operations, M–30, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(3) *Fax:* 202–493–2251.

(4) *Delivery:* Room W12–140 in the West Tower of the U.S. Department of Transportation Headquarters Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call Mr. Timothy A. Klein, Department of Transportation, Research and Innovative Technology Administration, 202–366–0075, or e-mail *NDGPS@dot.gov*.

If you have questions on viewing or submitting material to the docket, call Renée V. Wright, Program Manager, Docket Operations, 202–493–0402.

You may obtain a copy of this notice by calling RITA's Office of Governmental, International and Public Affairs, 202–366–9664, or read it online at *http://dms.dot.gov*.

SUPPLEMENTARY INFORMATION:

Background

In 1997, the Department of Transportation and Related Agencies Appropriations Act of 1998 (Pub. L. 105–66, section 346 (111 Stat. 1449)) authorized the implementation of the inland component of NDGPS. Federal agencies, states, and scientific organizations have been cooperating to complete the inland NDGPS component throughout the U.S. If completed as originally envisioned, NDGPS will provide coverage of the conterminous U.S., Hawaii, and Alaska, regardless of terrain, man-made obstructions, or other surface obstructions. This coverage is achieved by using a robust medium frequency broadcast optimized for surface applications. NDGPS currently meets all of the Maritime Differential GPS performance requirements.

The completed NDGPS system would provide an accurate, highly-reliable, dynamic, nationwide real-time differential GPS location and integrity function to users that could enable multiple surface transportation, other civil, commercial, scientific and homeland security applications. More information is available at: *http://www.navcen.uscg.gov/ndgps/default.htm*.

The Department of Transportation is evaluating the user needs and system requirements of the NDGPS system. DOT is examining whether it would be in the public interest to continue operations of the inland component of the NDGPS system, or to invest in completing and enhancing NDGPS by:

1. Completing the planned NDGPS Initial Operational Capability (IOC); or

2. Completing the planned NDGPS Full Operational Capability (FOC).

If further investment is not in the public interest and there are no other funding sources, DOT is evaluating whether to decommission the inland component of NDGPS.

DOT is also seeking information about potential NDGPS sponsor partnerships with other Federal, state and local agencies, universities, and the private sector.

Future operations and investment decision scenarios might include:

1. Sharing sponsorship (program operations, maintenance and funding responsibilities) across interested Federal, state and local agencies, which may lead to completing the planned NDGPS Initial Operating Capability (IOC) of providing users with coverage by at least one NDGPS site over the conterminous United States (CONUS), as defined in the 2005 Federal Radionavigation Plan (2005 FRP), available at: *http://www.navcen.uscg.gov/pubs/frp2005/2005%20FRP%20WEB.pdf*;

2. Sharing sponsorship (program operations, maintenance and funding responsibilities) across interested Federal, state and local agencies, which may lead to completing the planned NDGPS Full Operating Capability (FOC) of dual coverage over CONUS, as defined in the 2005 FRP;

3. Transferring system funding and/or operations to the private sector through a public-private partnership or similar mechanism; or,

4. If user requirements are not identified, decommissioning the inland component of NDGPS.

In all scenarios, the Coast Guard will continue to operate, maintain, and manage the Maritime Differential GPS system to meet maritime safety, navigation and security mission requirements.

Contributing factors to these decisions are:

1. Whether there are sufficient number of current and projected NDGPS transportation users, and/or other civil sector users (e.g., civil Federal, state and local agencies, commercial and scientific interests) to justify continued system operation, or build-out to FOC completion;

2. Whether there are sufficient safety, mobility, efficiency, economic,

environmental, and other benefits to justify the costs of FOC completion and future operations;

3. Whether there are other GPS augmentation or PNT services currently available to meet NDGPS requirements; or if such services are in development, when nationwide real-time deployment is expected;

4. Whether the private sector has or is developing the capability to provide services equivalent to or better than NDGPS requirements, or whether the private sector has an interest in assuming funding and/or operations of the inland component of NDGPS;

5. Whether there are international considerations to the decision concerning the future of the inland component of NDGPS; and

6. Whether there are interoperability or radio frequency spectrum considerations to the decision concerning the future of the inland component of NDGPS.

Specific to the DOT decision on future NDGPS sponsorship by the Department, contributing factors include:

7. Whether there are any transportation operational requirements for the inland component of NDGPS;

8. Whether there are existing uses of NDGPS by Federal, state and local transportation agencies, other transportation authorities, or private transportation and logistics providers and shippers, and if these uses are critical to transportation safety, operations and efficiency;

9. Should there be existing uses, whether another PNT or GPS augmentation service could meet the user requirement; and the cost of switching to another system, should that system meet the user requirements; and

10. Whether there are transportation safety, mobility or efficiency applications currently in research, development, or early deployment which are dependent upon the NDGPS for successful application; whether another PNT or GPS augmentation service could meet the projected application(s); and the cost of switching to another system, should that system meet the projected requirement.

The Department of Transportation seeks public input on the various decisions currently under consideration, with an emphasis on NDGPS user requirements and sponsorship opportunities. The Department of Transportation also will solicit real-time navigation and positioning requirements from Federal civil agencies and quantify any mission impacts of conducting public business without the availability of NDGPS. For more information on NDGPS, you may visit: *http://www.navcen.uscg.gov/ndgps/default.htm.*

Request for Comments

All comments received will be posted, without change, to *http://dms.dot.gov* and will include any personal information you have provided. Please see DOT's ''Privacy Act'' paragraph below.

Submitting Comments: If you submit a comment, please include your name and address, identify the docket number for this notice (RITA–2007–28836) and give the reason for each comment. You may submit your comments by electronic means, mail, fax, or delivery to the Docket Management Facility at the address under **ADDRESSES**; but please submit your comments by only one means. If you submit comments by mail or delivery, submit them in an unbound format, on white paper no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like confirmation they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments received during the comment period.

Viewing Comments and Documents: To view comments, go to *http://dms.dot.gov* at any time, click on ''Simple Search,'' enter the last five digits of the docket number for this notice (RITA–2007–28836), and click on ''Search.'' You may also visit the Docket Management Facility in Room W12–140 in the West Tower of the U.S. Department of Transportation Headquarters Building, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone can search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or you may visit *http://dms.dot.gov.*

Next Steps for this Project

At this time, the Department of Transportation seeks public input on the various options currently under consideration. The Department of Transportation also will inventory Federal civil agencies on any mission requirements that may require NDGPS, and identify mission impacts of conducting business without NDGPS. After considering all comments, the Department of Transportation will make a recommendation to the National Space-Based PNT Executive Committee (*http://www.pnt.gov*) on the need to continue to operate or to invest in completion or enhancement of the inland component of the NDGPS system, and on proposed sponsors and funding partners; and will inform the public of the agreed course of action with respect to future investment in NDGPS.

Issued in Washington, DC, on July 25, 2007.

Thomas O'Donoghue,

Chief Counsel, Research and Innovative Technology Administration.

[FR Doc. E7–14905 Filed 7–31–07; 8:45 am]

BILLING CODE 4910–HY–P



Federal Register

Wednesday,
August 1, 2007

Part II

Securities and Exchange Commission

17 CFR Part 240
Shareholder Choice Regarding Proxy Materials; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release Nos. 34–56135; IC–27911; File No. S7–03–07]

RIN 3235–AJ79

Shareholder Choice Regarding Proxy Materials

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: We are adopting amendments to the proxy rules under the Securities Exchange Act of 1934 to provide shareholders with the ability to choose the means by which they access proxy materials. Under the amendments, issuers and other soliciting persons will be required to post their proxy materials on an Internet Web site and provide shareholders with a notice of the Internet availability of the materials. The issuer or other soliciting person may choose to furnish paper copies of the proxy materials along with the notice. If the issuer or other soliciting person chooses not to furnish a paper copy of the proxy materials along with the notice, a shareholder may request delivery of a copy at no charge to the shareholder.

DATES: *Effective Date:* January 1, 2008, except § 240.14a–16(d)(3) and § 240.14a–16(j)(3) are effective October 1, 2007.

Compliance Dates: ''Large accelerated filers,'' as that term is defined in Rule 12b–2 under the Securities Exchange Act of 1934, not including registered investment companies, must comply with the amendments regarding proxy solicitations commencing on or after January 1, 2008. Registered investment companies, persons other than issuers, and issuers that are not large accelerated filers conducting proxy solicitations (1) may comply with the amendments regarding proxy solicitations commencing on or after January 1, 2008 and (2) must comply with the amendments regarding proxy solicitations commencing on or after January 1, 2009.

FOR FURTHER INFORMATION CONTACT: Raymond A. Be, Special Counsel, Office of Rulemaking, Division of Corporation Finance, at (202) 551–3430, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–3628.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to Rules 14a–3,[1] 14a–7,[2] 14a–16,[3] 14a–101,[4] 14b–1,[5] 14b–2,[6] 14c–2,[7] and 14c–3[8] under the Securities Exchange Act of 1934.[9]

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I. Introduction

On January 22, 2007, we proposed amendments to the proxy rules that would require all issuers and other soliciting persons to furnish proxy materials to shareholders by posting them on an Internet Web site and providing shareholders with notice of the electronic availability of the proxy materials.[10] Under the proposal, issuers and other soliciting persons would be permitted to deliver paper or e-mail copies of their proxy materials to shareholders along with the notice. The proposal was intended to provide all shareholders with the ability to choose the means by which they access proxy materials, including via paper, e-mail or the Internet, while still affording issuers and other soliciting persons flexibility in determining how to furnish their proxy materials to shareholders.[11] In a companion release issued on the same date, we adopted the ''notice and access'' model that issuers and other soliciting persons may comply with on a voluntary basis for proxy solicitations commencing on or after July 1, 2007.[12]

We received 23 comment letters on the proposal. The vast majority of commenters generally supported our goal of increasing reliance on technology to improve proxy distribution.[13] However, many of the

[1] 17 CFR 240.14a–3.
[2] 17 CFR 240.14a–7.
[3] 17 CFR 240.14a–16.
[4] 17 CFR 240.14a–101.
[5] 17 CFR 240.14b–1.
[6] 17 CFR 240.14b–2.
[7] 17 CFR 240.14c–2.
[8] 17 CFR 240.14c–3.
[9] 15 U.S.C. 78a *et seq.*

[10] See Release No. 34–55147 (Jan. 22, 2007) [72 FR 4176].

[11] For purposes of this release, the term ''proxy materials'' includes proxy statements on Schedule 14A [17 CFR 240.14a–101], proxy cards, information statements on Schedule 14C [17 CFR 240.14c–101], annual reports to security holders required by Rules 14a–3 [17 CFR 240.14a–3] and 14c–3 [17 CFR 240.14c–3] of the Exchange Act, notices of shareholder meetings, additional soliciting materials, and any amendments to such materials. For purposes of this release, the term does not include materials filed under Rule 14a–12 [17 CFR 240.14a–12].

[12] Release No. 34–55146 (Jan. 22, 2007) [72 FR 4148].

[13] See letters from AARP, American Business Conference (ABC), Automatic Data Processing Brokerage Services Group, now known as Broadridge Financial Solutions, Inc. (ADP), Bank of

commenters thought that the Commission's timetable for adopting the proposed amendments was too aggressive.[14] They suggested that we postpone adoption of the proposal until we gain experience from operation of the voluntary rule.

Although we acknowledge the timing concerns raised by the commenters, we think that it is appropriate to adopt the proposal at this time because the model that we are adopting will provide shareholders with enhanced choices without changing significantly the obligations of an issuer or other soliciting person. The only new obligations that the revised notice and access model will impose on issuers and other soliciting persons compared to the voluntary rule is that an issuer or other person soliciting proxies who wishes to initially furnish a full set of proxy materials in paper to shareholders will be required to: (1) Post those proxy materials on an Internet Web site; and (2) include a Notice of Internet Availability of Proxy Materials (Notice) with the full set or incorporate the Notice information into its proxy statement and proxy card.[15]

Furthermore, under the phase-in schedule that we are establishing for expanding the notice and access model to all issuers and other soliciting persons, the largest public companies will become subject to the model a year before any other companies become subject to the model. Most of these companies already appear to post their proxy materials and Exchange Act reports on an Internet Web site.[16] A large accelerated filer (not including registered investment companies) will have to comply with the notice and access model for solicitations beginning on or after January 1, 2008.[17] All other issuers (including registered investment companies) and soliciting persons other than issuers will have to comply with the model for solicitations beginning on or after January 1, 2009. This tiered system of implementation addresses the commenters' timing concerns by providing the Commission with a significant test group of large accelerated filers from which to obtain operating data and more than a full year to study the effects of the notice and access model and make any necessary revisions to the rules before they apply to other entities.

In addition, several commenters were concerned that the proposals would have required all issuers to establish Internet voting platforms [18] or to prepare their proxy materials at least 40 days prior to the shareholder meeting,[19] and therefore would impose significant costs on issuers. As discussed in detail below, the final rules do not require, and the proposals would not have required, an issuer or other soliciting person to establish an Internet voting platform. Similarly, the rules do not require an issuer or other soliciting person that sends a full set of proxy materials to shareholders to prepare its proxy materials at least 40 days prior to the meeting.

II. Description of the Amendments

Under the amendments, an issuer that is required to furnish proxy materials to shareholders under the Commission's proxy rules must post its proxy materials on a specified, publicly-accessible Internet Web site (other than the Commission's EDGAR Web site) and provide record holders with a notice informing them that the materials are available and explaining how to access those materials.[20] Intermediaries also must follow the notice and access model to furnish an issuer's proxy materials to beneficial owners. Persons other than the issuer conducting their own proxy solicitations must comply with the notice and access model as well. By requiring Internet availability of proxy materials, the amendments are designed to enhance the ability of investors to make informed voting decisions and to expand use of the Internet to ultimately lower the costs of proxy solicitations.

A. Notice and Access Model for Issuers: Two Options for Making Proxy Materials Available to Shareholders

The notice and access model allows an issuer to select either of the following two options to provide proxy materials to shareholders: (1) The ''notice only option'' and (2) the ''full set delivery option.'' Under the notice only option, an issuer will comply with the same requirements that we adopted in connection with the voluntary notice and access model. Under these requirements, the issuer must post its proxy materials on an Internet Web site and send a Notice to shareholders to inform them of the electronic availability of the proxy materials at least 40 days before the shareholders meeting. If an issuer follows this option, it must respond to shareholder requests for copies, including a shareholder's permanent request for paper or e-mail copies of proxy materials for all shareholder meetings.

Under the full set delivery option, an issuer can deliver a full set of proxy materials to shareholders, along with the Notice. An issuer need not prepare and deliver a separate Notice if it incorporates all of the information required to appear in the Notice into its proxy statement and proxy card,[21] and it need not respond to requests for copies as required under the notice only option.

An issuer does not have to choose one option or the other as the exclusive means for providing proxy materials to shareholders. Rather, an issuer may use

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New York (BONY), U.S. Chamber of Commerce (Chamber of Commerce), Council of Institutional Investors (CII), Commerce Finance Printers Corp. (Commerce Finance Printers), Computershare, Dechert LLP (Dechert), Kathryn Elmore and Michael Allen (Elmore & Allen), Investment Company Institute (ICI), Infosys Technologies Limited (Infosys), MailExpress, Reed Smith LLP (Reed Smith), Registrar and Transfer Company (Registrar and Transfer), Karl W. Reimers (Reimers), Ayal Rosenthal (Rosenthal), Society of Corporate Secretaries and Governance Professionals (SCSGP), Securities Industry and Financial Markets Association (SIFMA), Mark Snyder (Snyder), Shareholder Services Association (SSA), and Securities Transfer Association, Inc. (STA).

[14] See letters from AARP, ABC, ADP, BONY, Chamber of Commerce, CII, Computershare, ICI, Reed Smith, Registrar and Transfer, SCSGP, SIFMA, SSA, and STA.

[15] The effective result of the rules is that an intermediary must prepare Notices (or incorporate Notice information in its request for voting instructions) and create Web sites for all issuers for which securities are held by the intermediary's customers, rather than only for issuers who elect to follow the notice and access model under the voluntary system.

[16] Based on a random sampling of 150 large accelerated filers, approximately 80% of such filers already post their proxy materials on a non-EDGAR Web site, while almost all of the rest provide a link on their Web site to the Commission's EDGAR system. Only a small handful of such filers do not post their proxy materials on their Web site at all. We note, however, that currently there is no requirement that such Web sites preserve the anonymity of persons accessing the Web site. See Section II.A.1.f of this release for a description of this requirement.

[17] A large accelerated filer, as defined in Exchange Act Rule 12b–2 [17 CFR 240.12b–2], is an issuer that, as of the end of its fiscal year, has an aggregate worldwide market value of the voting and non-voting common equity held by its non-affiliates of $700 million or more, as measured on the last business day of the issuer's most recently completed second fiscal quarter; has been subject to the requirements of Section 13(a) or 15(d) of the Exchange Act for a period of at least twelve calendar months; has filed at least one annual report pursuant to Section 13(a) or 15(d) of the Exchange Act; and is not eligible to use Forms 10–KSB and 10–QSB for its annual and quarterly reports.

[18] See letters from ABC, BONY, and Registrar and Transfer.

[19] See, for example, letters from Chamber of Commerce, CII, Commerce Financial Printers, Elmore & Allen, ICI, and STA.

[20] See revised Rule 14a–3(a). The notice and access model does not apply to a proxy solicitation related to a business combination transaction. See Rule 14a–16(m) [17 CFR 240.14a–16(m)]. Also, as with the voluntary model, the notice and access model does not apply if the law of the issuer's state of incorporation would prohibit them from furnishing proxy materials in that manner. See Rule 14a–3(a)(3)(ii).

[21] If not soliciting proxies, an issuer may incorporate the Notice information into its information statement.

the notice only option to provide proxy materials to some shareholders and the full set delivery option to provide proxy materials to other shareholders. We describe both options in greater detail below.

1. The Notice Only Option: Sending a Notice Without a Full Set of Proxy Materials

We are adopting the notice only option substantially as proposed. Under the notice only option, an issuer will follow the same procedures that we have established under the existing notice and access model that issuers may choose to comply with on a voluntary basis for proxy solicitations commencing on or after July 1, 2007.[22] Under these procedures, the issuer must send a Notice to shareholders at least 40 calendar days before the shareholder meeting date, or if no meeting is to be held, at least 40 calendar days before the date that votes, consents, or authorizations may be used to effect a corporate action, indicating that the issuer's proxy materials are available on a specified Internet Web site and explaining how to access those proxy materials.[23] Issuers may household the Notice pursuant to Rule 14a–3(e).[24]

a. Contents of the Notice of Internet Availability of Proxy Materials

The Notice must contain the following information: [25]

- A prominent legend in bold-face type that states:

"Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].

- **This communication presents only an overview of the more complete proxy materials that are available to you on the Internet. We encourage you to access and review all of the important information contained in the proxy materials before voting.**
- **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].**
- **If you want to receive a paper or e-mail copy of these documents, you must request one. There is no charge to you for requesting a copy. Please make your request for a copy as instructed below on or before [Insert a date] to facilitate timely delivery."**

- The date, time, and location of the meeting or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted on, and the issuer's recommendations, if any, regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified Web site;
- (1) A toll-free telephone number; (2) an e-mail address; and (3) an Internet Web site address where the shareholder can request a copy of the proxy materials, for all meetings and for the particular meeting to which the Notice relates;
- Any control/identification numbers that the shareholder needs to access his or her proxy card;
- Instructions on how to access the proxy card, provided that such instructions do not enable a shareholder to execute a proxy without having access to the proxy statement; and
- Information about attending the shareholder meeting and voting in person.

The Notice must be written in plain English.[26] The Notice may contain only the information specified by the rules and any other information required by state law, if the issuer chooses to combine the Notice with any shareholder meeting notice that state law may require.[27] However, the Notice may contain a protective warning to shareholders, advising them that no personal information other than the identification or control number is necessary to execute a proxy.[28] In addition, a registered investment company may send its prospectus and/or report to shareholders together with the Notice.[29] The issuer must file its Notice with the Commission pursuant to Rule 14a–6(b) [30] no later than the date that it first sends the Notice to shareholders.[31]

b. Design of the Specified Publicly-Accessible Web Site

An issuer must make all proxy materials identified in the Notice publicly accessible, free of charge, at the Web site address specified in the Notice on or before the date that the Notice is sent to the shareholder.[32] The specified Web site may not be the Commission's EDGAR system.[33] The issuer also must post any subsequent additional soliciting materials on the Web site no later than the date on which such materials are first sent to shareholders or made public.[34] The materials must be presented on the Web site in a format, or formats, convenient for both reading online and printing on paper.[35] The proxy materials must remain available on that Web site through the conclusion of the shareholder meeting.[36]

c. Means To Vote

An issuer also must provide shareholders with a method to execute proxies as of the time the Notice is first sent to shareholders.[37] Several commenters on the proposal questioned whether this provision would require all issuers to establish Internet voting platforms.[38] The final rules do not require, and the proposals would not have required, an issuer to establish an Internet voting platform. Rather, an issuer can satisfy this requirement through a variety of methods, including providing an electronic voting platform, a toll-free telephone number for voting, or a printable or downloadable proxy card on the Web site. As noted above, if a telephone number for executing a proxy is provided, such a telephone number may appear on the Web site, but not on the Notice because it would enable a shareholder to execute a proxy without having access to the proxy statement.

d. Request for Paper or E-mail Copies

An issuer must provide paper or e-mail copies at no charge to shareholders requesting such copies.[39] It also must allow shareholders to make a permanent election to receive paper or e-mail copies of proxy materials distributed in connection with future proxy solicitations, and maintain

[22] See Rule 14a–16 [17 CFR 240.14a–16].

[23] Rule 14a–16(a)(1) [17 CFR 240.14a–16(a)(1)].

[24] 17 CFR 240.14a–3(e).

[25] Rule 14a–16(d) [17 CFR 240.14a–16(d)]. Appropriate changes must be made if the issuer is providing an information statement pursuant to Regulation 14C, seeking to effect a corporate action by written consent, or is a legal entity other than a corporation.

[26] Rule 14a–16(g) [17 CFR 240.14a–16(g)].

[27] Rule 14a–16(e) [17 CFR 240.14a–16(e)].

[28] Rule 14a–16(e)(2)(ii) [17 CFR 240.14a–16(e)(2)(ii)].

[29] See new Rule 14a–16(f)(2)(iii).

[30] 17 CFR 240.14a–6(b).

[31] Rule 14a–16(i) [17 CFR 240.14a–16(i)].

[32] Rule 14a–16(b)(1) [17 CFR 240.14a–16(b)(1)].

[33] Rule 14a–16(b)(3) [17 CFR 240.14a–16(b)(3)].

[34] Rule 14a–16(b)(2) [17 CFR 240.14a–16(b)(2)].

[35] Rule 14a–16(c) [17 CFR 240.14a–16(c)]. See Section II.A.3 of Release 34–55146 (Jan. 22, 2007) [72 FR 4148]. One commenter asked the Commission to consider the costs of requiring such formats. See letter from ICI. We believe that requiring readable and printable formats is important so that shareholders have meaningful access to the proxy materials. When determining the readability and printability of formats, issuers should consider the size of the files because many shareholders do not have broadband connections. Although some types of files may be suitable for persons with high-speed Internet access, the readability and printability of a document may be affected significantly by the time that it takes to download the document.

[36] Rule 14a–16(b)(1) [17 CFR 240.14a–16(b)(1)].

[37] Rule 14a–16(b)(4) [17 CFR 240.14a–16(b)(4)].

[38] See letters from ABC, BONY, and Registrar and Transfer.

[39] Rule 14a–16(j) [17 CFR 240.14a–16(j)].

records of those elections.[40] Further, the issuer must provide a toll-free telephone number, e-mail address, and Internet Web site address as a means by which a shareholder can request a copy of the proxy materials for the particular shareholder meeting referenced in the Notice or make a permanent election to receive copies of the proxy materials on a continuing basis with respect to all meetings.[41] The issuer also may include a pre-addressed, postage-paid reply card with the Notice that shareholders can use to request a copy of the proxy materials.[42]

e. Delivery of a Proxy Card

An issuer may not send a paper or e-mail proxy card to a shareholder until 10 calendar days or more after the date it sent the Notice to the shareholder, unless the proxy card is accompanied or preceded by a copy of the proxy statement and any annual report, if required, to security holders sent via the same medium.[43] This provision is intended to assist an issuer's efforts to solicit proxies if its initial efforts have not produced adequate response. This is similar to many issuers' current practice of sending reminder notices and duplicate proxy cards to shareholders who have not responded to the issuer's original request for proxy voting instructions.

One commenter remarking on this aspect of the proposals expressed concern that shareholders receiving proxy cards separately from the proxy statement and annual report may make their voting decisions without the benefit of access to those disclosure documents.[44] We appreciate this concern. However, at the point that a shareholder receives such a proxy card, the shareholder already would have received a Notice that provides information on how the shareholder can access the proxy materials and request copies of the materials, if desired. Moreover, the shareholder also would receive another copy of the Notice with the proxy card. We believe that, at this point, the shareholder will have had ample opportunity to either access the proxy materials on the Internet Web site or request a copy of those materials.

f. Web Site Confidentiality

An issuer must maintain the Internet Web site on which it posts its proxy materials in a manner that does not infringe on the anonymity of a person accessing that Web site.[45] An issuer also may not use any e-mail address provided by a shareholder solely to request a copy of proxy materials for any purpose other than to send a copy of those materials to that shareholder.[46] The issuer also may not disclose a shareholder's e-mail address to any person, except to its agent or an employee of the issuer. This disclosure may be made only for the purpose of facilitating delivery of a copy of the issuer's proxy materials by the agent or employee to a shareholder requesting a copy of the materials.

Three commenters were concerned about the provisions of the model that require a company to maintain the designated Web site in a manner that does not infringe on the anonymity of persons accessing the Web site.[47] One commenter was concerned that the prohibition on ''cookies'' will raise the costs of maintaining Internet Web sites.[48] Conversely, one commenter was concerned that there could be potential abuses of shareholder privacy through information tracking and collection of information on Internet Web sites.[49] Similar concerns regarding potential abuses of shareholder privacy also were raised with regard to the adoption of the voluntary notice and access model.

Although we recognize that the confidentiality requirements may increase the cost of maintaining an Internet Web site, we believe that the protection of shareholder information is important. A rule that permits issuers to discover the identity of a person accessing the Web site could effectively negate a beneficial owner's ability under the proxy rules to object to an intermediary's disclosure of that beneficial owner's identity to the issuer.[50] In addition, a rule without this prohibition on the issuer may make some shareholders hesitant to access the proxy disclosures, which would not promote the purposes of this rule. Therefore we have retained this provision of the rule to help prevent potential abuses of shareholder information.

We do not believe that this requirement will impose any undue burden on companies. Under the rule, a company must refrain from installing cookies and other tracking features on the Web site on which the proxy materials are posted. This may require segregating those pages from the rest of the company's regular Web site or creating a new Web site. However, the rule does not require the company to turn off the Web site's connection log, which automatically tracks numerical IP addresses that connect to that Web site. Although in most cases, this IP address does not provide companies with sufficient information to identify the accessing shareholder, companies may not use these numbers to attempt to find out more information about persons accessing the Web site. In addition, shareholders still concerned about their anonymity can request copies from their intermediaries.

2. The Full Set Delivery Option: Sending a Notice With a Full Set of Proxy Materials

Under the ''full set delivery option,'' an issuer will follow procedures that are substantially similar to the traditional means of providing proxy materials in paper.[51] Under this option, in addition to sending proxy materials to shareholders as under the traditional method, an issuer must:

- Send a Notice accompanied by a full set of proxy materials,[52] or incorporate all of the information required to appear in the Notice into the proxy statement and proxy card; [53] and
- Post the proxy materials on a publicly accessible Web site no later than the date the Notice was first sent to shareholders.[54]

Issuers may household the Notice and other proxy materials pursuant to Rule 14a–3(e).[55]

a. Contents of the Notice or Incorporation of Notice Information

Under the final rules that we are adopting, a separate Notice is not required if the issuer presents all of the

[40] See Rule 14a–16(d)(5) and (j)(4) [17 CFR 240.14a–16(d)(5) and (j)(4)].

[41] Rule 14a–16(d)(5) [17 CFR 240.14a–16(d)(5)].

[42] Rule 14a–16(f)(2)(i) [17 CFR 240.14a–16(f)(2)(i)].

[43] Rule 14a–16(h) [17 CFR 240.14a–16(h)].

[44] See letter from CII.

[45] Rule 14a–16(k)(1) [17 CFR 240.14a–16(k)(1)]. See Section II.A.1.b.iii of Release No. 34–55146 (Jan. 22, 2007) [72 FR 4148].

[46] 46 Rule 14a–16(k)(2) [17 CFR 240.14a–16(k)(2)].

[47] See letters from CII, ICI, and Reed Smith.

[48] See letter from ICI.

[49] See letter from CII.

[50] See Rules 14b–1(b) and 14b–2(b) [17 CFR 240.14b–1(b) and 240.14b–2(b)].

[51] Under the traditional proxy delivery scheme, issuers could send proxy materials to shareholders via e-mail provided they followed Commission guidance regarding such delivery, which typically required obtaining affirmative consent from individual shareholders. See Release No. 33–7233 (Oct. 6, 1995) [60 FR 53458]. Issuers may continue to rely on such guidance to send materials electronically to shareholders. See Section II.A. of this release.

[52] A ''full set'' of proxy materials would contain (1) a proxy statement or information statement, (2) an annual report if one is required by Rule 14a–3(b) or Rule 14c–3(a), and (3) a proxy card or, in the case of a beneficial owner, a request for voting instructions, if proxies are being solicited.

[53] See new Rule 14a–16(n)(2).

[54] As discussed below, this date does not have to be at least 40 days prior to the shareholder meeting date.

[55] 17 CFR 240.14a–3(e).

information required in the Notice in its proxy statement and proxy card.[56] In the proposing release, we solicited comment on whether we should permit the issuer that is sending a full set to incorporate the information required in the Notice into the proxy statement and proxy card, rather than require that issuer to prepare a separate Notice. Although we did not receive any comment on this issue, we do not see a compelling reason to require an issuer to include a separate Notice when it already is sending a shareholder a full set of proxy materials. We believe that providing the Notice information in the proxy materials will provide shareholders with sufficient information to access the materials on the Internet, while reducing costs to issuers. However, an issuer may prepare a separate Notice if it desires.

The information required in the Notice, or proxy materials if no separate Notice is prepared, includes much, but not all, of the information that is required under the notice only option, including the following: [57]

- A prominent legend in bold-face type that states:

Important Notice Regarding the Availability of Proxy Materials for the Shareholder Meeting to Be Held on [insert meeting date].

- **The [proxy statement] [information statement] [annual report to security holders] [is/are] available at [Insert Web site address].**

- The date, time, and location of the meeting or, if corporate action is to be taken by written consent, the earliest date on which the corporate action may be effected;
- A clear and impartial identification of each separate matter intended to be acted on and the issuer's recommendations, if any, regarding those matters, but no supporting statements;
- A list of the materials being made available at the specified Web site;
- Any control/identification numbers that the shareholder needs to access his or her proxy card; and
- Information about attending the shareholder meeting and voting in person.

The issuer is not required to provide paper or e-mail copies upon request to shareholders to whom it has furnished proxy materials under this option because it would already have provided those shareholders with a copy of the proxy materials as part of its initial distribution.[58] Therefore, the issuer need not provide instructions in the Notice as to how shareholders can request paper or e-mail copies of the proxy materials.[59]

If the issuer prepares a separate Notice, it must be written in plain English.[60] The Notice may contain only the information specified by the rules and any other information required by state law, if the issuer chooses to combine the Notice with any shareholder meeting notice that state law may require.[61] However, the Notice may contain a protective warning to shareholders, advising them that no personal information other than the identification or control number is necessary to execute a proxy.[62] The issuer must file any such separate Notice with the Commission pursuant to Rule 14a–6(b) no later than the date that it first sends the Notice to shareholders.[63]

b. Design of the Specified Publicly-Accessible Web Site

An issuer must post all proxy materials identified in the Notice, or proxy statement and proxy card if no separate Notice is prepared, on the publicly accessible Web site address specified in the Notice on or before the date that it sends the proxy materials to shareholders.[64] The specified Web site may not be the Commission's EDGAR system.[65] The issuer also must post any subsequent additional soliciting materials on the Web site no later than the date on which such materials are first sent to shareholders or made public.[66] The materials must be presented on the Web site in a format, or formats, convenient for both reading online and printing on paper.[67] The proxy materials must remain available on that Web site through the conclusion of the shareholder meeting.[68]

c. Means To Vote

The notice and access model requires an issuer to provide shareholders with a method to execute proxies as of the time the Notice is first sent to shareholders.[69] If an issuer follows the full set delivery option, the proxy card or request for voting instructions included in the full set of proxy materials satisfies this requirement. Therefore, the issuer does not need to provide another means for shareholders to execute proxies or submit voting instructions for accounts receiving proxy materials through the full set delivery option.

d. Repeat Delivery of a Proxy Card

Even though a proxy card already will be included in the full set of proxy materials, an issuer relying on the full set delivery option subsequently may choose to deliver another copy of the proxy card to shareholders who have not returned the card. This is permissible under the current rules, and issuers commonly do so as a reminder for shareholders to vote. The reminder proxy card does not have to be accompanied by the Notice because the reminder card would have been preceded by the proxy statement via the same medium and may be sent at any time after the full set of proxy materials has been sent.[70]

e. Web Site Confidentiality

As under the notice only option, an issuer must maintain the Internet Web site on which it posts its proxy materials in a manner that does not infringe on the anonymity of a person accessing that Web site.[71] An issuer also may not use any e-mail address provided by a shareholder solely to request a copy of proxy materials for any purpose other than to send a copy of those materials to that shareholder.[72] The issuer also may not disclose a shareholder's e-mail address to any person other than the issuer's employee or agent to the extent necessary to send a copy of the proxy materials to a requesting shareholder.

[56] Because issuers are obligated to provide proxy materials to beneficial owners, we recommend that issuers place only information required by the Notice that is relevant to all shareholders (record and beneficial owners) in the proxy statement, and present information that is relevant only to record holders on the proxy card so that beneficial owners are not confused by information in the proxy statement that would only be applicable to record holders. Required information disclosed on the proxy statement need not be repeated on the proxy card.

[57] See new Rule 14a–16(n)(4). Appropriate changes must be made if the issuer is providing an information statement pursuant to Regulation 14C, seeking to effect a corporate action by written consent, or is a legal entity other than a corporation.

[58] See new Rule 14a–16(n)(3)(ii).

[59] See new Rule 14a–16(n)(4)(ii).

[60] Rule 14a–16(g) [17 CFR 240.14a–16(g)].

[61] Rule 14a–16(e) [17 CFR 240.14a–16(e)].

[62] Rule 14a–16(e)(2)(ii) [17 CFR 240.14a–16(e)(2)(ii)].

[63] Rule 14a–16(i) [17 CFR 240.14a–16(i)]. If the issuer incorporates the contents of the Notice into the proxy materials, a separate filing is not required.

[64] Rule 14a–16(b)(1) [17 CFR 240.14a–16(b)(1)].

[65] Rule 14a–16(b)(3) [17 CFR 240.14a–16(b)(3)].

[66] Rule 14a–16(b)(2) [17 CFR 240.14a–16(b)(2)].

[67] Rule 14a–16(c) [17 CFR 240.14a–16(c)]. See Section II.A.3 of Release 34–55146 (Jan. 22, 2007) [72 FR 4148].

[68] Rule 14a–16(b)(1) [17 CFR 240.14a–16(b)(1)].

[69] Rule 14a–16(b)(4) [17 CFR 240.14a–16(b)(4)].

[70] See new Rule 14a–16(h)(2).

[71] Rule 14a–16(k)(1) [17 CFR 240.14a–16(k)(1)]. See Section II.A.1.b.iii of Release No. 34–55146 (Jan. 22, 2007) [72 FR 4148].

[72] Rule 14a–16(k)(2) [17 CFR 240.14a–16(k)(2)].

3. Differences Between the Full Set Delivery Option and the Notice Only Option

The full set delivery option varies from the notice only option in the following ways:

- An issuer may accompany the Notice with a copy of the proxy statement, annual report to security holders, if required by Rule 14a–3(b),[73] and a proxy card; [74]
- An issuer need not prepare a separate Notice if the issuer incorporates all of the Notice information into the proxy statement and proxy card; [75]
- Because the issuer already has provided shareholders with a full set of proxy materials, the issuer need not provide the shareholder with copies of the proxy materials upon request; [76]
- Because shareholders will not need extra time to request paper or e-mail copies, the issuer need not send the Notice and full set of proxy materials at least 40 days before the meeting date; [77]
- Because the full set of proxy materials includes a proxy card or request for voting instructions, the issuer need not provide another means for voting at the time the Notice is provided unless it chooses to do so; and
- The issuer need not include the part of the prescribed legend relating to security holder requests for copies of the documents and instructions on how to request a copy of the proxy materials.[78]

a. Inclusion of a Full Set of Proxy Materials

The notice only option does not permit an issuer to accompany the Notice with any other documents.[79] In contrast, an issuer relying on the full set delivery option will deliver a full set of proxy materials, including a proxy statement, annual report to shareholders if required by Rule 14a–3(b), and a proxy card, along with the Notice. Under this option, when the Notice is initially sent, it must be accompanied by all of these documents, not just some of them. For example, an issuer may not send only the Notice and a proxy card to a shareholder as part of its initial distribution of proxy materials.[80]

b. Request for Copies of the Proxy Materials

As noted above, because an issuer relying on the full set delivery option will send shareholders copies of all of the proxy materials along with the Notice, there is no need for the issuer to provide these shareholders with a means to request a copy of the proxy materials. The issuer therefore may exclude information from the Notice on how a shareholder may request such copies.[81]

c. 40-Day Deadline

Under the full set delivery option, if an issuer or other soliciting person sends a full set of the proxy materials with the Notice, it need not comply with the 40-day deadline in Rule 14a–16 for sending the Notice. Thus, if an issuer is unable or unwilling to meet the 40-day deadline, it still may begin its solicitation after that deadline provided that it complies with the full set delivery option. Six commenters on the proposal questioned whether the proposal would have required all issuers to prepare their proxy materials at least 40 days prior to the meeting.[82] We have clarified that an issuer must comply with the 40-day period *only* if it intends to comply with the notice only option.[83]

B. Implications of the Notice and Access Model for Intermediaries

An issuer or other soliciting person must provide each intermediary with the information necessary to prepare the intermediary's Notice in sufficient time for the intermediary to prepare and send its Notice to beneficial owners within the timeframes of the model. An issuer that complies with the notice only option must provide the intermediary with the relevant information in sufficient time for the intermediary to prepare and send the Notice and post the proxy materials on the Web site at least 40 calendar days before the shareholder meeting date.[84]

An issuer that complies with the full set delivery option need not comply with the 40-day deadline. The issuer need only provide the Notice information to the intermediary in sufficient time for the intermediary to prepare and send the Notice along with the full set of materials provided by the issuer. Under this option, as with the traditional method of delivering proxy materials, the intermediary must forward the issuer's full set of proxy materials to beneficial owners within five business days of receipt from the issuer or the issuer's agent.[85]

The intermediary's Notice generally must contain the same types of information as an issuer's Notice, but must be tailored specifically for beneficial owners.[86] With respect to beneficial owners who receive a Notice under the notice only option, the intermediary also must forward paper or e-mail copies of the proxy materials upon request, permit the beneficial owners to make a permanent election to receive paper or e-mail copies of the proxy materials, keep records of beneficial owner preferences, provide proxy materials in accordance with those preferences, and provide a means to access a request for voting instructions for its beneficial owner customers no later than the date the Notice is first sent.

When the issuer is delivering full sets of proxy materials to beneficial owners, the intermediary must either prepare a separate Notice and forward it with the full set of proxy materials, or incorporate any information required in the Notice, but not appearing in the issuer's proxy statement, in its request for voting instructions.

C. Reliance on the Notice and Access Model by Soliciting Persons Other Than the Issuer

Under the amendments, a soliciting person other than the issuer also must comply with the notice and access model. Such a person may solicit proxies pursuant to the notice only option, the full set delivery option, or a combination of the two.[87] Consistent

[73] The requirement in Exchange Act Rules 14a–3(b) and 14c–3(a) to furnish annual reports to security holders does not apply to registered investment companies [17 CFR 240.14a–3(b) and 240.14c–3(a)]. A soliciting person other than the issuer also is not subject to this requirement. Finally, an issuer is required to provide such a report for shareholder meetings at which directors are to be elected.

[74] See new Rule 14a–16(n)(1).

[75] See new Rule 14a–16(n)(2)(ii). See also footnote 58, above.

[76] See new Rule 14a–16(n)(3)(ii).

[77] See new Rule 14a–16(n)(3)(i).

[78] See new Rule 14a–16(n)(4).

[79] Rule 14a–16(f)(1) [17 CFR 240.14a–16(f)(1)]. We note however, that under the notice only option, an issuer may send the Notice and proxy card together 10 days or more after it initially sends the Notice. See new Rule 14a–16(h)(1).

[80] However, it may send a reminder proxy card at any time after it initially sends the Notice accompanied by the full set of proxy materials. See new Rule 14a–16(h)(2).

[81] See Rule 14a–16(n)(4).

[82] See, for example, letters from Chamber of Commerce, CII, Commerce Financial Printers, Elmore & Allen, ICI, and STA.

[83] See Rule 14a–16(n)(3)(i).

[84] If a soliciting person other than the issuer elects to follow the notice only option, the Notice must be sent to shareholders by the later of: (1) 40 calendar days prior to the security holder meeting date or, if no meeting is to be held, 40 calendar days prior to the date the votes, consents, or authorizations may be used to effect the corporate action; or (2) 10 calendar days after the date that the registrant first sends its proxy statement or Notice of Internet Availability of Proxy Materials to security holders. See Rule 14a–16(l)(2) [17 CFR 240.14a–16(l)(2)].

[85] See Rule 14b–1(b)(2) [17 CFR 240.14b–1(b)(2)].

[86] For a more complete discussion of the content of the intermediary's Notice, see Section II.B.2 of Release No. 34–55146 (Jan. 22, 2007) [72 FR 4148].

[87] That is, as in the case of an issuer, a soliciting person other than the issuer may solicit some

Continued

with the existing proxy rules and the voluntary model, the amendments treat such soliciting persons differently from the issuer in certain respects.

First, a soliciting person is not required to solicit every shareholder or to furnish an information statement to shareholders not being solicited. It may select the specific shareholders from whom it wishes to solicit proxies. For example, under the notice and access model, a soliciting person other than the issuer can choose to send Notices only to those shareholders who have not previously requested paper copies.[88]

Second, if a soliciting person other than the issuer elects to follow the notice only option, it must send a Notice to shareholders by the later of:

- 40 calendar days prior to the shareholder meeting date or, if no meeting is to be held, 40 calendar days prior to the date that votes, consents, or authorizations may be used to effect the corporate action; or
- 10 calendar days after the date that the issuer first sends its proxy materials to shareholders.[89]

This timing requirement does not apply to a solicitation pursuant to the full set delivery model.

If, at the time the Notice is sent, a soliciting person other than the issuer is not aware of all matters on the shareholder meeting agenda, the Notice must provide a clear and impartial identification of each separate matter to be acted upon at the meeting, to the extent known by the soliciting person.[90] The soliciting person's Notice also must include a clear statement that there may be additional agenda items that the soliciting person is unaware of, and that the shareholder cannot direct a vote for those items on the soliciting person's proxy card provided at that time.[91] If a soliciting person other than the issuer sends a proxy card that does not reference all matters that shareholders will act upon at the meeting, the Notice must clearly state whether execution of the proxy card would invalidate a shareholder's prior vote using the issuer's card on matters not presented on the soliciting person's proxy card.[92]

III. Clarifying Amendments

Since adopting the notice and access model as a voluntary model, we have received several questions regarding implementation of that model. Some of these questions were received as comments on the proposing release to these amendments. To the extent such comments relate to the previously adopted voluntary model, the Commission's staff is working with those commenters to provide guidance regarding implementation of those rules. However, several comments indicated aspects of the adopted rules that we believe would benefit from clarification in the regulatory text. To help clarify our intent, we are adopting the following technical amendments.

A. No Requirement To Provide Recommendations

Rule 14a–16(d)(3),[93] as it was initially adopted under the voluntary notice and access model, required the Notice to contain ''[a] clear and impartial identification of each separate matter intended to be acted on and the soliciting person's recommendation regarding those matters.'' Our intent with this provision was not to require an issuer or other soliciting person to have a recommendation for every matter. Therefore, we are revising this provision to clarify that an issuer or other a soliciting person must present its recommendation only if it chooses to make a recommendation on a particular matter to be acted upon by shareholders.

B. Deadline for Responding to Requests for Copies After the Meeting

We are also amending the requirements about the fulfillment of requests for paper or e-mail copies received after the conclusion of the meeting. The rules that we initially adopted as part of the voluntary notice and access model made no distinction in the fulfillment requirements based on whether the issuer received a request for a paper or e-mail copy before or after the meeting date. We did state in the adopting release for the voluntary notice and access model that the post-meeting fulfillment provision is intended to require issuers to provide a copy of the proxy statement for one year ''[j]ust as the proxy rules require issuers to undertake in their proxy statements or annual reports to shareholders to provide copies of annual reports on Form 10–K for the most recent fiscal year to requesting shareholders.'' [94] The rule relating to providing copies of the annual report on Form 10-ndash;K does not require the use of First Class mail or that the issuer respond within three business days.[95] After the meeting is concluded, we do not believe there is such an urgent need to provide copies of the proxy materials in a timely manner to impose such requirements. Therefore, we are revising Rule 14a–16(j)(3) [96] to clarify that, with respect to requests for copies received after the conclusion of the meeting, an issuer is not required to use First Class mail and is not required to respond within three business days.

C. Item 4 of Schedule 14A

Item 4 of Schedule 14A [97] requires that an issuer or other soliciting person describe the methods used for soliciting proxies if not using the mails. Because the amendments require issuers and other soliciting persons to comply with Rule 14a–16 with respect to all proxy solicitations not related to business combination transactions, we are revising this item to clarify that issuers and other soliciting persons need not describe the notice and access model when they are using it to solicit proxies.

IV. Compliance Dates

Large accelerated filers, not including registered investment companies, must comply with the amendments with respect to solicitations commencing on or after January 1, 2008. Registered investment companies, soliciting persons other than the issuer, and issuers that are not large accelerated filers conducting proxy solicitations (1) may comply with the amendments for solicitations commencing on or after January 1, 2008 and (2) must comply with the notice and access model for solicitations commencing on or after January 1, 2009. For example, a soliciting person other than the issuer that is soliciting proxies with respect to a shareholder meeting of a large accelerated filer is not required to follow the notice and access model until January 1, 2009, even though the large accelerated filer would be required to follow the model. However, such a soliciting person may voluntarily follow the model.

As stated above, the primary concern of most commenters on the proposal was the Commission's aggressive

shareholders using the notice only option, while soliciting other shareholders using the full set delivery option.

[88] Under Rule 14a–7(a)(2) [17 CFR 240.14a–7(a)(2)], an issuer is required to either mail the Notice on behalf of the soliciting person, in which case the soliciting person can request that the issuer send Notices only to shareholders who have not requested paper copies, or provide the soliciting person with a shareholder list, indicating which shareholders have requested paper copies. For a more complete discussion of the interaction of the model with Rule 14a–7, see Section II.C.4 of Release No. 34–55146 (Jan. 22, 2007) [72 FR 4148].

[89] Rule 14a–16(l)(2) [17 CFR 240.14a–16(l)(2)].

[90] Rule 14a–16(l)(3)(i) [17 CFR 240.14a–16(l)(3)(i)].

[91] *Id.*

[92] Rule 14a–16(l)(3)(ii) [17 CFR 240.14a–16(l)(3)(ii)].

[93] 17 CFR 240.14a–16(d)(3).

[94] See Release No. 33–55146 (Jan. 22, 2007) [72 FR 4148].

[95] See Rule 14a–3(b) [17 CFR 240.14a–3(b)].

[96] 17 CFR 240.14a–16(j)(3).

[97] 17 CFR 240.14a–101.

timetable for adopting the proposed rules. All 14 commenters on this topic requested that the Commission delay adoption of the proposed rules.[98] This group of commenters included trade associations representing issuers, transfer agents, intermediaries, proxy distribution service providers, institutional investors, and other shareholders.

Eight of these commenters were concerned that the short period between effectiveness of the voluntary model and adoption of the amendments in this release would not permit the Commission and the industry to properly evaluate the results of the voluntary model and prepare an adequate cost-benefit analysis.[99] Data that the commenters felt would be important to capture regarding the voluntary model included: (1) The effect on voter participation; (2) the costs of implementing the model; and (3) the extent to which predicted savings are actually realized by companies and other soliciting persons. These commenters recommended that the Commission not adopt the proposed amendments until it has had the opportunity to assess the data received regarding companies' experiences with the voluntary model.

With respect to costs, three of these commenters were concerned regarding the cost of adopting rules that would require issuers to develop, or hire outside services to develop, an Internet voting platform.[100] The rules that we are adopting do not require, and the proposals would not have required, such an Internet voting platform. Similarly, five commenters raised concerns regarding the ability of issuers to prepare their proxy materials at least 40 days before the date of the shareholder meeting, and costs associated with these efforts.[101] The rules that we are adopting do not require, and the proposal would not have required, all issuers to comply with the 40-day deadline if they are unable, or choose not, to do so.

As we have explained above, an issuer or other soliciting person may elect to comply with either: (1) The notice only option which is identical to the voluntary notice and access model; or (2) the full set delivery option. The latter option is substantially the same as the traditional system of providing proxy materials in paper, except that an issuer or other soliciting person complying with the full set delivery option also will have to:

- Prepare and send a Notice, or incorporate the Notice information into its proxy statement and proxy card; and
- Post its proxy materials on a publicly accessible Web site.

As we discuss more fully in our cost-benefit analysis, we believe that the cost to issuers and other soliciting persons to comply with these two requirements will not be significant, and therefore are expanding Internet availability of proxy materials to all shareholders. Many of the commenters' concerns regarding costs were based on beliefs that the proposal would require an electronic voting platform, preparation of proxy materials at least 40 days before the shareholder meeting, and anonymity controls on the Web site that exceed what the proposal would actually require. As noted above, the proposals would not have required, and the final rules do not require, such provisions. Rather, an issuer or other soliciting person can substantially continue to follow the traditional method of proxy delivery with minimal changes. Because the amendments will not have a significant impact on the requirements placed on issuers and other soliciting persons, we believe it is appropriate to adopt them now.

We also note that commenters have expressed concern, particularly in relation to the voluntary model, that if the model has a negative effect on shareholder participation, issuers may use the model to disenfranchise certain shareholders. We recognize these concerns and intend to monitor shareholder participation and take any steps necessary to prevent such abuse.

Furthermore, the tiered compliance dates address commenters' concerns because they will allow the Commission to better analyze the impact of the rules on a subset of issuers constituting large accelerated filers.[102] As noted above, a review of existing Web sites of such issuers indicated that approximately 80% of them already post their filings, including proxy materials, on their Web site. Thus, most of the issuers that will be subject to the rules in the first year will be large issuers that appear to already post their proxy materials on their Web site. Therefore, we believe that this group is in the best position with respect to implementation costs in the first year while we evaluate the performance of the model. Adopting the amendments before the 2008 proxy season effectively creates a test group of issuers, enabling the Commission to study the performance of the model with a significant number of larger issuers and providing the Commission with an opportunity to make any necessary revisions to the rules before they apply to all issuers and other soliciting persons.

V. Paperwork Reduction Act

Certain provisions of the amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (''PRA''), including preparation of Notices, maintaining Web sites, maintaining records of shareholder preferences, and responding to requests for copies. The titles for the collections of information are:

Regulation 14A (OMB Control No. 3235–0059)

Regulation 14C (OMB Control No. 3235–0057)

We requested public comment on these collections of information in the release proposing the notice and access model as a voluntary model for disseminating proxy materials,[103] and submitted them to the Office of Management and Budget (''OMB'') for review in accordance with the PRA. We received approval for the collections of information. We submitted a revised PRA analysis to OMB in conjunction with the release adopting the notice and access model as a voluntary model.[104] In those releases, we assumed conservatively that all issuers and other persons soliciting proxies would follow the voluntary model because the proportion of issuers and other soliciting persons that would elect to follow the model was uncertain.

The rules that we are adopting require all issuers and other soliciting persons to follow the notice and access model, including the preparation of the Notice, as we assumed for our prior PRA analysis. Therefore, we estimate that the rule amendments will not impose any new recordkeeping or information collection requirements beyond those described in the release adopting the

[98] See letters from AARP, ABC, ADP, BONY, Chamber of Commerce, CII, Computershare, ICI, Reed Smith, Registrar and Transfer, SCSGP, SIFMA, SSA, and STA.

[99] See letters from Chamber of Commerce, BONY, ICI, Reed Smith, Registrar and Transfer, SCSGP, SIMFA, and STA.

[100] See letters from ABC, BONY and Registrar and Transfer.

[101] See letters from Chamber of Commerce, CII, Commerce Financial Printers, Elmore & Allen, ICI, and STA.

[102] One commenter specifically noted that the timeframe would not allow the Commission to analyze the effects of one full year of compliance for large accelerated filers who chose to accept the voluntary model. See letter from the Chamber of Commerce. The tiered system will allow the Commission to analyze a full year of experience under the notice and access model for all large accelerated filers.

[103] Release No. 34–52926 (Dec. 8, 2005) [70 FR 74597].

[104] Release No. 34–55146 (Jan. 22, 2007) [72 FR 4147].

voluntary model, or necessitate revising the burden estimates for any existing collections of information requiring OMB's approval.

VI. Cost-Benefit Analysis

A. Background

We are adopting amendments to the proxy rules under the Exchange Act substantially as proposed that require issuers and other soliciting persons (jointly referred to as ''soliciting parties'') to follow the notice and access model for furnishing proxy materials. The amendments are intended to provide all shareholders with the ability to choose the means by which they access proxy materials, to expand use of the Internet to ultimately lower the costs of proxy solicitations, and to improve shareholder communications.

B. Summary of the Amendments

The notice and access model that we are adopting requires soliciting parties to furnish proxy materials by posting them on a specified, publicly-accessible Internet Web site (other than the Commission's EDGAR Web site) and providing shareholders with a notice informing them that the materials are available and explaining how to access them. Under the model, soliciting parties may choose between two options with respect to how they will provide proxy materials to shareholders. Under the first option, the notice only option, a soliciting party may follow the procedures in Exchange Act Rule 14a–16 that we adopted on January 22, 2007 in connection with the voluntary model.[105] Under this option, a soliciting party would send only a Notice indicating the Internet availability of the proxy materials to a solicited shareholder at least 40 days prior to the shareholders meeting and provide that shareholder with a paper or e-mail copy of the proxy materials upon request.

Under the second option, the full set delivery option, soliciting parties may follow procedures substantially similar to the traditional method of sending paper copies of the proxy materials to a shareholder by accompanying the Notice with a full set of proxy materials. Under the full set delivery option, the soliciting party is not required to send the Notice and the full set of proxy materials at least 40 days prior to the shareholders meeting and need not provide a means for shareholders to request another set of the proxy materials. Moreover, a soliciting party need not prepare a separate Notice if it includes all of the information otherwise required in a Notice in the proxy statement or proxy card.

A soliciting party may use the notice only option to provide proxy materials to some shareholders and the full set delivery option to provide proxy materials to other shareholders. The amendments also require intermediaries to follow similar procedures to provide beneficial owners with access to the proxy materials. Soliciting parties may not use the model with respect to a business combination transaction.

C. Benefits

1. Versatility of the Internet

Historically, soliciting parties decided whether to provide shareholders with the choice to receive proxy materials by electronic means. The amendments, which build on and incorporate the voluntary model that we adopted in January, are intended to provide all shareholders with the ability to choose the means by which they access proxy materials, to expand use of the Internet potentially to lower the costs of proxy solicitations, and to improve the efficiency of the proxy process and shareholder communications. The amendments provide all shareholders with the ability to choose whether to access proxy materials in paper, by e-mail or via the Internet. As technology continues to progress, accessing the proxy materials on the Internet should increase the utility of our disclosure requirements to shareholders. Information in electronic documents is often more easily searchable than information in paper documents. Shareholders will be better able to go directly to any section of the document that they are particularly interested in. The amendments also will permit shareholders to more easily evaluate data and transfer data using analytical tools such as spreadsheet programs. Such tools enable users to compare relevant data about several companies more easily.

In addition, encouraging shareholders to use the Internet in the context of proxy solicitations may encourage improved shareholder communications in other ways. Current and future Internet communications innovations may enhance shareholders' ability to interact not only with management, but with each other. Such access may improve shareholder relations to the extent that shareholders feel that they have enhanced access to management. Centralizing an issuer's disclosure on a Web site may facilitate shareholder access to other important information, such as research reports and news concerning the issuer. We believe that increased reliance on the Internet for making proxy materials available to shareholders could ultimately lower the cost of soliciting proxies for all soliciting parties.

2. Reduction in Paper Processing Costs

One of the purposes of the voluntary model was to reduce paper processing costs related to proxy solicitations. We previously estimated savings assuming that soliciting parties responsible for 10% to 50% of all proxy mailings would follow that model. We do not assume that the amendments will cause a soliciting party to change its decision under the voluntary model whether to send only a Notice or to send a full set of proxy materials to shareholders. Therefore, we do not assume for this analysis any savings in paper processing costs as a result of these particular amendments. However, because the voluntary model just recently became effective for proxy solicitations commencing on or after July 1, 2007, and therefore has not been used by many soliciting parties and because these amendments create a single notice and access model that includes aspects of the voluntary model, we are presenting a cost-benefit analysis that addresses the notice and access model as a whole, including our assessment of the benefits and costs created by the amendments.

As we discussed in the adopting release for the voluntary model, the paper-related benefits of the notice and access model are limited by the volume of paper processing that would occur otherwise. As we noted in that release, Automatic Data Processing, Inc.[106] (ADP) handles the vast majority of proxy mailings to beneficial owners.[107] ADP publishes statistics that provide useful background for evaluating the likely consequences of the rule amendments. ADP estimates that, during the 2006 proxy season,[108] over 69.7 million proxy material mailings were eliminated through a variety of means, including householding and existing electronic delivery methods. During that season, ADP mailed 85.3 million paper proxy items to beneficial owners. ADP estimates that the average cost of printing and mailing a paper copy of a set of proxy materials during

[105] Release No. 34–55146 (Jan. 22, 2007) [72 FR 4147].

[106] ADP recently spun off its brokerage services group, which is now called Broadridge Financial Solutions, Inc. However, because its comment letter was submitted when the group was part of ADP and carries the ADP letterhead, we continue to refer to the company as ADP for purposes of this release.

[107] We expect savings per mailing to record holders to roughly correspond to savings per mailing to beneficial owners.

[108] According to ADP data, the 2006 proxy season extended from February 15, 2006 to May 1, 2006.

the 2006 proxy season was $5.64. We estimate that soliciting parties spent, in the aggregate, $481.2 million in postage and printing fees alone to distribute paper proxy materials to beneficial owners during the 2006 proxy season.[109] Approximately 50% of all proxy pieces mailed by ADP in 2005 were mailed during the proxy season.[110] Therefore, extrapolating this percentage to 2006, we estimate that soliciting parties from beneficial owners spent approximately $962.4 million in 2006 in printing and mailing costs.[111]

As was the case with the voluntary model, for soliciting parties following the notice only option, paper-related savings may be reduced by the cost of fulfilling requests for paper copies.[112] We estimate that approximately 19% of shareholders would request paper copies from such soliciting parties. Commenters on the voluntary model provided alternate estimates. For example, Computershare, a large transfer agent, estimated that less than 10% of shareholders would request paper copies.[113] According to a survey conducted by Forrester Research for ADP, 12% of shareholders report that they would always take extra steps to get their proxy materials, and as many as 68% of shareholders report that they would take extra steps to get their proxy materials in paper at least some of the time. The same survey also finds that 82% of shareholders report that they look at their proxy materials at least some of the time. These survey results suggest that shareholders may review proxy materials even if they do not vote. During the 2005 proxy season, only 44% of accounts were voted by beneficial owners. Put differently, 56%, or 84.8 million accounts, did not return requests for voting instructions. Our estimate that 19% of shareholders would request paper copies reflects the diverse estimates suggested by the available data.

Based on the assumption that 19% of shareholders would choose to have paper copies sent to them when a soliciting party initially sends them only a Notice, we estimated that the voluntary model could produce annual paper-related savings ranging from $48.3 million (if soliciting parties responsible for 10% of all proxy mailings choose to follow the notice only option) to $241.4 million (if soliciting parties responsible for 50% of all proxy mailings choose to follow the notice only option).[114] This estimate excludes the effect of the provision of the amendments that would allow shareholders to make a permanent request for paper copies. That provision enables soliciting parties to take advantage of bulk printing and mailing rates for those requesting shareholders, and therefore should reduce the on-demand costs reflected in these calculations.

Although we expect the savings to be significant from the notice and access model as a whole, the actual paper-related benefits will be influenced by several factors that we estimate should become less important over time. First, to the extent that shareholders request paper copies of the proxy materials, the benefits of the notice and access model in terms of savings in printing and mailing costs will be reduced. Soliciting parties have expressed concern that the cost per paper copy would be significantly greater if they have to mail copies of paper proxy materials to shareholders on an on-demand basis, rather than mailing the paper copies in bulk. Thus, if a significant number of shareholders request paper, the savings will be substantially reduced. Second, soliciting parties may face a high degree of uncertainty about the number of requests that they may get for paper proxy materials and may maintain unnecessarily large inventories of paper copies as a precaution. As soliciting parties gain experience with the number of sets of paper materials that they need to supply to requesting shareholders, and as shareholders become more comfortable with receiving disclosures via the Internet, the number of paper copies are likely to decline, as would soliciting parties' tendency to print many more copies than ultimately are requested. This should lead to growth in paper-related savings from the notice and access model over time.

3. Reduction in the Cost of Proxy Contests

Benefits would accrue under the notice and access model from additional reductions in the costs of proxy solicitations by persons other than the issuer. Soliciting persons other than the issuer also must comply with the notice and access model, but can limit the scope of their proxy solicitations to shareholders who have not requested paper copies of the proxy materials. The flexibility afforded to persons other than the issuer under the model ultimately may reduce the cost of engaging in proxy contests, thereby increasing the effectiveness and efficiency of proxy contests as a source of discipline in the corporate governance process. However, because the amendments do not significantly change the options available to such soliciting person from the existing rules, we do not anticipate that the amendments will change significantly the number of soliciting persons other than issuers who select the notice only option as opposed to the number who would have chosen to follow the voluntary model.

The effect of the notice and access model of lessening the costs associated with a proxy contest will be limited by the persistence of other costs. One commenter on the proposal to create the voluntary model noted that a large percentage of the costs of effecting a proxy contest go to legal, document preparation, and solicitation fees, while a much smaller percentage of the costs is associated with printing and distribution of materials.[115] However, other commenters suggested that the paper-related cost savings that can be realized from the rule amendments are

[109] 85.3 million mailings × $5.64/mailing = $481.2 million.

[110] According to ADP, in 2005, 90,013,175 proxy pieces out of a total 179,833,774 proxy pieces were mailed during the 2005 proxy season. Thus, we estimate that 50% of proxy pieces are mailed during the proxy season (90,013,175 proxy pieces during the season/179,833,774 total proxy pieces = 0.5 or 50%).

[111] $481.2 million/50% = $962.4 million.

[112] Soliciting parties that choose to follow the full set delivery option will not incur fulfillment costs. Such soliciting parties are not required to provide paper copies to shareholders upon request because they would have provided such copies at the outset.

[113] See letter commenting on Release No. 34–52926 (Dec. 8, 2005) [70 FR 74598] from Computershare.

[114] This range of potential cost savings depends on data on proxy material production, home printing costs, and first-class postage rates provided by Lexecon and ADP, and supplemented with modest 2006 USPS postage rate discounts. The fixed costs of notice and proxy material production are estimated to be $2.36 per shareholder, including $0.42 to print and mail the Notice. The variable costs of fulfilling a paper request, including handling, paper, printing and postage, are estimated to be $6.11 per copy requested. Our estimate of the total number of shareholders is based on data provided by ADP and SIFMA (at the time it submitted these comments, the SIFMA was known as the Securities Industry Association or SIA). According to SIFMA's comment letter on Release No. 34–52926 (Dec. 8, 2005) [70 FR 74598], 78.49% of shareholders held their shares in street name. We estimate that the total number of proxy pieces mailed to both registered holders and beneficial owners is approximately 229,116,797 (179,833,774 proxy pieces to beneficial owners/78.49% = 229,116,799 total proxy pieces). To calculate the potential cost savings, for the percentage of proxy piece mailings replaced by the Notice (10% or 50% times 229,116,799 proxy pieces), we estimate the total savings of not printing and sending full sets ($5.64) and subtract the estimated costs of printing and sending Notices and fulfilling paper requests ($2.36 + (19.2% × $6.11)). 10% × 229,116,799 proxy pieces × ($5.64 − ($2.36 + (19.2% × $6.11)) = $48.3 million. 50% × 229,116,799 proxy pieces × ($5.64 − ($2.36 + (19.2% × $6.11)) = $241.4 million.

[115] See letter commenting on Release No. 34–52926 (Dec. 8, 2005) [70 FR 74598] from ADP.

substantial enough to change the way many contests are conducted.[116]

4. Environmental Benefits

Finally, some benefits from the notice and access model, as revised, may arise from a reduction in what may be regarded as the environmental costs of the proxy solicitation process.[117] Specifically, proxy solicitation involves the use of a significant amount of paper and printing ink. Paper production and distribution can adversely affect the environment, due to the use of trees, fossil fuels, chemicals such as bleaching agents, printing ink (which contains toxic metals), and cleanup washes. Although not all of these costs may be internalized by paper producers, to the extent that such producers do internalize these costs and the costs are reflected in the price of paper and other materials consumed during the proxy solicitation process, our dollar estimates of the paper-related benefits reflect the elimination of these adverse environmental consequences under the model.

D. Costs

The amendments require all soliciting parties, including those who follow the full set delivery option, to (1) prepare and print a Notice (or incorporate Notice information into its proxy statement and proxy card) and (2) post the proxy materials on an Internet Web site. Because the notice only option is identical to the voluntary model, soliciting parties that choose that option will incur the same costs and savings as they would have under the voluntary model.

1. Costs Under the Notice Only Option

A soliciting party that chooses to follow the notice only option would incur the same costs as a soliciting party that chose to follow the voluntary model. These costs include the following: (1) The cost of preparing, producing, and sending the Notice to shareholders; (2) the cost of posting proxy materials on an Internet Web site; (3) providing a means to execute a proxy as of the date that the Notice is sent; and (4) the cost of processing shareholders' requests for copies of the proxy materials and maintaining their permanent election preferences if a soliciting party elects to follow the notice only option.

Under the amendments, soliciting parties must prepare and print the Notice to shareholders and post their proxy materials on an Internet Web site. As noted above, these costs would apply to soliciting parties irrespective of which option they choose. A soliciting party following the notice only option also must separately send the Notice to shareholders. As we stated in the release adopting the voluntary model, the paper-related savings to soliciting parties discussed under the benefits section above are adjusted for the cost of preparing, printing and sending Notices.

In the release adopting the voluntary model, we assumed, for purposes of the PRA, that all soliciting parties would elect to follow the procedures, resulting in a total estimated cost to prepare the Notice of approximately $2,020,475.[118] We are adjusting this amount to $2,469,475 to reflect a change in the basis of our cost estimate for personnel time.[119] Based on the percentage range of soliciting parties that we estimated would adopt the voluntary model, we estimated that these costs for soliciting parties who follow the notice only option could range between $246,948 (if soliciting parties responsible for 10% of all proxy mailings followed the notice only option) and $1,234,736 (if soliciting parties responsible for 50% of all proxy mailings followed the notice only option).[120]

If Notices are sent by mail, then the mailing costs may vary widely among parties. Postage rates likely would vary from $0.14 to $0.41 per Notice mailed, depending on numerous factors. In our estimates of the paper-related benefits above, we assume that each Notice costs a total of $0.13 to print and $0.29 to mail. Based on data from ADP and SIA, we estimate that soliciting parties send a total of 229,116,797 proxy pieces per year.[121] In the release adopting the voluntary model, we assumed that only those soliciting parties that choose to follow the voluntary model would incur these printing and mailing costs. We estimated that the costs to print the Notices would range from $9.6 million (if soliciting parties responsible for 10% of all current proxy mailings choose to follow the notice only option) and $48.1 million (if soliciting parties responsible for 50% of current proxy mailings choose to follow the notice only option).[122] These same costs would be incurred by soliciting parties following the notice only option under the revised model.

Soliciting parties that follow the notice only option must post their proxy materials on an Internet Web site. Although costs for establishing a Web site and posting materials on it can vary greatly, the rules do not require elaborate Web site design. The rules only require that a soliciting party obtain a Web site and post several documents on that Web site. Several companies currently provide Web hosting services for free, including significant memory to post the required documents and bandwidth to handle several thousand ''hits'' per month.[123] We also noted that several Web hosting services provided Web sites which would handle up to five million hits per month are available for approximately $5 to $8 per month, or $60 to $96 per year.[124] Based on a review of several Internet Web page design firms, we estimate that the cost of designing a

[116] See letters commenting on Release No. 34–52926 (Dec. 8, 2005) [70 FR 74598] from CALSTRS, Computershare, ISS, and Swingvote.

[117] See letter commenting on Release No. 34–52926 (Dec. 8, 2005) [70 FR 74598] from American Forests.

[118] In the voluntary model adopting release, we estimated that soliciting parties would spend a total of $897,975 on outside professionals to prepare this disclosure. We also estimated that soliciting parties would spend a total of 8,980 hours of personnel time preparing this disclosure. We estimated the average hourly cost of personnel time to be $125, resulting in a total cost of $1,122,500 for personnel time and a total cost of $2,020,475 ($1,122,500 + $897,975 = $2,020,475).

[119] We are adjusting this estimate of personnel time to be $175 to be consistent with our other releases. This results in an in-house cost of $1,571,500 (8,980 hours × $175/hour = $1,571,500) and a total cost of $2,469,475 ($1,571,500 + $897,975 = $2,469,475) for soliciting parties following the notice only option. For purposes of the PRA analysis, we are not adjusting the hourly burden imposed on soliciting parties and, therefore, are not revising our PRA submission.

[120] $2,469,475 * 10% = $246,948. $2,469,475 * 50% = $1,234,736.

[121] See *http://www.ics.adp.com/release11/public_site/about/stats.html* stating that ADP handled 179,833,774 in fiscal year 2005 and letter commenting on Release No. 34–52926 (Dec. 8, 2005) [70 FR 74598] from SIFMA stating that beneficial accounts represent 78.49% of total accounts.

[122] 10% × 229,116,797 × ($0.13 + $0.29) = $9.6 million. 50% × 229,116,797 × ($0.13 + $0.29) = $48.1 million. As stated above, these costs would be significantly offset by savings as a result of not being required to print and mail full sets of proxy materials, resulting in a net savings of $48.3 million (if issuers responsible for 10% of all proxy mailings choose to follow the notice only option) to $241.4 million (if issuers responsible for 50% of all proxy mailings choose to follow the notice only option) for issuers choosing to follow the notice only option.

[123] A review found free Web hosting services that permit the posting of up to 100M of data, with a bandwidth capacity of 10,000MB. A document's size can vary dramatically depending on its design. Typical proxy statement and annual report sizes vary from 200KB for documents with few graphics such as an annual report on Form 10-K to 5MB for elaborate ''glossy'' annual reports. Based on this range of sizes, we estimate that a free Web hosting service would enable between 1,000 and 25,000 ''hits'' per month.

[124] We found several services which permit the posting of up to 300GB of data, with a bandwidth capacity of 3000GB, and include Web design programs at prices between $5 and $8 per month.

Web site that meets the basic requirements of the notice and access model would be approximately $300. Thus, we estimate that the approximate total cost to establish a new Web site would be approximately $360 per year for a soliciting party, or a range of $0.3 million (if soliciting parties responsible for 10% of all proxy mailings would not have followed the voluntary model) to $1.4 million (if soliciting parties responsible for 50% of all proxy mailings would not have followed the voluntary model).[125] This estimate assumes that the soliciting party obtains a new Web site to post the proxy materials. We believe that the cost to soliciting parties that already maintain Web sites would be less.

The Web site on which the proxy materials are posted must maintain the anonymity of shareholders accessing the site. As discussed elsewhere in the release, this requirement requires a soliciting party to refrain from installing software on the Web site that tracks the identity of persons accessing the Web site. Thus, this requirement does not impose any added burden on soliciting party establishing new Web sites. A soliciting party that already has a Web site must segregate a portion of that Web site so that any tracking software on its general Web site does not track persons accessing the portion containing the proxy materials. Such segregation of the Web site requires minimal effort and should not impose a significant burden on such parties.

The rules also require that the proxy materials be posted in a format or formats convenient for printing on paper or viewing online. One commenter was concerned that this would impose an unnecessary burden on soliciting parties. Currently, Internet Web sites regularly present the same document in multiple formats for the convenience of readers. In particular, Internet Web sites regularly post large files for Internet users with broadband connections and smaller files for users who do not have broadband connections. In light of this common practice on the Internet, we do not believe that this requirement will impose a significant burden on soliciting parties.

Soliciting parties must provide a means to vote as of the date on which the Notice is first sent. Those following the notice only option can do so by creating an electronic voting platform, providing a telephone number or posting a printable proxy card on the Web site. Some commenters questioned whether the model would require the creation of an electronic voting platform, which they estimated would cost approximately $3,000.[126] The amendments do not require such a voting platform. A soliciting party may simply post a printable proxy card or a telephone number for executing a proxy on its Web site, which should impose little burden.

The cost of processing shareholders' requests for copies of the proxy materials if a soliciting party elects to follow the notice only option is addressed as an offset to the savings discussed in the Benefits section of this analysis.

The amendments also require issuers and intermediaries to maintain records of shareholders who have requested paper and e-mail copies for future proxy solicitations. We estimate that this total cost if all issuers followed the notice only option would be approximately $13,098,500.[127] Thus, we estimated the cost due to the voluntary model would be approximately $1.3 million (if issuers responsible for 10% of all proxy mailings followed the notice only option) and $6.5 million (if issuers responsible for 50% of all proxy mailings followed the notice only option).[128]

2. Costs Under the Full Set Delivery Option

A soliciting party following the full set delivery option must either prepare a Notice or incorporate the Notice information into its proxy statement or proxy card. We base our estimates on preparing a separate Notice because we believe this would involve a greater cost. However, we anticipate that a significant number of soliciting parties would choose to incorporate the information into their materials. Based on the range that we estimated for soliciting parties following the notice only option, we estimate that soliciting parties responsible for 50% to 90% of all proxy mailings would choose to follow the full set delivery option. Soliciting parties who follow this option would not incur mailing costs in addition to costs incurred under the traditional system because the Notice would be included in the much larger package of the full set of proxy materials.

When the Commission adopted the voluntary model, we estimated that soliciting parties responsible for 10% to 50% of all proxy mailings would rely on the voluntary model. Under the amendments, we assume that soliciting parties that we estimated would not have followed the voluntary model (i.e., soliciting parties responsible for 50% to 90% of all proxy mailings) would incur the cost of preparing and printing a Notice (or incorporating Notice information into their proxy materials) [129] and posting the proxy materials on an Internet Web site.

We estimate that the cost for soliciting parties that would not have followed the voluntary model to prepare a Notice will range between $1.2 million (if soliciting parties responsible for 50% of all proxy mailings would not have followed the voluntary model) and $2.2 million (if soliciting parties responsible for 90% of all proxy mailings would not have followed the voluntary model).[130]

Similarly, we estimate that the cost for such parties of printing the Notice will range between $14.9 million [131] (if soliciting parties responsible for 50% of all proxy mailings would not have followed the voluntary model) and $26.8 million [132] (if soliciting parties responsible for 90% of all proxy mailings would not have followed the voluntary model). Soliciting parties can significantly reduce this cost to print the Notice by incorporating the Notice information into the proxy materials instead of printing a separate Notice. Printing costs for the full set of proxy materials would be identical to such costs under the traditional method of providing proxy materials by mail and therefore do not represent an incremental cost increase as a result of these rules.

We do not expect an incremental increase in mailing cost for the Notice for soliciting parties that choose the full

[125] Based on filings in our last fiscal year, we estimate 7,982 proxy solicitations per year. 10% × 7,982 × $360 = $0.3 million. 50% × 7,982 × $360 = $1.4 million.

[126] See letters from BONY and Registrar and Transfer.

[127] In the voluntary model adopting release, we estimated, for PRA purposes, that issuers and intermediaries would spend a total of 79,820 hours of issuer and intermediary personnel time maintaining these records. We estimate the average hourly cost of issuer and intermediary personnel time to be $175, resulting in a total cost of $13,068,500 for issuer and intermediary personnel time.

[128] $13,098,500 × 10% = $1,309,850* $13,098,500 * 50% = $6,549,250.

[129] We do not expect an incremental increase in mailing cost for the Notice for soliciting parties that choose the full set delivery option because the Notice is substantially smaller than the full set of proxy materials currently sent under the traditional system and must accompany that full set (or be incorporated into those materials).

[130] As noted above, we calculated a total cost of $2,469,475 for preparing the Notice for purposes of the PRA. $2,469,475 * 50% = $1,234,736. $2,469,475 * 90% = $2,222,528.

[131] 50% × 229,116,797 × $0.13 = $14.9 million.

[132] 90% × 229,116,797 × $0.13 = $26.8 million. We assume that the additional cost of mailing the Notice together with the full set of proxy materials is negligible.

set delivery option because the Notice is substantially smaller than the full set of proxy materials currently sent under the traditional system and must accompany that full set (or be incorporated into the proxy statement and proxy card).

In addition, under the amendments, soliciting parties that would not have followed the voluntary model must post their proxy materials on an Internet Web site. As we noted above, although costs for establishing a Web site and posting materials on it can vary greatly, the rules do not require elaborate Web site design. The rules only require that a soliciting party obtain a Web site and post several documents on that Web site. As with the notice only option, we estimate that the approximate total cost to establish a new Web site would be approximately $360 per year for a soliciting party, or a range of $1.4 million (if soliciting parties responsible for 50% of all proxy mailings would not have followed the voluntary model) to $2.6 million (if soliciting parties responsible for 90% of all proxy mailings would not have followed the voluntary model).[133]

3. Costs to Intermediaries

Soliciting parties and intermediaries will incur additional processing costs under the notice and access model. The amendments require an intermediary such as a bank, broker-dealer, or other association to follow the notice and access model with respect to all issuers. An intermediary must prepare its own Notice to beneficial owners, along with instructions on when and how to request paper copies and the Web site where the beneficial owner can access his or her request for voting instructions. Since soliciting parties reimburse intermediaries for their reasonable expenses of forwarding proxy materials and intermediaries and their agents already have systems to prepare and deliver requests for voting instructions, we do not expect the involvement of intermediaries in sending their Notices to significantly affect the costs associated with the rules.

Under the notice and access model, a beneficial owner desiring a copy of the proxy materials from a soliciting party following the notice only option must request such a copy from its intermediary. The costs of collecting and processing requests from beneficial owners may be significant, particularly if the intermediary receives the requests of beneficial owners associated with many different soliciting parties that specify different methods of furnishing the proxy. We expect that these processing costs will be highest in the first year after adoption but will subsequently decline as intermediaries develop the necessary systems and procedures and as beneficial owners increasingly become comfortable with accessing proxy materials online. In addition, the amendments permit a beneficial owner to specify its preference on an account-wide basis, which should reduce the cost of processing requests for copies. These costs ultimately are paid by the soliciting party.

4. Costs to Shareholders

Under the amendments, a shareholder can avoid any additional cost by accessing the proxy materials on the Internet if they already have Internet access or by requesting copies of the proxy materials from the soliciting parties if the shareholder is a record holder or the intermediary if the shareholder is a beneficial owner. Shareholders who do not already have Internet access and wish to access the proxy materials online would incur any necessary costs associated with gaining access to the Internet. In addition, some shareholders may choose to print out the posted materials, which would entail paper and printing costs. We estimate that approximately 10% of all shareholders receiving a Notice under the notice only option would print out the posted materials at home at an estimated cost of $7.05 per proxy package. Based on these assumptions, we estimated that the voluntary model could produce incremental annual home printing costs ranging from $16 million (if soliciting parties responsible for 10% of all current proxy mailings follow the notice only option) to $80 million (if soliciting parties responsible for 50% of all current proxy mailings follow the notice only option).[134] Shareholders of issuers that follow the full set delivery option would not incur such costs.

5. Comments Regarding Unanticipated Costs

Several commenters expressed concern with the adoption of these amendments before the Commission has collected operating data from the voluntary model. The recommended delaying adoption until the market has had more experience with the voluntary model before requiring companies to follow the notice and access model. As we note elsewhere in the release, the amendments adopted in this release do not require soliciting parties to follow procedures substantially different from the procedures available under the voluntary model. Soliciting parties who wish to furnish their proxy materials via traditional paper delivery may continue to do so, with the only added requirements being that they must post their proxy materials on an Internet Web site and prepare a Notice (or incorporate the Notice information into their proxy statement and proxy card).

In addition, only large accelerated filers that are subject to the proxy rules will be subject to the requirements in 2008. All other filers need not, but may, follow the notice and access model before January 1, 2009. Most large accelerated filers already appear to post their proxy materials on the Internet. As noted above, a review of existing Web sites of such issuers indicated that approximately 80% of them already post their filings, including proxy materials, on their Web site. Thus, most of the issuers that will be subject to the rules in the first year will be large issuers that already post their proxy materials on their Web site. Therefore, we believe that no company will incur significant cost as a result of these amendments in the first year, while we evaluate the performance of the model. Although they may need to implement some procedures to ensure the anonymity of persons accessing those materials, we do not believe this requirement will impose a significant burden on these companies.

Furthermore, the tiered compliance dates address commenters' concerns because they will allow the Commission to better analyze the impact of the rules on a subset of issuers constituting large accelerated filers.[135] Adopting the amendments for large accelerated filers before the 2008 proxy season effectively

[133] 50% × 7,982 × $360 = $1.4 million. 90% × 7,982 × $360 = $2.6 million.

[134] This range of potential home printing costs depends on data provided by Lexecon and ADP. See letter from ADP. The Lexecon data was included in the ADP comment letter. To calculate home printing cost, we assume that 50% of annual report pages are printed in color and 100% of proxy statement pages are printed in black and white. The estimated percentage of shareholders printing at home is derived from Forrester survey data furnished by ADP and adjusted for the reported likelihood that an investor will take extra steps to get proxy materials. Total number of shareholders estimated as above based on data provided by ADP and SIFMA. See letters commenting on Release No. 34–52926 (Dec. 8, 2005) [70 FR 74598] from ADP and SIFMA.

[135] One commenter specifically noted that the timeframe would not allow the Commission to analyze the effects of one full year of compliance for large accelerated filers who chose to accept the voluntary model. See letter from the Chamber of Commerce. The tiered system will allow the Commission to analyze a full year of experience under the notice and access model for all large accelerated filers.

creates a test group of issuers, enabling the Commission to study the performance of the model with a significant number of larger issuers and to make any necessary revisions to the rules before they apply to all issuers and other soliciting persons.

6. Comment on the Complexity of the Notice and Access Model

One commenter expressed concern that the proposed rule would make the proxy delivery system too complex for beneficial owners holding in street name through their brokers or other intermediaries.[136] We acknowledge that the amendments provide shareholders with more options with respect to the manner in which they are able to access their proxy materials, and thereby add complexity to the proxy distribution system. However, we believe that shareholder choice as to the means by which they access proxy materials and the expanded use of the Internet to provide such information to shareholders ultimately will provide shareholders with better access to information, which we believe can make the proxy process more efficient. In adopting the voluntary model, we created a provision that allows a shareholder to make a one-time election of the means by which they access proxy materials to simplify the model for those shareholders. In addition, by choosing to follow the full set delivery option, issuers and other soliciting persons wishing to do so can continue to furnish their proxy materials through procedures substantially similar to traditional methods of furnishing proxy materials. These provisions should significantly simplify the process for all shareholders.

VII. Consideration of Burden on Competition and Promotion of Efficiency, Competition and Capital Formation

Section 23(a)(2) of the Exchange Act[137] requires us, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition. In addition, Section 23(a)(2) prohibits us from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act[138] and Section 2(c) of the Investment Company Act of 1940[139] require us, when engaging in rulemaking that requires us to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

The amendments require all issuers and other soliciting persons to follow the notice and access model for all proxy solicitations, other than those associated with business combination transactions. The amendments are intended to provide all shareholders with the ability to choose the means by which they access proxy materials, to expand use of the Internet to lower the costs of proxy solicitations, and to improve shareholder communications. Historically, issuers decided whether to provide shareholders with the choice to receive proxy materials by electronic means. The amendments provide all shareholders with the ability to choose whether to access proxy materials in paper, by e-mail or via the Internet. We believe that expanded use of electronic communications to replace current modes of disclosures on paper and physical mailings will increase the efficiency of the shareholder communications process. Use of the Internet permits technology developers to enhance a shareholder's experience with respect to such communications. It permits interactive communications at real-time speeds. Improved shareholder communications may improve relationships between shareholders and management. Retail investors may have easier access to management. In turn, this may lead to increased confidence and trust in well-managed, responsive issuers.

The amendment may have the effect of initially raising costs on issuers and other soliciting persons by requiring persons who choose to follow the full set delivery option to post the proxy materials on a Web site and prepare a Notice (or incorporate Notice information into their proxy statement and proxy card). Commenters were concerned that the amendments may create other inefficiencies such as reducing shareholder voting participation and increased reliance on broker discretionary voting. The amendments do not significantly differ from the voluntary model. Issuers who are concerned about a reduction in voting participation still have the option to send a full set of proxy materials to all shareholders. Therefore, we do not believe that the amendments will have a significant impact compared to the previously-adopted voluntary model on shareholder voting participation, and hence reliance on broker discretionary voting.

We also considered the effect of the amendments on competition and capital formation, including the effect that the amendments may have on industries servicing the proxy soliciting process. We do not anticipate any significant effects on capital formation. We also anticipate that some companies whose business model is based on the dissemination of paper-based proxy materials may experience some adverse competition effects from the amendments. However, the full set delivery option permits companies to continue to send paper copies to shareholders. Thus, we do not anticipate that the amendments will have an incremental impact on this industry different from the voluntary model. The amendments may also promote competition among Internet-based information services.

VIII. Final Regulatory Flexibility Analysis

This Final Regulatory Flexibility Analysis has been prepared in accordance with 5 U.S.C. 603. It relates to amendments to the rules and forms under the Exchange Act that require issuers, other persons soliciting proxies, and intermediaries to follow the notice and access model for all proxy solicitations except for those associated with a business combination transaction. An Initial Regulatory Flexibility Analysis (IRFA) was prepared in accordance with the Regulatory Flexibility Act in conjunction with the proposing release. The proposing release included, and solicited comment on, the IRFA.

A. Need for the Amendments

On January 22, 2007, we proposed amendments to the rules regarding provision of proxy materials to shareholders. We are adopting those amendments, substantially as proposed. Specifically, the amendments require issuers and other persons soliciting proxies to provide shareholders with Internet access to proxy materials. The amendments are intended to provide all shareholders with the ability to choose the means by which they access proxy materials, to expand use of the Internet to ultimately lower the costs of proxy solicitations, and to improve shareholder communications. We anticipate that the model will enhance the ability of investors to make informed decisions and ultimately to lower the costs of proxy solicitations.

[136] See letter from Reed Smith. We received similar comments on our proposals to adopt the notice and access model as a voluntary means of furnishing proxy materials.

[137] 15 U.S.C. 78w(a)(2).

[138] 15 U.S.C. 78c(f).

[139] 15 U.S.C. 80a–2(c).

The amendments also will provide all shareholders with the ability to choose whether to access proxy materials in paper, by e-mail or via the Internet. Developing technologies on the Internet should expand the ways in which required disclosures can be used by shareholders. Electronic documents are more easily searchable than paper documents. Users are better able to go directly to any section of the document that they believe to be the most important. They also permit users to more easily evaluate data. It enables users to more easily download data into spreadsheet or other analytical programs so that they can perform their own analyses more efficiently. A centralized Web site containing proxy-related disclosure may facilitate shareholder access to other relevant information such as research reports and news about the issuer.

In addition, encouraging shareholders to use the Internet in the context of proxy solicitations may have the side-effect of improving shareholder communications in other ways. Internet tools may enhance shareholders' ability to communicate not only with management, but with each other. Such direct access may improve shareholder relations to the extent shareholders have improved access to management.

B. Significant Issues Raised by Public Comment

Five commenters were concerned that smaller firms may not realize the savings contemplated by the mandatory model and may even incur increased costs.[140] One commenter suggested that the Commission develop ''ways to 'scale' the notice and access model for smaller public companies so as to reduce the cost of compliance,'' but did not provide any recommendations on how to do so.[141]

Several commenters were concerned about the increased set-up costs for issuers, including small entities. One commenter estimated that, based on its ''back-of-envelope'' estimate, the cost of outsourcing the requirements to a third party provider could cost companies over $5,000 and may exceed $10,000, including the establishment of an Internet voting platform.[142] Three other commenters estimated that the proposal would cost companies approximately $3,000 to establish such an Internet voting platform.[143] However, as noted previously, the amendments do not require companies to establish such a platform.[144] One of these commenters noted that although posting the proxy materials on the Internet is not necessarily expensive or difficult, outsourcing this function to an outside firm could cost hundreds, if not thousands, of dollars to do so.[145]

One commenter was concerned that the prohibition on ''cookies'' raises the costs for maintaining the Web sites.[146] Although this prohibition does raise the cost to maintain the Web sites, we believe that eliminating this prohibition may have a negative effect on shareholders' willingness to access the proxy materials via an Internet Web site. We do not believe this requirement will create undue burden on companies. Soliciting parties must refrain from installing cookies and other tracking features on the Web site or portion of the Web site where the proxy materials are posted. This may require segregating those pages from the rest of the soliciting party's regular Web site or creating a new Web site. However, the rules do not require the company to turn off the Web site's connection log, which automatically tracks numerical IP addresses that connect to that Web site. Although in most cases, this IP address does not provide a soliciting party with sufficient information to identify the accessing shareholder, soliciting parties may not use these numbers to attempt to find out more information about persons accessing the Web site.

C. Small Entities Subject to the Amendments

The amendments affect issuers that are small entities. Exchange Act Rule 0–10(a)[147] defines an issuer to be a ''small business'' or ''small organization'' for purposes of the Regulatory Flexibility Act if it had total assets of $5 million or less on the last day of its most recent fiscal year. We estimate that there are approximately 1,100 public companies, other than investment companies, that may be considered small entities.[148]

For purposes of the Regulatory Flexibility Act, an investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[149] Approximately 164 registered investment companies meet this definition. Moreover, approximately 51 business development companies may be considered small entities.

Paragraph (c)(1) of Rule 0–10 under the Exchange Act[150] states that the term ''small business'' or ''small organization,'' when referring to a broker-dealer, means a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a–5(d); and is not affiliated with any person (other than a natural person) that is not a small business or small organization. As of 2005, the Commission estimates that there were approximately 910 broker-dealers that qualified as small entities as defined above.[151] Small Business Administration regulations define ''small entities'' to include banks and savings associations with total assets of $165 million or less.[152] The Commission estimates that the rules might apply to approximately 9,475 banks, approximately 5,816 of which could be considered small banks with assets of $165 million or less.

D. Reporting, Recordkeeping and Other Compliance Requirements

The amendments require all issuers, including small entities, to follow the notice and access model. This model does not significantly change an issuer's obligations under current rules. An issuer choosing to follow the notice only option would incur costs identical to costs that it would have incurred under the voluntary model. An issuer following the full set delivery option would incur two costs in addition to the current cost of sending proxy materials under the traditional method: (1) The cost of preparing a Notice of Internet Availability of Proxy Materials and (2) the cost of posting the proxy materials on a Web site with anonymity controls.

For purposes of the Paperwork Reduction Act, we have estimated that the Notice would take approximately

[140] See letters from ABC, BONY, Reed Smith, Registrar and Transfer, and STA.

[141] See letter from ABC.

[142] See letter from ABC.

[143] See letters from BONY, Registrar and Transfer, and STA.

[144] See letters from BONY and Registrar and Transfer.

[145] See letter from Registrar and Transfer.

[146] See letter from ICI.

[147] 17 CFR 240.0–10(a).

[148] The estimated number of reporting small entities is based on 2007 data including the Commission's EDGAR database and Thomson Financial's Worldscope database. This represents an update from the number of reporting small entities estimated in prior rulemakings. See, for example, *Executive Compensation and Related Disclosure,* Release No. 33–8732A (Aug. 29, 2006) [71 FR 53158] (in which the Commission estimated a total of 2,500 small entities, other than investment companies).

[149] 17 CFR 270.0–10.

[150] 17 CFR 240.0–10(c)(1).

[151] These numbers are based on a review by the Commission's Office of Economic Analysis of 2005 FOCUS Report filings reflecting registered broker-dealers. This number does not include broker-dealers that are delinquent on FOCUS Report filings.

[152] 13 CFR 121.201.

1.5 hours to prepare because the information is readily available to the issuer. We estimated that 75% of that burden would be incurred by in-house, while 25% of the burden would reflect costs of outside counsel, at a cost of $400 per hour, or approximately $150 per Notice. With respect to printing the Notice, for purposes of the Cost-Benefit Analysis we estimated a cost of $0.13 per copy to print the Notice. However, an issuer may reduce this cost by incorporating the Notice information into its proxy materials.

As we noted in our Cost-Benefit Analysis, we anticipate the cost of posting the proxy materials on a publicly accessible Web site to be relatively low. Although an issuer may choose to pay more for an elaborate Web site, the rules do not require such a Web site. An issuer with a small shareholder base may be able to post its materials on a free Web hosting service. As we note in more detail in the Cost-Benefit Analysis, based on our estimate of the typical size of a proxy statement and annual report, we estimate such services provide sufficient bandwidth for approximately 1,000 to 25,000 hits per month.[153] We also noted that several Web hosting services provided Web sites which would handle up to five million hits per month are available for approximately $5 to $8 per month, or $60 to $96 per year. Based on a review of several Internet Web page design firms, we estimate that the design of a Web site meeting the base requirements of the rules would be approximately $300.

Intermediaries must follow substantially similar requirements with respect to beneficial owners of the issuer's securities. Issuers, including small entities, are required to reimburse intermediaries for the cost of complying with these requirements. These costs are incorporated in our estimate of costs to issuers.

E. Agency Action To Minimize Effect on Small Entities

The amendments require all issuers and intermediaries, including small entities, to follow the notice and access model. The purpose of the amendments is to provide all shareholders with the ability to choose the means by which they can access proxy materials, to expand use of the Internet to ultimately lower the costs of proxy solicitations, and to improve shareholder communications. Exempting small entities would not be consistent with this goal and we do not believe that the additional compliance requirements that we are imposing are significant.

We believe that in the long run, use of the Internet for shareholder communications not only may decrease costs for all issuers, but also may improve the quality of shareholder communications by enhancing a shareholder's ability to search and manipulate proxy disclosures. However, in the short term, we are adopting a tiered system of compliance dates to minimize the burdens on smaller issuers, including small entities. Under this tiered system, issuers that are not large accelerated filers need not comply with the requirements until January 1, 2009. This would provide smaller issuers more time to adjust to the amendments and learn from the experiences of larger filers. Furthermore, adopting the amendments for large accelerated filers before the 2008 proxy season effectively creates a test group of issuers, enabling the Commission to study the performance of the model with a significant number of larger issuers and to make any necessary revisions to the rules before they apply to all issuers, including small entities.

Intermediaries that are small entities also are subject to the amendments. We understand that the task of forwarding proxy materials to over 95% of beneficial ownership accounts currently is handled by a single entity. Because a third-party outsourcing alternative is readily available and issuers are required to reimburse such costs to the intermediary, we believe that imposing the amendments on small entities will not create a substantial burden on small entities. Thus, we have decided not to exempt intermediaries that are small entities from the amendments. Such an exemption may create disparity in the way shareholders receive proxy materials. Shareholders owning securities through such intermediaries would not have the ability to choose the means by which they receive proxy disclosures.

We considered the use of performance standards rather than design standards in the amendments. The amendments contain both performance standards and design standards. We are adopting design standards to the extent that we believe compliance with particular requirements is necessary. For example, we are using a design standard with respect to the contents of the Notice so that investors get uniform information regarding access to important information. However, to the extent possible, we are adopting rules that impose performance standards to provide issuers, other soliciting persons and intermediaries with the flexibility to devise the means through which they can comply with such standards. For example, we are adopting a performance standard for providing for anonymity on the Web site so that issuers and other soliciting persons can determine for themselves the least costly option to meet the requirement.

[153] These calculations are based on typical file sizes of proxy statements and annual reports. The lower capacity (1,000) corresponds to files that are elaborate ''glossy'' annual statements. We believe the higher capacity (25,000) is a more reasonable estimate for small entities because small entities tend to send annual reports on Form 10–K to meet their Rule 14a–3(b) requirements rather than spend the significant cost of producing a ''glossy'' annual report.

IX. Statutory Basis and Text of Amendments

We are adopting the amendments pursuant to sections 3(b), 10, 13, 14, 15, 23(a), and 36 of the Securities Exchange Act of 1934, as amended, and sections 20(a), 30, and 38 of the Investment Company Act of 1940, as amended.

List of Subjects in 17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

■ For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for Part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

■ 2. Amend § 240.14a–3 by revising paragraph (a) to read as follows:

§ 240.14a–3 Information to be furnished to security holders.

(a) No solicitation subject to this regulation shall be made unless each person solicited is concurrently furnished or has previously been furnished with:

(1) A publicly-filed preliminary or definitive proxy statement, in the form and manner described in § 240.14a–16, containing the information specified in Schedule 14A (§ 240.14a–101);

(2) A preliminary or definitive written proxy statement included in a registration statement filed under the Securities Act of 1933 on Form S–4 or F–4 (§ 239.25 or § 239.34 of this chapter) or Form N–14 (§ 239.23 of this chapter) and containing the information specified in such Form; or

(3) A publicly-filed preliminary or definitive proxy statement, not in the form and manner described in § 240.14a–16, containing the information specified in Schedule 14A (§ 240.14a–101), if:

(i) The solicitation relates to a business combination transaction as that term is defined in § 230.165 of this chapter; or

(ii) The solicitation may not follow the form and manner described in § 240.14a–16 pursuant to the laws of the state of incorporation of the registrant;

* * * * *

3. Amend § 240.14a–7 by removing Note 3 to § 240.14a–7.

§ 240.14a–7 [Amended]

■ 4. Amend § 240.14a–16 by:

■ a. Revising paragraphs (a), (d)(3), (f)(2)(i), (f)(2)(ii), (h), (j)(3), and (n); and

■ b. Adding paragraph (f)(2)(iii).

The revisions and additions to read as follows:

§ 240.14a–16 Internet availability of proxy materials.

(a)(1) A registrant shall furnish a proxy statement pursuant to § 240.14a–3(a), or an annual report to security holders pursuant to § 240.14a–3(b), to a security holder by sending the security holder a Notice of Internet Availability of Proxy Materials, as described in this section, 40 calendar days or more prior to the security holder meeting date, or if no meeting is to be held, 40 calendar days or more prior to the date the votes, consents or authorizations may be used to effect the corporate action, and complying with all other requirements of this section.

(2) Unless the registrant chooses to follow the full set delivery option set forth in paragraph (n) of this section, it must provide the record holder or respondent bank with all information listed in paragraph (d) of this section in sufficient time for the record holder or respondent bank to prepare, print and send a Notice of Internet Availability of Proxy Materials to beneficial owners at least 40 calendar days before the meeting date.

* * * * *

(d) * * *

(3) A clear and impartial identification of each separate matter intended to be acted on and the soliciting person's recommendations, if any, regarding those matters, but no supporting statements;

* * * * *

(f) * * *

(2) * * *

(i) A pre-addressed, postage-paid reply card for requesting a copy of the proxy materials;

(ii) A copy of any notice of security holder meeting required under state law if that notice is not combined with the Notice of Internet Availability of Proxy Materials; and

(iii) In the case of an investment company registered under the Investment Company Act of 1940, the company's prospectus or a report that is required to be transmitted to stockholders by section 30(e) of the Investment Company Act (15 U.S.C. 80a–29(e)) and the rules thereunder.

* * * * *

(h) The registrant may send a form of proxy to security holders if:

(1) At least 10 calendar days or more have passed since the date it first sent the Notice of Internet Availability of Proxy Materials to security holders and the form of proxy is accompanied by a copy of the Notice of Internet Availability of Proxy Materials; or

(2) The form of proxy is accompanied or preceded by a copy, via the same medium, of the proxy statement and any annual report to security holders that is required by § 240.14a–3(b).

* * * * *

(j) * * *

(3) The registrant must provide copies of the proxy materials for one year after the conclusion of the meeting or corporate action to which the proxy materials relate, provided that, if the registrant receives the request after the conclusion of the meeting or corporate action to which the proxy materials relate, the registrant need not send copies via First Class mail and need not respond to such request within three business days.

* * * * *

(n) *Full Set Delivery Option.*

(1) For purposes of this paragraph (n), the term full set of proxy materials shall include all of the following documents:

(i) A copy of the proxy statement;

(ii) A copy of the annual report to security holders if required by § 240.14a–3(b); and

(iii) A form of proxy.

(2) Notwithstanding paragraphs (e) and (f)(2) of this section, a registrant or other soliciting person may:

(i) Accompany the Notice of Internet Availability of Proxy Materials with a full set of proxy materials; or

(ii) Send a full set of proxy materials without a Notice of Internet Availability of Proxy Materials if all of the information required in a Notice of Internet Availability of Proxy Materials pursuant to paragraphs (d) and (n)(4) of this section is incorporated in the proxy statement and the form of proxy.

(3) A registrant or other soliciting person that sends a full set of proxy materials to a security holder pursuant to this paragraph (n) need not comply with

(i) The timing provisions of paragraphs (a) and (l)(2) of this section; and

(ii) The obligation to provide copies pursuant to paragraph (j) of this section.

(4) A registrant or other soliciting person that sends a full set of proxy materials to a security holder pursuant to this paragraph (n) need not include in its Notice of Internet Availability of Proxy Materials, proxy statement, or form of proxy the following disclosures:

(i) Paragraphs 1 and 3 of the legend required by paragraph (d)(1) of this section;

(ii) Instructions on how to request a copy of the proxy materials; and

(iii) Instructions on how to access the form of proxy pursuant to paragraph (d)(7) of this section.

■ 5. Amend § 240.14a–101 by revising the first sentence of Item 4(a)(3) to read as follows:

§ 240.14a–101 Schedule 14A. Information required in proxy statement.

* * * * *

Item 4. Persons Making the Solicitation—(a) * * *

(3) If the solicitation is to be made otherwise than by the use of the mails or pursuant to § 240.14a–16, describe the methods to be employed. * * *

* * * * *

■ 6. Amend § 240.14b–1 by:

■ a. Revising the introductory text of paragraph (d); and

■ b. Adding paragraph (d)(5).

The revision and addition read as follows.

§ 240.14b–1 Obligation of registered brokers and dealers in connection with the prompt forwarding of certain communications to beneficial owners.

* * * * *

(d) Upon receipt from the soliciting person of all of the information listed in § 240.14a–16(d), the broker or dealer shall:

* * * * *

(5) Notwithstanding any other provisions in this paragraph (d), if the broker or dealer receives copies of the proxy statement and annual report to security holders (if applicable) from the soliciting person with instructions to forward such materials to beneficial owners, the broker or dealer:

(i) Shall either:

(A) Prepare a Notice of Internet Availability of Proxy Materials and forward it with the proxy statement and annual report to security holders (if applicable); or

(B) Incorporate any information required in the Notice of Internet

Availability of Proxy Materials that does not appear in the proxy statement into the broker or dealer's request for voting instructions to be sent with the proxy statement and annual report (if applicable);

(ii) Need not comply with the following provisions:

(A) The timing provisions of paragraph (d)(1)(ii) of this section; and

(B) Paragraph (d)(4) of this section; and

(iii) Need not include in its Notice of Internet Availability of Proxy Materials or request for voting instructions the following disclosures:

(A) Legends 1 and 2 in § 240.14a–16(d)(1); and

(B) Instructions on how to request a copy of the proxy materials.

* * * * *

■ 7. Amend § 240.14b–2 by:

■ a. Revising the introductory text of paragraph (d); and

■ b. Adding paragraph (d)(5).

The revision and addition read as follows.

§ 240.14b–2 Obligation of banks, associations and other entities that exercise fiduciary powers in connection with the prompt forwarding of certain communications to beneficial owners.

* * * * *

(d) Upon receipt from the soliciting person of all of the information listed in § 240.14a–16(d), the bank shall:

* * * * *

(5) Notwithstanding any other provisions in this paragraph (d), if the bank receives copies of the proxy statement and annual report to security holders (if applicable) from the soliciting person with instructions to forward such materials to beneficial owners, the bank:

(i) Shall either:

(A) Prepare a Notice of Internet Availability of Proxy Materials and forward it with the proxy statement and annual report to security holders (if applicable); or

(B) Incorporate any information required in the Notice of Internet Availability of Proxy Materials that does not appear in the proxy statement into the bank's request for voting instructions to be sent with the proxy statement and annual report (if applicable);

(ii) Need not comply with the following provisions:

(A) The timing provisions of paragraph (d)(1)(ii) of this section; and

(B) Paragraph (d)(4) of this section; and

(iii) Need not include in its Notice of Internet Availability of Proxy Materials or request for voting instructions the following disclosures:

(A) Legends 1 and 2 in § 240.14a–16(d)(1); and

(B) Instructions on how to request a copy of the proxy materials.

* * * * *

■ 8. Amend § 240.14c–2 by revising paragraph (d) to read as follows:

§ 240.14c–2 Distribution of information statement.

* * * * *

(d) A registrant shall transmit an information statement to security holders pursuant to paragraph (a) of this section by satisfying the requirements set forth in § 240.14a–16; provided, however, that the registrant shall revise the information required in the Notice of Internet Availability of Proxy Materials, including changing the title of that notice, to reflect the fact that the registrant is not soliciting proxies for the meeting.

■ 9. Amend § 240.14c–3 by revising paragraph (d) to read as follows:

§ 240.14c–3 Annual report to be furnished security holders.

* * * * *

(d) A registrant shall furnish an annual report to security holders pursuant to paragraph (a) of this section by satisfying the requirements set forth in § 240.14a–16.

By the Commission.

Dated: July 26, 2007.

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E7–14793 Filed 7–31–07; 8:45 am]

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August 1, 2007

Part III

Department of Commerce

Patent and Trademark Office

37 CFR Part 2

Miscellaneous Changes to Trademark Trial and Appeal Board Rules; Final Rule

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 2

[Docket No.: PTO–T–2005–014]

RIN 0651–AB56

Miscellaneous Changes to Trademark Trial and Appeal Board Rules

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (Office) is amending the Trademark Rules of Practice (trademark rules) to require plaintiffs in Trademark Trial and Appeal Board (Board) inter partes proceedings to serve on defendants their complaints or claims; to utilize in Board inter partes proceedings a modified form of the disclosure practices included in the Federal Rules of Civil Procedure; and to delete the option of making submissions to the Board in CD–ROM form. In addition, certain amendments are being made to clarify rules, conform the rules to current practice, and correct typographical errors or deviations from standard terminology.

DATES: *Effective Date:* This rule is effective November 1, 2007 except the amendments for the following rules are effective August 31, 2007: 2.105(a); 2.113(a), and removal of (e); 2.116(g); 2.118; 2.119(b)(6); 2.120(d)(1); 2.122(d)(1); 2.126(a)(6), removal of (b) and redesignation of (c) and (d) as (b) and (c); 2.127(a) and (c); 2.129(a); 2.133(a) and (b); 2.142(e)(1); 2.173(a); and 2.176.

Applicability to pending cases: The amendment to rule 2.116(g), which makes the Board standard protective order applicable in all inter partes cases applies to all cases pending before the Board as of the effective date of that amendment, except for cases in which the Board's standard protective order, or some other protective order, has already been applied or approved by the Board. The following amendments also apply to all cases pending before the Board as of their effective date: 2.105(a); 2.113(a), and removal of (e); 2.118; 2.119(b)(6); 2.120(d)(1); 2.126(a)(6), removal of (b) and redesignation of (c) and (d) as (b) and (c); 2.127(a) and (c); 2.133(a) and (b); 2.173(a); and 2.176. All other amendments to the rules apply in cases commenced on or after the effective dates of the respective amendments.

FOR FURTHER INFORMATION CONTACT: Gerard F. Rogers, Trademark Trial and Appeal Board, by telephone at (571) 272–4299, by mail addressed to Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, VA, 22313–1451, attention Gerard F. Rogers, or by facsimile to (571) 273–0059, marked to the attention of Gerard F. Rogers.

Information may also be obtained via the Federal eRulemaking Portal. See the Federal eRulemaking Portal Web site (*http://www.regulations.gov*) for the full text of the notice of proposed rule making that preceded this final rule, and the full text of comments received in response to the notice of proposed rule making.

SUPPLEMENTARY INFORMATION: The amended rules will increase the efficiency of the processes for commencing inter partes cases, and take account of the Board's deployment in recent years of electronic filing options and the increased availability and use of facsimile and e-mail as methods of communication between parties involved in inter partes cases. Also, the amended rules will increase the efficiency by which discovery and pretrial information is exchanged between parties to inter partes cases, by adopting a modified form of the disclosure practice that is uniformly followed in the federal district courts. These practices have been found in the courts to enhance settlement prospects and to lead to earlier settlement of cases; and for cases that do not settle, disclosure has been found to promote greater exchange of information, leading to increased procedural fairness and a greater likelihood that cases eventually determined on their merits are determined on a fairly created record. The amendments also include minor modifications necessary to make corrections or updates to certain rules and conform those rules to current practice.

As of November 1, 2007, the following notice originally published in the USPTO Official Gazette on January 15, 1994, at 1159 TMOG 14, will no longer have effect: ''Notice Regarding Inapplicability of December 1, 1993 Changes in Federal Rules of Civil Procedure to TTAB Cases.''

I. Commencement of Proceedings

Plaintiffs in Board proceedings include an opposer that files a notice of opposition against an application, a petitioner that files a petition for cancellation of a registration, and a concurrent use applicant whose concurrent use application sets forth details about the concurrent use applicant's claim of entitlement to a concurrent use registration. The former process by which a plaintiff in a Board proceeding filed notice of its complaint (or claim of right to a concurrent use registration) required the plaintiff to prepare as many copies of its complaint (or claim of right, i.e., concurrent use application) as there would be defendants in the action. The plaintiff would then file the requisite copies with the original, for subsequent forwarding by the Board to the defendant or defendants. Occasionally, before the Board could forward the copies to the defendant or defendants, the plaintiff would engage in additional correspondence with the Board, to provide the Board with updated correspondence address information the plaintiff had uncovered in its investigation of the adverse applications, registrations or marks, particularly in cancellation and concurrent use proceedings.

Under the amended trademark rules, the initiation of a Board proceeding will be more efficient, because a plaintiff will serve copies directly on defendants. Use of a direct service approach recognizes that plaintiffs and defendants often are in contact before the plaintiff files its complaint or claim, and also recognizes that continuation of direct communication is vital both for promoting possible settlement of claims and for ensuring cooperation and procedural efficiency in the early stages of a proceeding.

In recent years, the Board has deployed its ESTTA system, the Electronic System for Trademark Trials and Appeals, so that virtually all filings can be submitted electronically. In addition, more and more parties to Board proceedings are choosing to utilize fax or e-mail options for communicating with each other during an inter partes proceeding, either in lieu of using the mail or in combination with use of the mail.

Under the amended trademark rules, an opposer or petitioner will file its complaint with the Board and is required to concurrently serve a copy of its complaint (notice of opposition or petition for cancellation), including any exhibits, on the owner of record, or when applicable the attorney or domestic representative designated in the defending application or registration, or in assignment records regarding the application or registration. A concurrent use applicant, however, will not have to serve copies of its application on any defending applicant, registrant or common law mark owner until notification of commencement of the concurrent use proceeding is issued by the Board, as discussed below.

A plaintiff filing a notice of opposition must serve the owner of the application, according to Office records,

or the attorney or domestic representative of the owner, if Office records designate that an attorney or domestic representative should receive correspondence for the owner of the application. A plaintiff filing a petition for cancellation must serve the owner of the registration, according to Office records, or the domestic representative of the owner, if Office records designate that a domestic representative should receive correspondence for the owner of the registration. A plaintiff filing a petition for cancellation is not expected to serve any attorney who may have represented the registrant before the Office in the prosecution of the application that resulted in issuance of the registration. (It is noted, however, that an attorney who was designated as a domestic representative during prosecution of an application is considered by the Office to continue in such role unless the appointment as domestic representative was revoked or a different domestic representative was subsequently appointed.) Whether a plaintiff should serve the owner directly, an attorney, or a domestic representative depends on what Office records provide as the correspondence address.

To determine the correspondence address of record for an applicant or registrant, the plaintiff must check the Trademark Applications and Registrations Retrieval (TARR) system at the following web address: *http://tarr.uspto.gov.* (This system also is accessible via links from the Office's main Web site.) A plaintiff in an opposition or cancellation proceeding need only serve a copy of its notice of opposition or petition for cancellation to the correspondence address of record. The TARR display of information about a particular application or registration also includes an active link to assignment (including changes of name) information, if any exists in the Office's assignments database. For questions about correspondence address information in TARR, or about assignment records and determining the current owner of an application or registration, plaintiffs may contact the Board's customer service representatives at the main telephone number for the Board, listed on the Web site *http://www.uspto.gov/main/contacts.htm.*

A plaintiff in an opposition or cancellation is not required to serve a copy of its notice of opposition or petition for cancellation to any address other than the address listed in the TARR system. A plaintiff may wish to serve a courtesy copy on any party at any address the plaintiff may have reason to believe is more current than the address for that party listed in Office records. A plaintiff may wish to serve a courtesy copy on any party the plaintiff believes has an ownership interest in the relevant application or registration (e.g., an assignee or survivor of merger that had not recorded the document of transfer in the Office but was known to the plaintiff) at the correspondence address known to the plaintiff. It is generally in a plaintiff's interest to have the real party in interest apprised of the existence of the Board opposition or cancellation proceeding, so that any judgment eventually obtained will be binding on the correct party.

As for service obligations of a concurrent use applicant (i.e., the plaintiff in a concurrent use proceeding), current practice requires such party to provide, for forwarding by the Board, as many copies of its application as are necessary to forward one to each person or entity listed in the concurrent use application as an exception to the concurrent use applicant's rights (i.e., excepted parties, the defendants in the concurrent use proceeding). Existing practice requires the concurrent use applicant to provide correspondence address information for excepted parties, even if the excepted parties do not own applications or registrations for marks listed in the TARR system. The amended trademark rules continue the requirement that the concurrent use applicant provide correspondence address information for excepted parties. The new rules dispense with the requirement that the concurrent use applicant file copies of its claim of right to a concurrent use registration, i.e., copies of its concurrent use application, for service by the Board on each excepted party. Under the amended trademark rules, the concurrent use applicant must promptly serve a copy of its application on each of the excepted parties following its receipt of a notice from the Board that the concurrent use proceeding has been instituted.

All plaintiffs, including concurrent use applicants, bear the same service obligations. Specifically, they must serve copies by one of the methods provided in Trademark Rule 2.119, 37 CFR 2.119. Plaintiffs are neither required nor expected to follow the provisions of Rules 4, 4.1 or 5 of the Federal Rules of Civil Procedure or, for defendants located outside the United States, any international convention regarding service of process. The parties may agree to use e-mail to communicate with each other and for forwarding of service copies. A plaintiff, however, may not serve its complaint or concurrent use application on a defendant by e-mail unless the defendant has agreed with the plaintiff to accept such service, notwithstanding that the defendant may have authorized the Office to communicate with it by e-mail.

If a service copy is returned to plaintiff as undeliverable, plaintiff must notify the Board within ten (10) days of receipt of the returned service copy, or of any notice indicating that the service copy could not be delivered. Notification to the Board of failure of service may be provided by any means available for filing pleadings, motions, etc., keeping in mind that business with the Office is generally to be conducted in writing. Therefore, notice of failure of service may be provided, for example, by written notice mailed to the Board, or by appropriate filing through ESTTA. A plaintiff is under no obligation to search for current correspondence address information for, or investigate the whereabouts of, any defendant the plaintiff is unable to serve. However, notice to the Board of failure of service must include, if known, any new address information for the defendant whose service copy was returned to the plaintiff or reported to be undeliverable. For example, if a service copy returned by the United States Postal Service because of an expired forwarding order nonetheless lists the addressee's new address, then that must be reported to the Board. Similarly, if the plaintiff whose attempt at service has been unsuccessful discovers a new address for a defendant through independent means or voluntary investigation, then it must report the results of its investigation in its notice to the Board of the failure of service. In any case in which a plaintiff notifies the Board that a service copy sent to a defendant was returned or not delivered, including any case in which the notification includes a new address for the defendant discovered by or reported to the plaintiff, the Board will effect service.

The Board will, after a notice of opposition or petition for cancellation is filed, or after a concurrent use application is published for opposition and found free of any opposition, send notice to all parties to the proceeding, noting the filing of the complaint, or publication of the concurrent use application. The notice will set the due date for an answer, and the discovery and trial schedule. Notification from the Board may be sent by e-mail when a party has provided an e-mail address. A party providing an e-mail address includes a plaintiff providing an e-mail address when filing any paper by ESTTA or with a complaint delivered by other means, an applicant that

authorized the Office to communicate with it by e-mail when it filed its application, and any registrant whose registration file record includes such authorization. In any proceeding, an undelivered notice from the Board of the commencement of a proceeding may result in notice by publication in the Official Gazette, available via the Office's Web site (*http://www.uspto.gov*).

II. Adoption of a Disclosure Model

In 1993, significant amendments to the Federal Rules of Civil Procedure (federal rules) implemented a system requiring parties litigating in the federal courts to, among other things, disclose certain information and/or documents and things without waiting for discovery requests, and to meet and confer to discuss settlement options and plans for disclosure and discovery if settlement were not possible (disclosure regime). Individual district courts were permitted to opt out of this disclosure regime.

In 2000, the federal rules were further amended, eliminating the option for individual courts to opt out of the most significant changes of the disclosure regime.

By notice issued January 15, 1994 (and published in the Official Gazette at 1159 TMOG 14), the Office announced the Board would not follow many of the 1993 changes to the federal rules, including the disclosure regime established by the amended rules. This notice specifically stated, ''the Office's Public Advisory Committee for Trademark Affairs has recommended that incorporation of the [1993] amendments [related to conferencing and disclosure] in Board practice be deferred until the Office can evaluate the effects of the amendments on civil actions.''

The Office subsequently amended the Trademark Rules of Practice in 1998. The original notice of amendment issued September 29, 1998 (and was published at 1214 TMOG 145); and a correction notice issued October 20, 1998 (and was published at 1215 TMOG 64). While the Office did not adopt a disclosure regime for Board inter partes cases as an element of these amendments, the Office noted that the Board would continue to monitor recurring procedural issues in Board cases and that in the future the Office might propose and adopt additional changes to practice.

In accordance with the recommendation of the Public Advisory Committee for Trademark Affairs, and to evaluate the effects of the 1993 and 2000 amendments on civil actions, the Office reviewed an empirical study and numerous other available articles and reports on the subject of the disclosure regime followed in the courts. The empirical study reported that the new disclosure regime has been successful in the courts:

> In general, initial disclosure appears to be having its intended effects. Among those attorneys who believed there was an impact, the effects were most often of the type intended by the drafters of the 1993 amendments. Far more attorneys reported that initial disclosure decreased litigation expense, time from filing to disposition, the amount of discovery, and the number of discovery disputes than said it increased them. At the same time, many more attorneys said initial disclosure increased overall procedural fairness, the fairness of the case outcome, and the prospects of settlement than said it decreased them.

Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments,* 39 B.C.L. Rev. 525, 534–35 (May 1998).

The Office concluded from its review of the empirical study and other materials that use of a modified disclosure regime in Board proceedings, will increase the possibility of parties settling a Board proceeding and doing so sooner. In addition, even if parties do not settle the case, disclosure will promote more efficient discovery and trial, reduce incidents of unfair surprise, and increase the likelihood of fair disposition of the parties' claims and defenses. In large part, disclosure will serve as a substitute for a certain amount of traditional discovery and will provide a more efficient means for exchange of information that otherwise would require the parties to serve traditional discovery requests and responses thereto.

Following many consultations with the Trademark Public Advisory Committee (successor to the Public Advisory Committee for Trademark Affairs) or subcommittees thereof, the Office proposed adoption of a disclosure regime for Board inter partes proceedings, in a Notice of Proposed Rule Making (NPRM) at 71 Fed. Reg. 2498 (January 17, 2006). The NPRM and comments received in response thereto are available for viewing at the *http://www.regulations.gov* web portal.

One subject related to the adoption of a disclosure regime and covered in the NPRM is the applicability of the Board's standard order for protecting confidential or otherwise sensitive information and documents. By notice published in the Office's Official Gazette (O.G.) on June 20, 2000 (1235 TMOG 70), the Office noted the Board's adoption of that standard order. The O.G. notice explained that the standard order was promulgated in response to many public requests for such an order and explained that the standard order could be adopted by parties as published or with modifications. The O.G. notice also noted that the Board could impose the order in appropriate cases. In fact, since publication of the O.G. notice, it has become quite routine for the Board to impose the order in any inter partes proceeding in which the efficient conduct of discovery is hampered by the parties' inability to agree on a protective order.

In the disclosure regime established by this final rule, the Board's standard protective order is applicable in all cases. The Board's notice of the institution of a proceeding will advise parties that the standard protective order applies and that it is available on the Office's Web site or, by request made to the Board, in hard copy form. The applicability of this standard protective order does not make all submissions confidential. Parties must utilize its provisions to protect confidential information. Neither does the applicability of the standard order preclude a party, when appropriate, from moving for a protective order under applicable trademark or federal rules, when the standard order does not cover the extant circumstances or is viewed by the moving party as providing insufficient protection. As under current practice, parties are free to agree to modify the standard protective order. It should be routine for parties to discuss possible modification in the disclosure/discovery/settlement conference (discovery conference) that is a part of the disclosure regime established by this final rule. Absent a stipulation to vary the terms of the standard protective order, approved by the Board, or an order by the Board granting a party's motion to use an alternative order, the parties must abide by the standard order.

A. The Schedule for Cases Under the Disclosure Model

The Board's notice of the commencement of the proceeding (commonly referred to as the institution order) will set forth disclosure, discovery and trial-related deadlines, as illustrated below.

The institution order will set forth specific dates for the various phases in a case. Since each deadline or phase is measured from the date of the institution order, the parentheticals explain the total number of days, as

measured from that date, until each deadline:

Due date for an answer—40 days from the date of the institution order.

(Institution date plus 40 days.)

Deadline for a disclosure/discovery/settlement conference—30 days from the date the answer is due.

(Institution date plus 70 days.)

Discovery opens—30 days after the date the answer is due.

(Institution date plus 70 days.)

Deadline for making initial disclosures—30 days from the opening of the discovery period.

(Institution date plus 100 days.)

Deadline for disclosure of expert testimony—30 days prior to close of discovery.

(Institution date plus 220 days.)

Discovery closes—180 days from the opening date of the discovery period.

(Institution date plus 250 days.)

Deadline for plaintiff's pretrial disclosures—15 days prior to the opening of plaintiff's testimony period.

(Institution date plus 295 days.)

Plaintiff's 30-day testimony period—closes 90 days after the close of discovery.

(Institution date plus 340 days.)

Deadline for defendant's pretrial disclosures—15 days prior to the opening of defendant's testimony period.

(Institution date plus 355 days.)

Defendant's 30-day testimony period—closes 60 days after the close of plaintiff's testimony period.

(Institution date plus 400 days.)

Deadline for plaintiff's rebuttal pretrial disclosures—15 days prior to the opening of plaintiff's rebuttal testimony period.

(Institution date plus 415 days.)

Plaintiff's 15-day rebuttal testimony period—closes 45 days from close of defendant's testimony period.

(Institution date plus 445 days.)

Under this schedule, discovery typically will open after the discovery conference, unless the parties defer their discovery conference to the deadline date, in which case discovery will open concurrently with the conference.

The deadline for making initial disclosures is similar to that of Federal Rule 26(a)(1), except that disclosure under the federal rule is measured from the actual date of, not the deadline for, the discovery conference. Because the Board approach measures the due date for disclosures from the opening of discovery, which typically will occur after the discovery conference, the Board approach typically will provide a longer period for making disclosures than is provided under the federal rule. This will accommodate the possibility of motions to suspend for settlement talks, which are quite common in Board proceedings. The Board anticipates that such motions may frequently result from settlement discussions begun during the required disclosure/discovery/settlement conference.

The length of the discovery period is the same as under current Board practice, i.e., 180 days. Disclosures will be made no later than thirty (30) days into that period, and the parties will have another 150 days for any necessary additional discovery. The trial schedule, with its sixty-day break between discovery and trial and thirty-day breaks between the respective testimony periods, is also the same as under current Board practice.

Because disclosure is tied to claims and defenses, in general, a defendant's default or the filing of various pleading motions under Federal Rule 12 will effectively stay the parties' obligations to conference and, subsequently, make initial disclosures. An answer must be filed and issues related to the pleadings resolved before the parties can know the extent of claims and defenses and, therefore, be able to discuss the extent of their initial disclosure obligations, plans for discovery, and the possibility of settlement.

The Board anticipates it will be liberal in granting extensions or suspensions of time to answer, when requested to accommodate settlement talks or submission of the dispute to an arbitrator or mediator. However, if a motion to extend or suspend for settlement talks, arbitration or mediation is not filed prior to answer, then the parties will have to proceed, after the answer is filed, to their discovery conference, one point of which is to discuss settlement. It is unlikely the Board will find good cause for a motion to extend or suspend for settlement if the motion is filed after answer but prior to the discovery conference, precisely because the discovery conference itself provides an opportunity to discuss settlement.

The parties' discovery conference may be in person or by other means. A Board professional, i.e., an Interlocutory Attorney or an Administrative Trademark Judge, will participate in the conference upon the request of any party. If the parties propose to meet in person, participation by a Board professional will be by telephone, and be arranged by the parties. A request for the participation of a Board professional may only be made with or after the answer is filed but in no event later than ten (10) days prior to the deadline for conducting the discovery conference. The request may be made by phone or via ESTTA. If neither party requests participation of a Board professional in the discovery conference, the parties must meet on their own, in person or by other means, no later than the prescribed deadline, and the Board will operate on the assumption that the conference was held by the deadline. The parties do not have to file a disclosure/discovery plan with the Board, following their discovery conference, unless they are seeking leave by motion or stipulation to alter standard deadlines/obligations, or unless they were directed to make a particular filing by a participating Board professional.

There is no Federal Rule 16(b) scheduling conference/order. The Board's institution order will already have set a schedule for the case.

Disclosure deadlines and obligations may be modified upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. If a stipulation or motion is denied, dates may remain as set. Because dates may remain as set if the Board denies a stipulation or motion to alter dates, it is in the interests of the parties to file stipulations or motions promptly after the conference.

B. The Interplay of Disclosure and Discovery

A party may not seek discovery through traditional devices until after it has made its initial disclosures. A party may not move for summary judgment until after it has made its initial disclosures, except on grounds of claim or issue preclusion or lack of jurisdiction by the Board.

Initial disclosure obligations should be easier to meet in Board cases than in civil actions. One reason is that the Board's jurisdiction is limited to determining the right of a party to obtain, or retain, a registration. Moreover, the extent of available claims and defenses that may be advanced is not nearly as broad as in the district courts. In addition, the Board recognizes the impact of other issues relatively unique to Board proceedings. For example, a high percentage of applications involved in oppositions are not based on use of the applied-for mark in commerce but, rather, on intent to use, on a foreign registration or on an international registration. Further, certain precepts that govern analysis of issues raised by claims or defenses in typical Board cases effectively limit the Board's focus. For example, in a case under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), the Board focuses only on goods or services recited in identifications, and on the

mark as registered or applied-for, irrespective of many actual marketplace issues.

Federal Rule 26(a)(1) requires initial disclosures to obviate the need to use traditional discovery to obtain ''basic information'' about a party's claims or defenses. (''A major purpose of the [1993] revision is to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives.'' Fed. R. Civ. P. 26(a)(1) advisory committee's note, 1993 amendments.) However, in Board cases, subsections (C) and (D) of Federal Rule 26(a)(1) are not relevant and will not apply. Further, in complying with subsections (A) and (B), the range of individuals with discoverable information that the disclosing party may use to support a claim or defense, and the number of documents, data compilations, and tangible things that a party may use to support a claim or defense, will be more limited than in district court cases, because of the more limited claims and defenses available in Board cases.

Under Federal Rule 26(a)(1), a party is not obligated to disclose the name of every witness, document or thing that may have or contain discoverable information about its claim or defense, but merely the witnesses, documents and things having or containing discoverable ''information that the disclosing party may use to support its claims or defenses.'' Further, initial disclosures focus on exchange of ''basic information'' about witnesses and documents and do not substitute for taking comprehensive discovery, when necessary. (For reasons already noted in relation to initial disclosures, discovery also should be more limited in scope in Board proceedings than in district court cases.)

The specificity of information parties will provide to comply with initial disclosure obligations is one of the issues that must be anticipated and discussed by the parties during their discovery conference. Further, although this final rule requires fewer, and less extensive, initial disclosures than those proposed by the NPRM, the parties are free to discuss the option of making more extensive disclosure than is required by the rule. For example, parties could choose to rely on specified, reciprocal disclosures in lieu of formal discovery, if they find such an approach more efficient and less costly. Similarly, parties could choose to forgo disclosures and agree to utilize only traditional discovery devices. (Either approach, as a deviation from the regime prescribed by this final rule, would be subject to Board approval.)

To emphasize, initial disclosures are not intended to substitute for all discovery but, rather, to prompt routine disclosure of names of potential witnesses and basic information about documents and things that a party may use to support a claim or defense. Any adverse party is free to take discovery on subjects that will undermine a claim or defense.

Written initial disclosures of facts known by witnesses, if provided by a party, for example, pursuant to an approved agreement to utilize more extensive disclosure than required by this final rule, may be used in support of or in opposition to a motion for summary judgment and may, at trial, be introduced by notice of reliance. Disclosed documents, if provided in lieu of descriptions of documents, may also be used to support or contest a motion for summary judgment but at trial they may be introduced by notice of reliance only if otherwise appropriate for such filing. In essence, initial written disclosures and initial disclosures of documents will be treated like responses to written discovery requests.

C. Expert Disclosure and Pretrial Disclosure

A party's planned use of expert witnesses is largely governed by Federal Rule 26(a)(2). This rule governs testifying witnesses, not consulting experts who are not expected to testify.

A plaintiff's plan to use any expert at trial must be disclosed no later than thirty (30) days prior to the close of discovery (i.e., ninety (90) days prior to the opening of plaintiff's testimony period). In any case in which a defendant plans to use an expert at trial irrespective of whether the plaintiff plans to do so, the defendant must also make its disclosure no later than thirty (30) days prior to the close of discovery. A party planning to use an expert solely to contradict or rebut an adverse party's expert must disclose such plans within thirty (30) days of the adverse party's prior disclosure (i.e., no later than close of discovery). Federal Rule 26(a)(2) also details what information and materials must be provided for a party to satisfy its disclosure obligation with respect to experts.

Federal Rule 26(a)(2) allows the Board by order, or the parties by stipulation approved by the Board, to alter the sequence and timing of expert disclosures and the extent of the information or material that must be disclosed to satisfy the disclosure obligation. The parties are expected to engage in at least preliminary discussions on these subjects in their discovery conference. If any party retains an expert earlier in the Board proceeding than the applicable disclosure deadline, and any adverse party has inquired about experts through traditional discovery requests, the party retaining the expert may not rely on the disclosure deadline to delay revealing the expert to such adverse party.

Any party disclosing plans to use an expert must notify the Board that it has made the required disclosure. The Board may then suspend proceedings to allow for discovery limited to experts. The suspension order may anticipate and also provide for discovery regarding any expert that may subsequently be retained for rebuttal purposes.

The Office recognizes that there may be cases in which a party may not decide that it needs to present an expert witness at trial until after the deadline for expert disclosure. In such cases, disclosure must be made promptly when the expert is retained and a motion for leave to present testimony by the expert must be filed. Prompt disclosure after the deadline, however, does not necessarily ensure that the expert's testimony or evidence will be allowed into the record at trial. The Board will decide on a case-by-case basis how to handle a party's late identification of experts.

Pretrial disclosures are governed by Federal Rule 26(a)(3), but the Board does not require pretrial disclosure of each document or other exhibit that a party plans to introduce at trial under Rule 26(a)(3)(C). Further, because the trial schedule in a Board proceeding employs alternating testimony periods with gaps between them, the due dates for pretrial disclosure of witnesses expected to testify, or who may testify if the need arises, will be different for each party and will be specified in the Board's institution order. In essence, each party will make its pretrial disclosures under Federal Rules 26(a)(3)(A) and 26(a)(3)(B) fifteen (15) days prior to its testimony period. Witnesses who are expected to or may testify by affidavit, in accordance with a written stipulation of the parties under Trademark Rule 2.123(b), 37 CFR 2.123(b), must be disclosed under Federal Rule 26(a)(3)(A) along with disclosure of witnesses who are expected to or may testify by giving oral testimony.

A party may object to improper or inadequate pretrial disclosures and may move to strike the testimony of a witness for lack of proper pretrial disclosure.

Pretrial disclosure of plans to file notices of reliance is not required. The notice of reliance is a device for introduction of evidence that is unique to Board proceedings. There are established practices covering what can be introduced by notice of reliance, how it must be introduced, and for objecting to, or moving to strike, notices or material attached thereto. There is less opportunity for surprise or trial by ambush with notices of reliance because they are most often used to introduce discovery responses obtained from an adversary, printed publications in general circulation, or government documents generally available to all parties. A party planning to introduce an adverse party's discovery deposition, or part thereof, need not disclose such plans in order to comply with Federal Rule 26(a)(3)(B), which covers introduction of depositions in lieu of testimony under Federal Rule 32(a).

III. Removal of Option To Make Submissions on CD–ROM

The Office has removed from Trademark Rule 2.126, 37 CFR 2.126, the option to file submissions in CD–ROM form. CD–ROMs have rarely been utilized by parties and have presented technical problems for the ESTTA/TTABIS systems.

IV. Clarification of Rule on Briefing of Motions

The Office has amended Trademark Rule 2.127, 37 CFR 2.127, to clarify that a table of contents, index of cases, description of record, statement of the issues, recitation of facts, argument and summary all count against the limit of twenty-five (25) pages for a brief in support of a motion or in response to a motion and the limit of ten (10) pages for a reply brief.

Discussion of Specific Rules

Title 37 of the Code of Federal Regulations, Part 2, is amended as follows:

[2.99(b) to (d)]

Sections 2.99(b) to (d) currently set forth certain procedures for processing an application for registration as a lawful concurrent user, and for institution of a concurrent use proceeding at the Board. Sections 2.99(b), (c) and (d)(1) are amended to shift applicant's time to furnish copies of applicant's application, specimens and drawing until after the Board's notification of the proceeding; and to indicate that the Office may transmit the notification of proceedings via e-mail to any party that has provided an e-mail address.

[2.101(a), (b) and (d)]

Section 2.101(a) currently sets forth that an opposition proceeding is commenced by filing a timely opposition, together with the required fee, in the Office. Section 2.101(a) is amended to specify that proof of service on applicant or its attorney or domestic representative of record in the USPTO, at the correspondence address of record in the USPTO, must be included with the notice of opposition.

Section 2.101(b) currently sets forth who may file a notice of opposition and how the notice must be signed. Section 2.101(b) is amended to reflect the new requirement in § 2.101(a) that an opposer include proof of service on the applicant with its notice of opposition. It also explains who must be served, specifies that the correspondence address of record in the USPTO is to be used, and specifies the steps opposer must take if the service copy of the notice of opposition is returned to opposer as undeliverable.

Section 2.101(d)(4) currently sets forth that the filing date of an opposition is the date of its receipt in the Office with the required fee. Section 2.101(d)(4) is amended to add proof of service on applicant or its attorney or domestic representative of record in the USPTO, at the correspondence address of record in the USPTO, to the requirements for receiving a filing date for the notice of opposition; and to include a clarifying reference to filing by ''Express Mail'' under § 2.198.

[2.105(a) and (c)]

Section 2.105(a) currently sets forth that the Board will prepare a notification of the filing of a notice of opposition. Section 2.105(a) is amended to cross-reference §§ 2.101 and 2.104 regarding proper form for and proper service of a notice of opposition, and to indicate that the Board may transmit the notification of proceedings via e-mail to any party that has provided an e-mail address.

Section 2.105(c) currently sets forth that the Board will forward copies of the notice of opposition, exhibits and notification of the proceeding to an applicant. Section 2.105(c), in its introductory text, is amended to delete the reference to forwarding of copies of the notice of opposition and exhibits by the Board, and to reflect the amendments to § 2.101 that now require the opposer to serve the notice of opposition and exhibits directly on the applicant, attorney or domestic representative.

[2.111(a) to (c)]

Section 2.111(a) currently sets forth that a cancellation proceeding is commenced by the filing of a timely petition for cancellation, together with the required fee, in the Office. Section 2.111(a) is amended to specify that proof of service on the owner of the registration, or the owner's domestic representative of record in the USPTO, at the correspondence address of record in the USPTO, must be included with the petition for cancellation and fee.

Section 2.111(b) currently sets forth who may file a petition for cancellation, how the petition must be signed and certain provisions regarding when a petition may be filed. Section 2.111(b) is amended to reflect the new requirement in § 2.111(a) that the petitioner must include with its petition for cancellation proof of service on the owner of the registration, or domestic representative of the owner of record in the USPTO, to specify that the correspondence address of record in the USPTO is to be used, and to specify the steps petitioner must take if the service copy of the petition for cancellation is returned to petitioner as undeliverable.

Section 2.111(c)(4) currently sets forth that the filing date of a petition for cancellation is the date of its receipt in the Office with the required fee. Section 2.111(c)(4) is amended to add proof of service on the owner of the registration, or domestic representative of record in the USPTO, at the correspondence address of record in the USPTO, to the requirements for receiving a filing date for the petition for cancellation; and to include a clarifying reference to filing by ''Express Mail'' under § 2.198.

[2.113(a) and (c)]

Section 2.113(a) currently sets forth that the Board will prepare a notification of the filing of a petition for cancellation. Section 2.113(a) is amended to cross-reference §§ 2.111 and 2.112 regarding proper form for and proper service of a petition for cancellation, and to indicate that the Board may transmit the notification of proceedings via e-mail to any party that has provided an e-mail address.

Section 2.113(c) currently sets forth that the Board will forward copies of the petition for cancellation, exhibits and notification of the proceeding to the respondent (owner of the registration). Section 2.113(c) is amended to delete the reference to forwarding of copies of the petition for cancellation and exhibits by the Board, and to reflect the amendments to § 2.111 that now require the petitioner to serve the petition for cancellation and exhibits directly on the

owner of the registration, attorney or domestic representative.

[2.113(e)] [remove and reserve]

Section 2.113(e) currently sets forth that the Board may allow a petitioner time to correct an informality in a defective petition for cancellation. Section 2.113 is amended to remove and reserve paragraph (e) to conform the rule to the existing practice whereby the Board no longer advises petitioners of defects in petitions for cancellation.

[2.116(g)] [add]

Section 2.116 currently sets forth an explanation of the applicability of the Federal Rules of Civil Procedure in Board inter partes trademark proceedings, and equates particular terms used in the Federal Rules to terms used in inter partes trademark proceedings. Section 2.116 is amended to add new paragraph (g). Section 2.116(g) provides that the Board's standard protective order, available via the Office's Web site or upon request made to the Board, is applicable to all inter partes trademark proceedings, unless the parties agree to, and the Board approves, an alternative protective order, or unless a motion by a party to enter a specific protective order is granted by the Board.

[2.118]

Section 2.118 currently sets forth that the Office may provide notice of a proceeding by publication in the Official Gazette, when a notice of a proceeding mailed to a registrant is returned to the Office as undeliverable. Section 2.118 is amended to also allow for notice by publication when a notice mailed to an applicant is returned as undeliverable.

[2.119(a) and (b)]

Section 2.119(a) currently sets forth provisions regarding proof of service requirements for papers filed in Board inter partes trademark proceedings, but specifies that proof of service is not required for certain papers that the Office serves. Section 2.119(a) is amended by striking out the list of exceptions to reflect amendments to other sections that now require opposers, petitioners and concurrent use applicants to serve papers previously served by the Office. Section 2.119(a) also is amended to change ''Patent and Trademark Office'' to ''United States Patent and Trademark Office,'' and to make the singular ''notice of appeal'' the plural ''notices of appeal.''

Section 2.119(b) currently sets forth the permissible means for a party to serve a paper on an adverse party. Section 2.119(b) is amended to add paragraph (6), which will allow parties by agreement to meet their service obligations by utilizing fax or e-mail.

[2.120(a), (d) through (j)]

Section 2.120(a) currently sets forth various general provisions regarding discovery in Board inter partes trademark proceedings, including the extent to which the Federal Rules of Civil Procedure are applicable, and the timing and sequence of the discovery period and various discovery activities. Section 2.120(a) is amended to separate it into three paragraphs. Paragraph (1) discusses the applicability of the federal rules provisions relating to a conference of the parties to discuss disclosures, discovery and possible settlement, and the requirements for automatic disclosures. Paragraph (1) also explains that the Board will, by order, specify the dates for conferencing, disclosures and discovery. Paragraph (2) provides more specific information regarding the deadlines or due dates for conferencing, disclosures, and discovery; and explains that the parties by stipulation approved by the Board, or a party by motion granted by the Board, may seek to reset various deadlines or due dates or to alter their disclosure obligations. Paragraph (3) provides that a party must make its initial disclosures prior to seeking discovery, provides a deadline for taking discovery depositions and for serving various types of discovery requests, and for serving responses to discovery requests, and provides that the parties by stipulation approved by the Board, or a party by motion granted by the Board, may seek to alter the obligation to make initial disclosures prior to seeking discovery or to reset the deadlines relating to discovery.

Section 2.120(d)(1) currently sets forth the limit on the number of interrogatories a party may serve, means by which the parties or a party may seek leave to exceed the limit, and procedures for either objecting to interrogatories alleged to be in excess of the limit or seeking to compel responses. Section 2.120(d)(1) is amended to clarify that a motion or stipulation of the parties to allow interrogatories in excess of the limit requires approval of the Board.

Section 2.120(e) currently sets forth various provisions regarding filing and required support for motions to compel. Section 2.120(e) is amended to make provisions regarding a motion to compel applicable to discovery and initial and expert disclosures.

Section 2.120(f) currently sets forth various provisions by which a party from whom discovery is sought may seek a protective order from the Board. Section 2.120(f) is amended to make provisions regarding a motion for a protective order applicable to discovery requests and required initial disclosures.

Section 2.120(g) currently sets forth provisions regarding how and when a party may move for entry of sanctions for failure of an adverse party to provide discovery or comply with an order of the Board relating to discovery. Section 2.120(g), in paragraph (1) is amended to make its provisions applicable to Board orders relating to disclosures and to provide a deadline for filing a motion for sanctions for a party's failure to participate in a discovery conference.

Section 2.120(h)(2) currently sets forth provisions regarding motions to test the sufficiency of responses to requests for admissions. Section 2.120(h)(2) is amended to state that filing a motion to test the sufficiency of responses to requests for admissions shall not toll the time for a party to comply with disclosure obligations, to respond to outstanding discovery requests, or to appear for a noticed deposition.

Section 2.120(i) currently sets forth provisions regarding the availability and use of telephone conferences and the possibility that parties may have to meet at the Board for a pretrial conference. Section 2.120(i) is amended to clarify language used in paragraph (i)(1), to conform titles used in paragraph (i)(2) to existing titles, and to specify that the existing provision through which the Board may require parties to attend a conference at the Board's offices can involve discovery or disclosure issues.

Section 2.120(j) currently sets forth provisions governing the use of discovery depositions and discovery responses by the deposing or inquiring party. Section 2.120(j), in paragraphs (3) and (5) through (8), is amended to provide that written disclosures and disclosed documents shall be treated in essentially the same manner as information and documents obtained through discovery requests; and to remove a reference to past Board practice whereby filings related to discovery that should not have been filed with the Board were returned to the parties.

[2.121(a) and (d)]

Section 2.121(a) currently sets forth the process by which the Board issues a trial order setting various deadlines, and provisions for resetting deadlines by stipulation or motion. Section 2.121(a) is amended to state that deadlines for pretrial disclosures will be

included in the Board's trial order, that provisions for resetting dates apply to pretrial disclosures and testimony period dates, and to delete (and reserve) paragraph 2.

Section 2.121(d) currently sets forth how parties should file stipulations resetting testimony periods. Section 2.121(d) is amended to account for stipulations resetting pretrial disclosure deadlines and testimony periods.

[2.121(e)] [add]

Section 2.121(e) is added to explain what is required of a party when it makes its pretrial disclosures.

[2.122(d)]

Section 2.122(d), in paragraph (1), currently sets forth provisions whereby a party in position of opposer or petitioner may make its registration(s) of record with its pleading. Section 2.122(d), in paragraph (1), is amended to conform to existing practice by removing the requirement for a party in position of opposer or petitioner to file two copies when making a pleaded registration of record with its pleading, and to allow the party to rely on printouts from Office electronic database records establishing status and title of a registration.

[2.123(e)]

Section 2.123(e) currently sets forth provisions regarding the examination of witnesses.

Section 2.123(e), in paragraph (3), is amended to provide that a party may object to improper or inadequate pretrial disclosures and may move to strike the testimony of a witness for lack of proper pretrial disclosure.

[2.126(a)]

Section 2.126(a) currently sets forth provisions regarding the filing of submissions on paper, and their related exhibits. Section 2.126(a), in paragraph (6), is amended to reflect the removal of § 2.126(b).

[2.126(b)] [remove and reserve]

Section 2.126(b) currently allows a party to make submissions on CD–ROM. This section is deleted and reserved.

[2.127(a), (c) and (e)]

Section 2.127(a) currently sets forth provisions regarding the briefing of motions.

Section 2.127(a) is amended to clarify certain provisions relating to briefing of motions and to conform them to existing practice.

Section 2.127(c) is amended to conform titles used in the section to current titles and to correct a typographical error.

Section 2.127(e) currently sets forth provisions regarding filing and briefing motions for summary judgment. Section 2.127(e) is amended to provide that a party generally may not file a motion for summary judgment before it has made its initial disclosures; and to provide that a party may submit written disclosures and disclosed documents when briefing a motion for summary judgment.

[2.129(a)]

Section 2.129(a) is amended to conform titles used in the section to current titles.

[2.133(a) and (b)]

Sections 2.133(a) and (b) currently set forth provisions regarding the amendment of an application or registration involved in an inter partes trademark proceeding. Sections 2.133(a) and (b) are amended to conform the sections to current Office practice.

[2.142(e)]

Section 2.142(e) is amended to conform titles used in the section to current titles.

[2.173(a)]

Section 2.173(a) currently sets forth provisions regarding amendment of a registration involved in an inter partes trademark proceeding. Section 2.173(a) is amended to conform the provisions in the section to current Office practice.

[2.176]

Section 2.176 currently sets forth provisions regarding amendment of a registration involved in an inter partes trademark proceeding. Section 2.176 is amended to conform the provisions in the section to current Office practice.

Response to comments: The Office published a Notice of Proposed Rule Making (NPRM or proposed rule) in the **Federal Register** at 71 FR 2498 (Jan. 17, 2006), in the Official Gazette at 1303 TMOG 58 (February 14, 2006), and posted the notice on the Office's Web site (*http://www.uspto.gov*) and at *http://www.regulations.gov*. The comment period was originally set to close on March 20, 2006. Six comments requested only an extension of the comment period and/or a public hearing. Numerous others included specific comments but also requested an extended comment period and/or a public hearing. As a result of the many requests for an extension and/or hearing, the USPTO published a notice reopening the comment period until May 4, 2006, i.e., forty-five (45) days beyond the original deadline, in the **Federal Register** at 71 FR 15097 (March 27, 2006), and posted that notice on the Office's Web site and at *http://www.regulations.gov*. All told, the Office received comments from the American Bar Association Section of Intellectual Property Law (ABA–IPL), American Intellectual Property Law Association (AIPLA), the Intellectual Property Owners Association (IPO), the International Trademark Association (INTA), the New York State Bar Association Intellectual Property Law Section (NYSBA–IPL), three businesses, eleven attorneys in their individual capacities, and eight law firms. In addition, ABA–IPL, AIPLA, IPO and INTA, while maintaining their separate comments, also submitted consensus views on some subjects of the proposed rules. A number of rule amendments suggested in the comments, though meritorious, cannot be adopted at this time because they are outside the scope of the present rule making. Virtually every proposal received at least some support. Many proposals, however, prompted either criticism or requests for clarification. Finally, many who provided comments also offered alternatives to promote the stated goals of the proposed rules. The comments and the Office's responses to the comments follow:

Comments subject 1 (Service by Plaintiffs): Many comments addressed the Office's proposal to have plaintiffs serve on defendants copies of complaints or, in the case of a concurrent use applicant, its claim of right to a registration. Many comments stated no objection in principle to a service requirement, but sought clarification of the type of service that would be sufficient and argued that personal service should not be required. Most comments addressing service also sought clarification of whether a plaintiff would have any duty to investigate ownership of a mark, application, or registration, and argued that there should be no such duty beyond reference to Office records. Many also sought clarification of what was meant by the phrase ''correspondence address of record.''

Response: The Office is, in this final rule, proceeding with a requirement that plaintiffs in inter partes proceedings serve on defendants copies of complaints or claims of right to a concurrent use registration on defendants. In the affected rules and in the Supplementary Information portion of this notice, the Office has clarified the meaning of correspondence address of record. It further clarifies that a plaintiff has no duty to investigate other than to refer to Office records, that

personal service is not required, and that all that is required is service and proof of service pursuant to § 2.119.

Comments subject 2 (Service of Additional Copies by Plaintiffs): Many comments argued against the requirement in the proposed rules that a plaintiff serve additional copies of its complaint or claim of right to a concurrent use registration on parties the plaintiff might have reason to believe had an ownership interest in a mark, application, or registration, even if not shown by Office records to have such an interest. One comment suggested that a petitioner should serve a copy of its petition for cancellation on the attorney, if any, that prosecuted the application resulting in issuance of a registration; but most comments argued against such a practice as a burden on the attorney, who may no longer represent the client.

Response: The Office recognizes that a plaintiff may conduct independent investigations prior to commencing a proceeding and may thereby discover an ownership interest in a party not reflected in Office records, or a more current address for a prospective defendant. The Office did not propose to require any investigation prior to commencement of a proceeding, but only recognized that such investigations do occur. The Office intended by this proposal only to enhance the prospects of having any real party in interest joined as a defendant and any subsequent judgment be binding on the real party in interest. The Office has withdrawn this proposal and retained only a requirement that the plaintiff serve the defendant or defendants revealed by reference to Office records, at the correspondence address(es) of record.

Comments subject 3 (Informing the Board of Returned Service Copies): Several comments sought clarification of the proposed requirement that a plaintiff inform the Board of any return to the plaintiff of an undeliverable service copy of its complaint or claim of right to a concurrent use registration. In particular, these comments sought clarification of the plaintiff's obligations when the service copy is returned. One comment, focusing on the proposed requirement that the Board be notified ''within 10 days'' of a returned service copy, sought clarification as to the event that would start the count and also sought five additional days.

Response: The Office is proceeding with the requirement and is providing the requested clarifications in the Supplementary Information section of this notice. There is no obligation on a plaintiff to investigate the failure of service; but if the returned service copy includes a new address for the defendant or if the plaintiff voluntarily investigates and uncovers a new address, then this information must be included in the report of the failure of service. There is no obligation on the plaintiff to serve a defendant at any new address. There are no specific obligations regarding how the plaintiff informs the Board that a service copy has been returned. The plaintiff can inform the Board in any manner that it might otherwise use to communicate with the Board, as specified in §§ 2.126 and 2.191. The ten (10) days within which a party receiving a returned service copy should notify the Board of the return is measured from the date of delivery to the serving party of the returned service copy. The Office has decided not to extend that time period to fifteen (15) days. The Board will effect service on the defendant whose service copy was returned, utilizing the newer correspondence address information the plaintiff has obtained, if any, or information the Board may obtain through its own investigation. In the Board order effecting service, the Board will clarify what address is to be used for service thereafter, and amend, if necessary, any deadlines or dates that were set in the institution order. If a current correspondence address for the defendant cannot be obtained, then the Board may effect service by publication in the Official Gazette. Service by publication will include a web address that will allow the defendant to view the complaint or concurrent use application through the Office's Web site.

Comments subject 4 (Correspondence by e-mail): One comment discussed the prospective expanded use of e-mail by the Board when issuing notices that proceedings have been instituted. Specifically, the comment proposed that the rules explaining that the Board may use e-mail to notify parties of the commencement of a proceeding be amended to allow for forwarding of notices to multiple e-mail addresses for a party. Another comment focused on use of e-mail by parties when forwarding service copies, and sought confirmation that service by e-mail does not result in an additional five (5) days to respond to the served paper, as is the case with other means of service, pursuant to § 2.119(c).

Response: The proposed rules specifying that the Board may use e-mail to notify a party of a proceeding can be read to allow the Board to utilize more than one e-mail address without need of further amendment. Whether the Board will use more than one e-mail address, however, is a discretionary matter to be decided on a case-by-case basis. As for agreed use by parties of e-mail or fax for forwarding of service copies, the Office confirms that § 2.119(c) would not apply to service by electronic transmission (e-mail or fax) under § 2.119(b)(6).

Comments subject 5 (Universal applicability of the Board's Standard Protective Order): Numerous comments addressed the proposal to make the Board's Standard Protective Order applicable in all inter partes proceedings. Many of these comments argued that the standard order does not provide necessary protections in all possible circumstances. Some comments noted that the standard order might not provide necessary protection when dealing with a pro se party, or after the conclusion of the proceeding. One comment noted that the Board has no ability to issue injunctions or contempt rulings and argued that possible entry of a sanction in a Board proceeding or a disciplinary action against an attorney would not provide immediate protection or remedy economic harm. Some of the comments concerned with post-proceeding issues argued that the Board should make the standard protective order applicable during and after the proceeding, or should require the parties to sign the protective order, so as to create a contract that may provide a cause of action after the conclusion of the proceeding if protected information was revealed by a party after conclusion of a proceeding.

Numerous comments argued that the Board should allow parties time to negotiate a protective order of their own before imposing the standard order. Some comments indicated that if the Board was to require fewer initial disclosures and more closely follow what is required under Federal Rule 26(a)(1), then the asserted deficiencies in the standard protective order would be less problematic for parties. One comment among this latter group suggested that the standard order would not need to be universally applied if initial disclosures were lessened, apparently on the theory that limited disclosures would not likely involve any information in need of protection.

Response: The standard protective order was created ''in response to requests from parties involved in [Board] cases'' and was first published in the Official Gazette on June 20, 2000, at 1235 TMOG 70. The announcement explained that parties could agree to use the standard order or could use it as a template or starting point for crafting an order more to their liking. The

announcement also explained that the Board may make orders designed to facilitate discovery and trial and that the Board therefore could impose the standard order in any case in which it would be appropriate to do so. The standard order is also discussed in the Board's manual of procedure, the TBMP, and the order itself is contained in the appendix of forms included in the manual.

The Board's interlocutory attorneys have routinely applied the standard order when parties are unable to agree on terms for a protective order and progress in discovery is being thwarted by the absence of a protective order. The Board's authority to impose the order has been upheld despite a challenge raised in a petition to the Commissioner. See Petition Decision Nos. 01–515 (July 2, 2002) and 01–515(r) (August 7, 2003), arising out of Opposition No. 91112956 (the latter petition decision viewable in the TTABVUE electronic proceeding file for the opposition). While the matter has not been empirically studied, it is believed that in the vast majority of cases in which the Board has imposed the order, the parties have complied with it without further modification. Nonetheless, the standard protective order has always been subject to supplementation or modification by the parties, upon agreement approved by the Board or upon motion of any party granted by the Board. This practice does not change under this final rule.

While many of the comments received in response to the proposed rule implicitly assume that the universal application of the standard order to inter partes cases was proposed only because of the initial disclosures required in the proposed rule, the reason for the rule change is broader. Universal application of the standard protective order should reduce some existing motion practice relating to discovery, regardless of the extent of initial disclosures required by rule. Accordingly, although this final rule, in response to many comments, scales back the extent of required initial disclosures, universal application of the standard protective order remains a part of this final rule. As noted above, the parties in any inter partes case are free to negotiate supplementary terms or to substitute an alternative order to which they may agree; and any party is free to move for addition of supplementary terms or substitution of a different order.

As for the comment that addressed possible breach of the protective order during a proceeding, it is noted that access to a party's confidential information is not provided as a matter of course in Board proceedings and confidential information need only be provided in response to a proper and relevant discovery request or when the party chooses to use such information in support of its case at trial. The imposition of the standard protective order provides assurances to a party that may need to reveal confidential information in response to a discovery request, so as to avoid adverse consequences that may result from failure to respond, or in support of its case at trial. Further, the attorney or party or any other individual receiving confidential information in response to a discovery request or during trial, may only obtain the information if it abides by the standard protective order's provisions. The standard protective order covers parties and their attorneys during a proceeding, defining the individuals that are encompassed by each designation. In addition, each independent expert or consultant, non-party witness, or individual not falling within the definition of party or attorney must sign an acknowledgment form agreeing to be bound by the standard protective order during and after the proceeding, as a condition for gaining access to protected information through a party or attorney. Thus, an attorney, party or non-party individual receiving confidential information does so voluntarily and, in return for access to the confidential information, is obligated to the disclosing party and the Board to abide by the provisions of the protective order, thereby providing the disclosing party with legal protection for harm it may suffer by any breach. Allegations of such a breach are very rare or nonexistent in Board proceedings, and no comment pointed to a reported incident involving breach. The Board's power to order sanctions for breach during a proceeding, and the Office's powers to discipline attorneys or sanction attorneys and parties are viewed as effective deterrents to breach.

As for the comments noting that the standard order does not account for all circumstances that may be presented by all inter partes cases, the Office acknowledges the accuracy of these observations. However, the Office also notes the standard order was never intended to account for all situations, and the parties are free to seek additional protections by agreement or motion. Further, the Board's interlocutory attorneys have experience dealing with situations in which a party's access to information may have to be restricted or precluded, including situations involving pro se parties.

As for the comments noting that universal application of the standard order does not assist parties if protected information is revealed after the conclusion of a proceeding, it is not at all clear that parties can be compelled to enter contracts that will govern their actions after the Board proceeding has concluded. While the Board encourages parties to consider creating a contract, the parties are responsible for the protection of their confidential information outside of a Board proceeding. See *Fort Howard Paper Co.* v. *G.V. Gambina Inc.*, 4 USPQ2d 1552 n. 3 (TTAB 1987) (''it is the function of counsel to decide what is in the best interest of the party''). On the other hand, because a party receiving confidential information in a Board proceeding voluntarily takes on obligations that benefit the disclosing party and the Board, a disclosing party may well have remedy at law if a breach were to occur after a Board proceeding concluded. In fact, the TBMP refers to one case in which a claim brought in a federal district court, alleging breach after conclusion of the Board proceeding, survived a motion to dismiss. See *Alltrade Inc.* v. *Uniweld Products Inc.*, 946 F.2d 622, 20 USPQ2d 1698 n.11 (9th Cir. 1991). In addition, the standard protective order provides that information or material disclosed in accordance with the terms of the order is for use solely in connection with the Board proceeding and must be returned to the disclosing party at the conclusion of the proceeding. The obligation to return protected material includes memoranda, briefs, summaries and the like that discuss or ''in any way refer to'' protected information or material. Therefore, opportunities for breach after a proceeding are very limited. As with the posited situations involving breach during a proceeding, allegations of breach after conclusion of a proceeding are extremely rare.

Comments subject 6 (Discovery Conference): Most comments did not specifically address the discovery conference requirement. One comment ''generally supports'' the conference requirement but did not add any suggestions or recommendations. One comment suggested that the final rule specify the subjects to be discussed during the conference. The same comment recommended that any Board Interlocutory Attorney or judge that is involved in a conference not be involved in the management or decision of the case, to ensure impartiality. Finally, this comment also recommended that the final rule be clarified to specify that the provision of

the federal rules that requires parties, when in court, to file a written report on their conference is not applicable in Board proceedings and that a written report would be necessary in a Board case only when directed by a participating Board attorney or judge. One comment supportive of the conference requirement suggested mediation training for Board professionals designated to conduct conferences. One comment critical of the conference requirement noted that the proposed rule is silent on the extent of involvement by a participating Board professional and views the conference as an unnecessary formality because of the existing flexibility parties have to manage discovery. One comment argued that counsel experienced in Board practice will bear a burden of educating pro se parties, foreign individuals or entities, or even U.S. attorneys that are not well versed in Board practice. One comment suggested that the availability of Board professionals to participate in the conferences might create a burden on the Board. One comment argued that conferences will be more successful if ''a member of the Board were actively involved,'' and is taken as a recommendation that an Administrative Trademark Judge participate, rather than a Board Interlocutory Attorney.

Response: The final rule retains the requirement for a conference to discuss the nature and basis of the involved claims and defenses, the possibility of settlement of the case or modification of the pleadings, and plans for disclosures and discovery. The final rule has been amended to clarify that the parties shall discuss the subjects outlined in Federal Rule 26(f) and any other subjects that the Board may, in an institution order, require to be discussed. Subjects the Board may require the parties to discuss could include, for example, plans to supplement or modify the Board's standard protective order, or to substitute a different order, whether the parties want to seek mediation, arbitration or to proceed under the Board's Accelerated Case Resolution option, and whether the parties want to enter into any stipulations of fact or stipulations as to the manner in which evidence may be presented at trial. In a conference, parties are free to discuss any additional topics that could promote settlement or efficient adjudication of the Board proceeding. Neither Federal Rule 26(f) nor any listing of subjects for discussion that the Board may include in an institution order should be read as limiting what the parties may discuss. This final rule also clarifies that the parties are not required to file a written report on their discussions except under certain circumstances.

The Office has chosen not to provide that only Board judges, rather than Board attorneys, will participate in discovery conferences. It is anticipated that the Board will provide training to its Interlocutory Attorneys and Administrative Trademark Judges, so that a Board professional occupying either position will be able to provide effective assistance to the parties during a conference. In addition, while it is anticipated that Board attorneys will participate in conferences far more often than Board judges, the final rule allows the Board to draw from both groups of professionals to provide the Board flexibility in scheduling and deployment of personnel. In this regard, it is noted that the Board cannot predict the percentage of inter partes cases in which a party will request involvement of a Board attorney or judge. In informal discussions with members of the bar, predictions of the extent to which parties will request involvement of a Board professional have varied widely, with some suggesting that there will be many requests for Board participation and others suggesting that if Board professionals do not plan to directly and substantially involve themselves in detailed settlement discussions, then requests for Board involvement in conferences may be limited.

The Office anticipates that Board professionals involved in conferences will fill the educator's role that one comment suggested would have to be filled by experienced counsel. Any experienced counsel who fears being forced into the role of educator for a pro se adversary or less experienced adverse counsel can request the participation of a Board professional. The extent of involvement of a Board professional in a conference will necessarily vary depending on the relative expertise and needs of the parties and/or their counsel.

The Office anticipates that involvement of a participating Board professional in the settlement aspect of a conference will be rather limited, in comparison to the involvement of a district court judge. The Board professional may ascertain whether the parties have had settlement talks and whether they have made progress, may ensure that the parties know about mediation, arbitration and the Board's Accelerated Case Resolution option, and may inquire whether the parties desire additional time after the conference to discuss settlement. The Office does not anticipate, though it cannot rule out, participation of a Board professional in discussions concerning assignments, licenses, restrictions on use, conditions of phase-out agreements, terms of consent agreements or the like. Similarly, in discussing claims and defenses and possible amendment of pleadings, it is anticipated that involved Board professionals will limit their observations to whether claims or defenses are within the Board's jurisdiction and the relative difficulty of proving a particular claim or defense, given the applicable law. It is unlikely a Board professional will be directly involved in discussions about what evidence a party believes it will be able to use to support a claim or defense, the good faith or bad faith of a party, or the relative equities of the parties' respective positions. Because the Office does not anticipate that Board professionals typically will be intimately involved in discussing possible terms of settlement, or providing evaluations of a particular party's chances of success on a particular claim or defense, it is not anticipated that a Board professional's involvement in these aspects of the discovery conference will present a risk that the Board professional will become partial to one party or another. The other aspect of conferences, i.e., discussing plans for disclosure and discovery will involve a more mechanical exercise. Involved Board professionals will participate as needed to confirm for the parties how Board rules and applicable federal rules operate, answer questions the parties may have about deviating from those rules, and to aid the parties in crafting a plan that will ensure efficient compliance with obligations.

Comments subject 7 (Initial Disclosures): Perhaps the greatest source of concern and most frequently addressed subject was the proposal for initial disclosures that would obviate the need for a party to seek certain information through service of discovery requests. The proposed rule did not specify what should be disclosed, as does Federal Rule 26(a)(1), but the ''Background'' section of the notice of proposed rule making noted that a party generally would be found to have met its initial disclosure obligations if the party provided information to adverse parties on any of a number of particular subjects, ''as applicable in any particular case.'' Many comments reflected an assumption that every party, in every case, would be required to make initial disclosures on the subjects listed in the Background section of the NPRM, and argued that such a requirement would be more

onerous than the subjects covered by Federal Rule 26(a)(1). Numerous comments argued that disclosure would burden larger plaintiffs and foreign parties more than pro se or small entity defendants or applicants whose applications are based on intent to use. However, one comment argued that a small entity or pro se party would suffer the greater burden. One comment suggested that much information about a party, especially a large party, can be obtained from the internet and disclosures or discovery then become merely a tool for harassment of the large party.

Numerous comments argued that disclosures should not be required until it is clear that a defendant intends to defend the action, which would be shown by the filing of an answer. Many comments noted that most Board cases settle and therefore initial disclosures will be unnecessary in most cases. Other comments asserted that traditional discovery devices work well enough and that initial disclosure is not necessary. One comment asserted that disclosure would require a party to disclose information helpful to its adversary and that the Board proposal to allow introduction of disclosures in the same way that discovery responses may be introduced in a Board proceeding would put the disclosing party in the position of aiding its adversary. Some comments asserted that once a party has made significant disclosures it will be less likely to settle. Some comments argued that initial disclosures would lead to increased motion practice regarding the sufficiency of disclosures and/or whether sanctions should be entered for failure to make sufficient disclosures.

Some comments supported the use of initial disclosures in principle but concluded the proposed rule requires further clarification. These comments suggested that disclosure obligations be articulated in the trademark rules themselves and not in the Background or Supplementary Information section of a notice of rule making or on the Board Web site. Among those who offered alternatives to the proposed rule, some proposed that the Board follow Federal Rule 26(a)(1)(A) & (B), or include in a trademark rule language roughly akin to the federal rule. Others suggested the federal rule as a starting point, with some additional disclosures reflective of what is generally at issue when a particular claim or defense is pleaded. Some comments distinguished between reasonable disclosure of ''objective'' or ''fact neutral'' matters and disclosure of subjective, overbroad or irrelevant information. Many comments argued for clarification that disclosures may be amended or supplemented.

Response: This final rule adopts the oft-suggested alternative of requiring only those initial disclosures set forth in Federal Rule 26(a)(1) (one comment stated ''the resources involved in producing this information are relatively minimal''). Thus, the Office has not adopted suggested alternatives that would require any additional disclosures, even if such matters might be considered ''objective'' or ''fact neutral.'' In fact, though the Board in its January 1994 Official Gazette announcement stated that it would not follow many of the Federal Rules of Civil Procedure as amended in December 1993, much of this final rule constitutes an effective retraction of that announcement. Much more Board practice will now follow the federal rules. Thus, the Office has decided that disclosure practice will be more predictable if only those initial disclosures contemplated by the federal rule are required in Board proceedings.

Many of the arguments against initial disclosures may have been rooted in the perception that every party in every case would have to disclose information regarding the list of subjects contained in the Background section of the proposed rule. Accordingly, since the initial disclosures required by this final rule will be much more limited, numerous comments no longer require a response. However, it is understood that numerous comments may also have been intended to apply to any form of required initial disclosures and are addressed as follows.

The Office has concluded that the relative burden for parties making initial disclosures is not a function of Federal Rule 26(a)(1) or the application of Federal Rule 26 to Board proceedings by Trademark Rules 2.116 and 2.120 but, rather, reflects the position the party occupies in the case and the claims or defenses the party chooses to assert. No comments asserted that Federal Rule 26(a)(1) creates unequal burdens and no comments asserted that utilization of initial disclosures in the district courts routinely creates unequal or unfair burdens. There is no effective means for ensuring that every party to every case will have to exert the same effort to comply with the requirement for initial disclosures. Information gleaned from the internet about an adverse party, and initial disclosures or discovery responses from that party, are not of equal evidentiary value. In fact, in cases before the Board, it is not unusual for motions to compel to result from discovery responses that do not provide information or documents and instead refer the inquiring party to a Web site. Therefore, the potential that disclosure or discovery rules could be used to harass an adversary is not seen as sufficient reason to rely on the availability of the internet as a sufficient substitute for disclosure and discovery procedures. A motion for a protective order is available to any party, large or small, that believes it is the subject of harassment by an adversary.

The argument that disclosure should not be necessary if a defendant defaults and that initial disclosures will not be necessary in the large percentage of Board cases that settle is dealt with infra in the discussion regarding the disclosure, discovery and trial schedule for a case proceeding under this final rule. Comments that predict increases in motion practice, or seek clarification regarding certain motions related to disclosures, are dealt with below, but also are addressed infra in the discussion of the comments regarding particular types of motions relating to disclosures.

It is not the Board's experience that traditional discovery requests always work so well as a mechanism for the exchange of routine information that initial disclosures would be of limited utility. As utilized in the district courts, and as it is expected they will be utilized in Board inter partes cases, initial disclosures eliminate the cost and time associated with seeking core information regarding the existence of and location of witnesses and documents. While the introduction of the use of initial disclosures in the courts prompted criticism that undue satellite litigation would result, the empirical study referenced in the Supplementary Information section did not find that to be a significant problem. Because the Board is adopting the same initial disclosure approach utilized in the district courts, it is likewise expected that there will not be significant problems with satellite litigation in Board cases. Moreover, the argument that initial disclosures unfairly require a party to aid its adversary was raised in connection with disclosure in the district courts under the federal rules. However, this has not been the case. Further, it appears that this concern may have been rooted in the perceived need to disclose more information under the proposed rule than is required by this final rule.

While some comments contended that parties to Board proceedings should not be able to introduce written disclosures or disclosed documents as affirmative evidence, the limited initial disclosures contemplated by this final rule are not

expected to provide many opportunities to utilize the disclosures as evidence. For example, the identification of witnesses and identifying information is itself of little evidentiary value. On the other hand, the Office notes that a party making initial disclosures has the option to produce copies of documents instead of disclosing information about the existence and location of documents. If copies of documents are produced in lieu of providing descriptions of documents and their locations, then these documents may have evidentiary value and the final rule merely proposes that they be treated in the same way as documents produced in response to discovery requests. In addition, if parties agree in a discovery conference to make greater use of reciprocal written disclosures of facts, as a less expensive mechanism for exchanging information than traditional discovery, then the written disclosures should be treated the same as discovery responses.

The provision of Federal Rule 26(e) regarding supplementation of disclosures and discovery responses will be applicable to Board inter partes proceedings.

Comments subject 8 (Interrogatory Limit): As with other subjects, comments on the proposed limit on the number of interrogatories varied. Some comments supported either the proposed limit of twenty-five (25) or something lower than the existing limit of seventy-five (75). Other comments, however, argued that reduction of the limit on the number of interrogatories would have adverse consequences. Among this latter group of comments, some noted that a reduction in interrogatories may lead to an increase in discovery depositions, which are more costly; others suggested that more motion practice may result, whether from parties seeking leave to exceed the limit or from parties objecting to interrogatories alleged to be in excess of the limit. One comment observed that if the Office was responsive to comments calling for less extensive mandatory initial disclosures, then the need for more interrogatories would remain. Some comments noted that although the federal courts have a limit of twenty-five (25) interrogatories, the courts generally do not count subparts, while the Board does, so a reduction in the limit without a change in the practice of counting subparts would represent a drastic reduction.

Response: A number of the comments against reducing the limit on interrogatories make a persuasive case why the limit should remain unchanged. Because the Board's practice of counting subparts is different from the practice in many courts, those familiar with Board practice have developed an understanding of the counting methodology. In addition, interrogatories are more cost-effective than depositions and have more utility when dealing with certain parties or in more complicated cases with numerous issues. Accordingly, the Office retracts the proposal to further limit interrogatories. The methodology for counting interrogatories shall remain unchanged.

Comments subject 9 (Expert Disclosures): Several comments observed that a distinction needed to be drawn between consulting/non-testifying experts, who should not be covered by disclosure rules, and testifying experts, who could be covered by disclosure rules. Other comments noted that the proposed rule did not specify, as does Federal Rule 26(a)(2), the extent of the disclosures to be made about expert witnesses, their qualifications, bases for their testimony and the like. A common concern was that the proposed rule called for disclosure of experts too early in discovery, because most parties will not decide whether to use experts until late in discovery or after discovery but prior to trial. Numerous comments suggested that expert disclosure not occur until after fact discovery was completed. Several related comments suggested that disclosure of experts be staggered, with plaintiff's disclosure followed by defendant's, followed by plaintiff's rebuttal. Some comments suggested tracking the Federal Rule 26(a)(2) provisions on when expert disclosure should occur. One comment suggested that the Office make clear that a resetting of the closing date for discovery would result in a resetting of the deadline for expert disclosure(s). While the proposed rule recognized that in some instances a party may not decide to use an expert witness at trial until after discovery had closed, and required prompt disclosure when the expert was retained after the close of discovery, one comment suggests that this provision may lead to abuse. Another comment requested further clarification on the availability of motions to strike or exclude expert testimony for untimely or insufficient disclosure. Almost universally, comments acknowledged that retention of an expert witness is likely to be quite expensive and is not frequently done in Board proceedings.

Response: The Office acknowledges the need to clarify aspects of the proposed rule as noted in various comments. The final rule provides for disclosure of expert testimony. This clarifies that disclosure of consulting experts is not required. In addition, the final rule specifies that disclosure of expert testimony shall occur in the manner and sequence of Federal Rule 26(a)(2), unless the Board provides alternate instructions in an institution order or subsequent order. This clarifies that the information to be disclosed is that provided for in the federal rule. As in the federal rule, this final rule allows the Board to specify staggered disclosure schedules, when necessary or appropriate, but specifies that in the absence of such direction by the Board, disclosure will occur in accordance with the federal rule. Because the federal rule requires disclosure ninety (90) days prior to trial, as applied in Board proceedings that will mean expert disclosures will occur with thirty (30) days remaining in the discovery period. The federal rule also allows for disclosure of a testifying expert retained solely to contradict or rebut the anticipated testimony of another party's expert thirty (30) days after the disclosure by the other party. This provision will likewise apply to Board practice.

As many of the comments noted, expert testimony is expensive and typically not utilized in Board proceedings. Accordingly, detailed information in the final rule setting forth deadlines for staggered expert disclosures after discovery and prior to trial is not included. Such provisions would delay trial in the vast majority of cases that do not involve use of expert testimony. Instead, the final rule provides the Board with flexibility to make any orders necessary to accommodate disclosure of experts and discovery regarding experts in the rare cases when expert testimony may be used. Following Federal Rule 26(a)(2) and allowing the Board flexibility to manage the disclosure and discovery process makes it unnecessary to include in the final rule a specific statement that expert disclosure deadlines will be reset when the close of the discovery period is reset. As noted, because of the potential for abuse when an expert is retained *after* the disclosure deadline set forth in the federal rule, or any deadline that may be specified by the Board in any order it may issue, the final rule also specifies that a party retaining a testifying expert *after* the deadline for disclosure will have to seek leave from the Board to utilize the expert. The Board anticipates deciding any such motion promptly or suspending proceedings until the motion can be decided, and the

amended rule allows the Board flexibility to choose either option.

Comments subject 10 (Pretrial Disclosures): Some comments suggested that pretrial disclosures are not necessary and there is little in the way of unfair surprise testimony in Board proceedings. One comment suggested that a pretrial disclosure deadline fifteen (15) days prior to trial, instead of the proposed thirty (30) days prior to trial, should be sufficient. A related comment suggested that disclosure deadlines be staggered, as are the testimony periods in Board cases. Two comments argued for clarification of certain terms or phrases in the proposed rule and one of these offered suggested alternate language. Some comments addressed the ramifications of inadequate or improper disclosure and/or the availability of motions directed to asserted inadequate or improper disclosure.

Response: For the Board cases that go through trial, motions to quash testimony depositions or to strike testimony after it has been taken are not frequent but, when filed, are particularly disruptive. Claims of unfair surprise due to asserted inadequate discovery responses and claims of improper or insufficient notice although not frequent are not unusual. While one comment suggested that the 30-day intervals between the parties' respective testimony periods provide opportunities to ameliorate the ill effects of unfair surprise, the Board's experience is to the contrary. Because trial is conducted without a Board professional present, there is little opportunity for swift rulings on motions alleging unfair surprise and when such motions arise, testimony periods often need to be adjusted or reset. The requirement for limited pretrial disclosures of the witnesses a party expects to present or may present if needed is maintained in this final rule. The suggestions to stagger pretrial disclosures and to schedule the first such disclosure closer to the time of trial have been adopted and are included in the final rule. The final rule also includes clarifying language on what is necessary to identify a witness and the expected topics of the planned testimony of the witness. The subject of motions addressing asserted improper or inadequate disclosure is covered below in the discussion of comments on motions relating to all required disclosures and the obligation to supplement required disclosures.

Comments subject 11 (Scheduling Issues; Accommodating Settlement Talks): Some comments argued for clarification that initial disclosures would not be required of a plaintiff if a defendant did not file an answer. One of these suggested that the de facto stay of initial disclosure obligations when there is a default or a motion under Federal Rule 12 be codified in any final rule. Some comments argued that the Board should be willing to suspend cases for settlement talks in the period after answer is filed but prior to a discovery conference. One comment posited that the 180-day (approximately six-month) discovery period is effectively shortened by thirty (30) days under the proposed rule, because a party may not seek discovery until it has made its initial disclosures and they are not due until thirty (30) days into the discovery period. One comment argued that proceedings in a case should not be suspended when a motion to compel disclosure or discovery is filed. The same comment sought clarification that a party should not be able to serve discovery after a motion to compel is filed but prior to issuance of a suspension order by the Board. A different comment sought clarification as to whether discovery requests can be served after issuance of a Board order suspending proceedings because a discovery motion has been filed. Two comments sought inclusion of entire proceeding schedules in the rules, i.e., all pleading, disclosure, discovery, and trial deadlines in a proceeding, rather than having the proceeding schedule set in an institution order.

Response: The proposed rule, and this final rule, provides that initial disclosures are not due until 30 days after discovery opens. Discovery itself does not open until 30 days after an answer is filed by a defendant. Thus, in any case of default or in any case in which a defendant files a motion under Federal Rule of Civil Procedure 12 directed to plaintiff's pleading, the Board will reset discovery, disclosure and trial dates. Similarly, when a defendant includes a counterclaim with its answer, the Board must reset these dates to account for the addition of the counterclaim. In short, there are many potential triggers that will prompt the Board to reset discovery, disclosure and trial dates and any attempt to codify them all in § 2.120 would be cumbersome. The final rule states that disclosure obligations may be reset by order of the Board and the Supplementary Information section of this final rule addresses the ways in which the Board may exercise this authority.

The Board has traditionally been very liberal in its willingness to suspend cases to accommodate settlement negotiations between parties. This practice is not codified in the trademark rules and will remain a discretionary practice that the Board may alter as necessary without need for any change in the rules. However, the Office clarifies that this final rule does not alter that traditional liberal approach except in one instance, namely, the Board is unlikely to suspend cases for settlement talks between the time an answer is filed and the deadline for a discovery conference. One point of the conference is for the parties to either discuss settlement or at least discuss whether, in light of the answer and the close of the pleadings, they may have a basis to begin settlement talks. In essence, comments calling for the Board to allow for suspension after answer but before the discovery conference do not address a proposed change in a rule but, rather, only address Supplementary Information included in the proposed rule. Accordingly, no change has been made in the final rule to codify discretionary practices relating to suspension to accommodate settlement talks.

A party's initial disclosures are due within thirty (30) days after discovery opens but may be served as soon as the party wishes. Given that both parties, once the pleadings are closed, should be able to start preparing their disclosures, and given the scaled back number and extent of disclosures required by this final rule, the parties may be able to exchange disclosures at their discovery conference or soon thereafter. In short, the parties can effectively use the entire 180-day period for discovery if they are prompt with service of their initial disclosures.

When the Office amended certain trademark rules governing Board practice in 1998, it included provisions providing for suspension of cases until discovery motions are decided. It may be possible for parties to continue with discovery activities while other discovery matters involved in discovery motions are decided, especially when the case is in the early part of the discovery period. However, the Board receives many motions relating to discovery late in the discovery period or after the discovery period has closed but prior to trial. In these cases in particular, it is more efficient to suspend proceedings and stay trial until discovery matters have been resolved. It would be cumbersome to have different rules governing suspension for discovery motions, depending on when such motions are filed. Accordingly, the Office retains the rule providing for suspension as a matter of course. The final rule has, however, been amended in response to some comments to

prevent service of additional discovery requests after filing and service of a motion relating to discovery, even prior to the Board's issuance of a suspension order.

The entire discovery and trial schedule, including disclosure deadlines, has not been included in the final rule. Dates must be reset when a defendant files a counterclaim, and often are reset once issues relating to a defendant's default or a defendant's motions under Federal Rule 12 are decided. Accordingly, it would be cumbersome and unwieldy to craft a rule that would account for all possible circumstances and permutations of dates.

Comments subject 12 (Motions relating to Disclosures): One comment argued that ''all-encompassing'' initial disclosures would lead to motions to compel such disclosures, motions challenging the sufficiency of such disclosures and motions to preclude introduction of testimony, documents or other evidence because of inadequate disclosures. Numerous other comments also asserted that such satellite litigation would result from the proposed required disclosures. Some of these comments suggested that such problems could be limited by adopting the disclosures of Federal Rule 26. One comment asserted that the Board lacks adequate sanctioning authority to stem evasive and incomplete discovery responses and may face the same problem with disclosures. Some comments sought clarification that supplementation of disclosures will be permitted and implied that this may ameliorate some motion practice relating to disclosures. One comment sought clarification that a party may move to strike or preclude expert testimony for improper or untimely disclosure. One comment suggested that a final rule permit motions to strike portions of testimony for inadequate or improper pretrial disclosure. One comment sought an explanation why a motion for sanctions for a party's failure to participate in a discovery conference must be filed prior to the due date for initial disclosures and also argued that if such a motion is filed proceedings should be suspended. Two comments argued that a party should be permitted to file a motion for summary judgment prior to making its initial disclosures if the ground for the motion for summary judgment is unrelated to the disclosures. One comment argued for, on the one hand, specification of the consequences for a party's failure to meet the deadline for pretrial disclosures and, on the other hand, procedures available to a party attempting to remedy its failure to make pretrial disclosures. This comment also sought clarification whether a party would have to respond to a motion for summary judgment if it believed the moving party had not made adequate initial disclosures, the process for determining whether an initial disclosure was adequate, clarification of the penalties for inadequate initial disclosures and clarification whether a party seeking imposition of such penalties would have to file a motion to compel. Another comment also sought addition of a rule specifying the consequences for failing to disclose facts as of the initial disclosure deadline.

Response: When the Federal Rules of Civil Procedure were amended to require disclosures, many commentators suggested that significant satellite litigation would result. The actual result was not nearly as severe as feared. Further, most of the comments advancing similar arguments in response to the proposed rule appear to be based on the extent and number of initial disclosures perceived to be a part of the proposed rule, which are significantly scaled back in this final rule. Specific consequences for failure of a party to make timely, proper or adequate disclosures have not been set out in the final rule. The Board must retain the discretion to tailor sanctions to the particular circumstances of each case. However, the final rules have been clarified in certain respects. A party may seek to strike any testimony or portions of testimony, whether or not from an expert, when related disclosures were untimely, improper or inadequate. The rule has been clarified to state that a motion to strike testimony of a witness for inadequate pretrial disclosure may seek to strike that portion of the testimony that was not adequately covered by the disclosure.

A motion for sanctions for a party's failure to participate in the discovery conference must be filed prior to the deadline for initial disclosures because one subject for discussion in such a conference is disclosure. Further, if the motion seeks a sanction that is potentially dispositive of the case, a suspension order is issued under the existing rules and no further amendment is needed to so specify. A motion to compel is the available remedy when an adversary has failed to make, or has made inadequate, initial disclosures or disclosures of expert testimony. Both of these types of disclosures are made during discovery, and a motion to compel must precede a motion for sanctions. A motion for sanctions is only appropriate if a motion to compel these respective disclosures has already been granted. In contrast, pretrial disclosures are not a discovery activity, and a motion to compel is not available. Accordingly, the approach varies when an adversary does not make pretrial disclosures, or provides inadequate pretrial disclosures. The possibilities include a motion for sanctions, a motion to quash a notice of testimony deposition, or a motion to strike testimony, depending on the circumstances.

The requirement that a party make its initial disclosures before filing a motion for summary judgment, except for motions based on claim or issue preclusion or asserted lack of jurisdiction of the Board, is retained in the final rules. Given the scaled back nature of initial disclosures, making the required disclosures should not prove a significant obstacle to a party that decides to seek summary judgment on any other ground.

Comments subject 13 (Briefing of Motions): One comment argued that the proposed rule results in a de facto reduction in the page limit for briefs on motions.

Response: The proposed rule only reflects current practice and does not reduce the stated page limit for motions on briefs. This final rule adopts the clarifying language presented by the proposed rule.

Comments subject 14 (Removal of option to file materials on CD–ROM): One comment noted that restrictions on CD–ROM submissions may not be imposed by the courts and stated the assumption that the Office might reconsider permitting such submissions if improvements in technology make them more suitable for the Board to handle. One comment supported the proposal.

Response: The Office is willing to reconsider allowing submissions by CD–ROM in inter partes trademark proceedings if technology eventually will allow such submissions to be efficiently incorporated in the Board's electronic proceeding files. The removal of the option to file materials on CD–ROM is adopted in this final rule.

Rule Making Considerations

Regulatory Flexibility Act: For the reasons set forth herein, the Deputy General Counsel for General Law of the United States Patent and Trademark Office has certified to the Chief Counsel for Advocacy of the Small Business Administration that the changes in this final rule will not have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 605(b).

The United States Patent and Trademark Office (Office) is amending

its rules in 37 CFR part 2 governing initiation of inter partes proceedings at the Trademark Trial and Appeal Board (Board) and the prosecution and defense of such proceedings, and making corrections or modifications that conform rules to current practice. There are no new fees or fee changes associated with any of the final rules.

The changes in this final rule involve interpretive rules, or rules of agency practice and procedure, and prior notice and an opportunity for public comment are not required pursuant to 5 U.S.C. 553(b)(A) (or any other law). Because prior notice and an opportunity for public comment were not required for the changes in the proposed rule, a Regulatory Flexibility Act analysis was also not required. *See* 5 U.S.C. 603. Nevertheless, the Office published a notice of proposed rule making in the **Federal Register** and in the Official Gazette of the United States Patent and Trademark Office, in order to solicit public participation with regard to this rule package.

The primary changes in this rule are: (1) Plaintiffs will serve certain papers (complaints or claims of right to a concurrent use registration) directly on defendants, and (2) parties will, on a reciprocal basis, identify individuals with knowledge that could be used to support their claims or defenses and identify the existence and location of documents which could support their claims or defenses, will disclose, as part of the discovery phase, expert witnesses to be used during the trial phase of Board proceedings, and will, during a pretrial phase, disclose the identify of witnesses the party expects to call during trial.

These rules will not have a significant economic impact on large or small entities. With regard to the first change, very little (if any) additional cost is associated with the rules because plaintiffs must currently serve these papers on the Office, which, in turn, serves the papers on the defendants. Changing the recipient of the papers will not have a significant economic impact on any party to a Board proceeding. With regard to the second change, very little (if any) additional cost is associated with these rules because under current Board procedures, parties are obligated to provide almost all of this information, when requested through discovery. This rule simply affects when the information is exchanged and eliminates the need for a party to incur expenses associated with preparing requests for the information.

The rules also contemplate many instances in which parties may avoid disclosure obligations otherwise provided for by the rules. For example, if a case is suspended to allow the parties to discuss settlement, as occurs in the vast majority of Board cases, no disclosure would be required during settlement talks. In addition, parties can stipulate, subject to approval of the Board, that disclosure is not necessary in a particular case and can specify their own plans for exchanging information.

One comment received in response to the notice of proposed rule making specifically addressed the Regulatory Flexibility Act, making two points: First, the requirement that a plaintiff serve a copy of its complaint on the defendant will create a burden. Second, the requirement that any party must, under certain circumstances, make particular disclosures will be a burden. The Office does not find the arguments persuasive, for reasons that follow:

(1) In regard to the service requirement, the final rule has been clarified in response to many comments and has been scaled back from the proposed rule. Under existing practice, every plaintiff, including a small business, must serve a copy of every paper the plaintiff files during a proceeding on the defendant. *See* 37 CFR 2.119. During the course of a proceeding, this could amount to many filings. The sole exception is the plaintiff's initial pleading or complaint. Id. The final rule merely requires that the single filing (the pleading or complaint) that does not currently carry a service requirement will now be treated the same as all other filings and carry such a requirement. Thus, this is not a significant economic burden on any plaintiff. In addition, while parties could not previously meet the service requirement by using electronic transmissions (e-mail or fax), the final rule allows for such forwarding of service copies, when the parties agree to use of that form of communication. Since many parties now routinely use e-mail or fax to communicate, the Board expects that the vast majority of parties will agree to use of e-mail or fax and this will facilitate compliance with the requirement for service of the complaint. For this reason, too, the amended service requirement will not create a significant economic burden on any plaintiff.

(2) In regard to the disclosure requirements, there are three types of disclosures called for under the final rule. There are initial disclosures, disclosures of expert witnesses expected to testify, and pretrial disclosures. Because ninety-five percent or more of Board cases settle, and most of these settle or can be settled at a point in the process where none of the disclosure obligations will have arisen, the requirements for disclosures should not create a significant economic burden for most parties. Even in cases that do not settle, parties are free to agree to greater or lesser use of disclosures, subject to approval of their agreement by the Board, and can therefore modify their reciprocal responsibilities in whatever manner they believe will promote an efficient and fair procedure.

For the small percentage of cases that proceed far enough that initial disclosures will be necessary and where the parties have not by agreement modified their obligations, the number and breadth of initial disclosures have been scaled back significantly from the proposed rule. The final rule essentially requires a party only to identify individuals who are knowledgeable about matters for which the party bears the burden of proof, and to identify the existence and location of documents that would help the party bear its burden of proof. These types of information must currently be provided anyway, if a party's adversary asks, and most parties that do not settle prior to discovery do ask not only for these items of information but for much more. Thus, initial disclosures merely require a party to provide, without being asked, a small portion of that which it would routinely be asked to provide in any case that proceeds into the discovery phase. While the party must make limited disclosures, it also receives the benefit of disclosures from its adversary without having to employ costly discovery requests or motions related thereto, so the requirement for initial disclosures creates no net adverse economic effect.

Disclosure of expert testimony will not create a significant economic burden on any business, including a small business, because expert witnesses are so expensive to employ that even large entities utilize experts in only the rarest of cases. Under current practice, plans to use experts must be revealed if the party is asked; so, again, the rule only requires a minimal disclosure without the need for an adverse party to serve discovery requests. For any party that does retain an expert, any additional expense associated with disclosures would be minimal, compared to the expense of retaining the expert.

Finally, pretrial disclosures only require that a party, in advance of the presentation of its testimony, inform its adversary of the names of, and certain minimal identifying information about, the individuals who are expected to testify at trial. The benefits to all parties of knowing in advance what witnesses

will be presented, so parties can prepare for trial and avoid surprise witnesses, far outweigh the negligible expense associated with informing adverse parties of witnesses who will be presented at trial.

For these reasons, the Office has concluded that none of the three types of required disclosures will have a significant net adverse economic effect on any parties, including small businesses.

Executive Order 13132: This rule making does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (Aug. 4, 1999).

Executive Order 12866: This rule making has been determined to be not significant for purposes of Executive Order 12866 (Sept. 30, 1993).

Paperwork Reduction Act: The proposed amendments to the Trademark Trial and Appeal Board Rules did not impose any collection of information requirements within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) (PRA). Accordingly, the PRA did not apply to the proposed amendments. This final rule also does not impose any such requirements.

Interested persons are requested to send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10202, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for the Patent and Trademark Office; and (2) Gerard F. Rogers, Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, VA 22313–1451.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects in 37 CFR Part 2

Administrative practice and procedure, Trademarks.

■ For the reasons set forth in the preamble, and under the authority contained in 35 U.S.C. 2 and 15 U.S.C. 1123, as amended, 37 CFR Part 2 is amended as follows:

PART 2—RULES OF PRACTICE IN TRADEMARK CASES

■ 1. The authority citation for 37 CFR part 2 continues to read as follows:

Authority: 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

■ 2. Revise § 2.99(b), (c) and (d)(1) to read as follows:

§ 2.99 Application to register as concurrent user.

* * * * *

(b) If it appears that the applicant is entitled to have the mark registered, subject to a concurrent use proceeding, the mark will be published in the Official Gazette as provided by § 2.80.

(c) If no opposition is filed, or if all oppositions that are filed are dismissed or withdrawn, the Trademark Trial and Appeal Board will send a notification to the applicant for concurrent use registration (plaintiff) and to each applicant, registrant or user specified as a concurrent user in the application (defendants). The notification for each defendant shall state the name and address of the plaintiff and of the plaintiff's attorney or other authorized representative, if any, together with the serial number and filing date of the application. If a party has provided the Office with an e-mail address, the notification may be transmitted via e-mail.

(d)(1) Within ten days from the date of the Board's notification, the applicant for concurrent use registration must serve copies of its application, specimens and drawing on each applicant, registrant or user specified as a concurrent user in the application for registration, as directed by the Board. If any service copy is returned to the concurrent use applicant as undeliverable, the concurrent use applicant must notify the Board within ten days of receipt of the returned copy.

* * * * *

■ 3. Revise § 2.101(a), (b) introductory text and (d)(4) to read as follows:

§ 2.101 Filing an opposition.

(a) An opposition proceeding is commenced by filing in the Office a timely notice of opposition with the required fee. The notice must include proof of service on the applicant, or its attorney or domestic representative of record, at the correspondence address of record in the Office, as detailed in §§ 2.101(b) and 2.119.

(b) Any person who believes that he, she or it would be damaged by the registration of a mark on the Principal Register may file an opposition addressed to the Trademark Trial and Appeal Board and must serve a copy of the opposition, including any exhibits, on the attorney of record for the applicant or, if there is no attorney, on the applicant or on the applicant's domestic representative, if one has been appointed, at the correspondence address of record in the Office. The opposer must include with the opposition proof of service pursuant to § 2.119 at the correspondence address of record in the Office. If any service copy of the opposition is returned to the opposer as undeliverable, the opposer must notify the Board within ten days of receipt of the returned copy. The opposition need not be verified, but must be signed by the opposer or the opposer's attorney, as specified in § 10.1(c) of this chapter, or other authorized representative, as specified in § 10.14(b) of this chapter. Electronic signatures pursuant to § 2.193(c)(1)(iii) are required for oppositions filed through ESTTA under paragraphs (b)(1) or (2) of this section.

* * * * *

(d) * * *

(4) The filing date of an opposition is the date of receipt in the Office of the notice of opposition, with proof of service on the applicant, or its attorney or domestic representative of record, if one has been appointed, at the correspondence address of record in the Office, and the required fee, unless the notice is filed in accordance with § 2.198.

■ 4. Revise § 2.105(a) and the introductory text of paragraph (c) to read as follows:

§ 2.105 Notification to parties of opposition proceeding(s).

(a) When an opposition in proper form (see §§ 2.101 and 2.104), with proof of service in accordance with § 2.101(b), has been filed and the correct fee has been submitted, the Trademark Trial and Appeal Board shall prepare a notification, which shall identify the title and number of the proceeding and the application involved and shall designate a time, not less than thirty days from the mailing date of the notification, within which an answer must be filed. If a party has provided the Office with an e-mail address, the notification may be transmitted via e-mail.

* * * * *

(c) The Board shall forward a copy of the notification to applicant, as follows:

* * * * *

■ 5. Revise § 2.111(a), (b) and (c)(4) to read as follows:

§ 2.111 Filing petition for cancellation.

(a) A cancellation proceeding is commenced by filing in the Office a timely petition for cancellation with the required fee. The petition must include proof of service on the owner of record for the registration, or the owner's domestic representative of record, at the correspondence address of record in the

Office, as detailed in §§ 2.111(b) and 2.119.

(b) Any person who believes that he, she or it is or will be damaged by a registration may file a petition, addressed to the Trademark Trial and Appeal Board, for cancellation of the registration in whole or in part. Petitioner must serve a copy of the petition, including any exhibits, on the owner of record for the registration, or on the owner's domestic representative of record, if one has been appointed, at the correspondence address of record in the Office. The petitioner must include with the petition for cancellation proof of service, pursuant to § 2.119, on the owner of record, or on the owner's domestic representative of record, if one has been appointed, at the correspondence address of record in the Office. If any service copy of the petition for cancellation is returned to the petitioner as undeliverable, the petitioner must notify the Board within ten days of receipt of the returned copy. The petition for cancellation need not be verified, but must be signed by the petitioner or the petitioner's attorney, as specified in § 10.1(c) of this chapter, or other authorized representative, as specified in § 10.14(b) of this chapter. Electronic signatures pursuant to § 2.193(c)(1)(iii) are required for petitions submitted electronically via ESTTA. The petition for cancellation may be filed at any time in the case of registrations on the Supplemental Register or under the Act of 1920, or registrations under the Act of 1881 or the Act of 1905 which have not been published under section 12(c) of the Act, or on any ground specified in section 14(3) or (5) of the Act. In all other cases, the petition for cancellation and the required fee must be filed within five years from the date of registration of the mark under the Act or from the date of publication under section 12(c) of the Act.

(c) * * *

(4) The filing date of a petition for cancellation is the date of receipt in the Office of the petition for cancellation, with proof of service on the owner of record, or on the owner's domestic representative, if one has been appointed, at the correspondence address of record in the Office, and with the required fee, unless the petition is filed in accordance with § 2.198.

■ 6. Remove § 2.113(e) and revise § 2.113(a) and (c) to read as follows:

§ 2.113 Notification of cancellation proceeding.

(a) When a petition for cancellation in proper form (see §§ 2.111 and 2.112), with proof of service in accordance with § 2.111(b), has been filed and the correct fee has been submitted, the Trademark Trial and Appeal Board shall prepare a notification which shall identify the title and number of the proceeding and the registration(s) involved and shall designate a time, not less than thirty days from the mailing date of the notification, within which an answer must be filed. If a party has provided the Office with an e-mail address, the notification may be transmitted via e-mail.

* * * * *

(c) The Board shall forward a copy of the notification to the respondent (see § 2.118). The respondent shall be the party shown by the records of the Office to be the current owner of the registration(s) sought to be cancelled, except that the Board, in its discretion, may join or substitute as respondent a party who makes a showing of a current ownership interest in such registration(s).

* * * * *

■ 7. Add § 2.116(g) to read as follows:

§ 2.116 Federal Rules of Civil Procedure.

* * * * *

(g) The Trademark Trial and Appeal Board's standard protective order is applicable during disclosure, discovery and at trial in all opposition, cancellation, interference and concurrent use registration proceedings, unless the parties, by stipulation approved by the Board, agree to an alternative order, or a motion by a party to use an alternative order is granted by the Board. The standard protective order is available at the Office's Web site, or upon request, a copy will be provided. No material disclosed or produced by a party, presented at trial, or filed with the Board, including motions or briefs which discuss such material, shall be treated as confidential or shielded from public view unless designated as protected under the Board's standard protective order, or under an alternative order stipulated to by the parties and approved by the Board, or under an order submitted by motion of a party granted by the Board.

■ 8. Revise § 2.118 to read as follows:

§ 2.118 Undelivered Office notices.

When a notice sent by the Office to any registrant or applicant is returned to the Office undelivered, additional notice may be given by publication in the Official Gazette for the period of time prescribed by the Director.

■ 9. Revise § 2.119(a) and add paragraph (b)(6) to read as follows:

§ 2.119 Service and signing of papers.

(a) Every paper filed in the United States Patent and Trademark Office in inter partes cases, including notices of appeal, must be served upon the other parties. Proof of such service must be made before the paper will be considered by the Office. A statement signed by the attorney or other authorized representative, attached to or appearing on the original paper when filed, clearly stating the date and manner in which service was made will be accepted as prima facie proof of service.

(b) * * *

(6) Electronic transmission when mutually agreed upon by the parties.

* * * * *

■ 10. Revise § 2.120, paragraphs (a), (d)(1), (e), (f), (g), (h)(2), (i), (j) introductory text, (j)(3) and (j)(5) through (8) to read as follows:

§ 2.120 Discovery.

(a) *In general.* (1) Wherever appropriate, the provisions of the Federal Rules of Civil Procedure relating to disclosure and discovery shall apply in opposition, cancellation, interference and concurrent use registration proceedings except as otherwise provided in this section. The provisions of Federal Rule of Civil Procedure 26 relating to required disclosures, the conference of the parties to discuss settlement and to develop a disclosure and discovery plan, the scope, timing and sequence of discovery, protective orders, signing of disclosures and discovery responses, and supplementation of disclosures and discovery responses, are applicable to Board proceedings in modified form, as noted in these rules and as may be detailed in any order instituting an inter partes proceeding or subsequent scheduling order. The Board will specify the deadline for a discovery conference, the opening and closing dates for the taking of discovery, and the deadlines within the discovery period for making initial disclosures and expert disclosure. The trial order setting these deadlines and dates will be included with the notice of institution of the proceeding.

(2) The discovery conference shall occur no later than the opening of the discovery period, and the parties must discuss the subjects set forth in Federal Rule of Civil Procedure 26(f) and any subjects set forth in the Board's institution order. A Board Interlocutory Attorney or Administrative Trademark Judge will participate in the conference upon request of any party made after answer but no later than ten days prior

to the deadline for the conference. The participating attorney or judge may expand or reduce the number or nature of subjects to be discussed in the conference as may be deemed appropriate. The discovery period will be set for a period of 180 days. Initial disclosures must be made no later than thirty days after the opening of the discovery period. Disclosure of expert testimony must occur in the manner and sequence provided in Federal Rule of Civil Procedure 26(a)(2), unless alternate directions have been provided by the Board in an institution order or any subsequent order resetting disclosure, discovery or trial dates. If the expert is retained after the deadline for disclosure of expert testimony, the party must promptly file a motion for leave to use expert testimony. Upon disclosure by any party of plans to use expert testimony, whether before or after the deadline for disclosing expert testimony, the Board may issue an order regarding expert discovery and/or set a deadline for any other party to disclose plans to use a rebuttal expert. The parties may stipulate to a shortening of the discovery period. The discovery period may be extended upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. If a motion for an extension is denied, the discovery period may remain as originally set or as reset. Disclosure deadlines and obligations may be modified upon written stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. If a stipulation or motion for modification is denied, disclosure deadlines may remain as originally set or reset and obligations may remain unaltered. The parties are not required to prepare or transmit to the Board a written report outlining their discovery conference discussions, unless the parties have agreed to alter disclosure or discovery obligations set forth by these rules or applicable Federal Rules of Civil Procedure, or unless directed to file such a report by a participating Board Interlocutory Attorney or Administrative Trademark Judge.

(3) A party must make its initial disclosures prior to seeking discovery, absent modification of this requirement by a stipulation of the parties approved by the Board, or a motion granted by the Board, or by order of the Board. Discovery depositions must be taken, and interrogatories, requests for production of documents and things, and requests for admission must be served, on or before the closing date of the discovery period as originally set or as reset. Responses to interrogatories, requests for production of documents and things, and requests for admission must be served within thirty days from the date of service of such discovery requests. The time to respond may be extended upon stipulation of the parties, or upon motion granted by the Board, or by order of the Board. The resetting of a party's time to respond to an outstanding request for discovery will not result in the automatic rescheduling of the discovery and/or testimony periods; such dates will be rescheduled only upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.

* * * * *

(d) * * * (1) The total number of written interrogatories which a party may serve upon another party pursuant to Rule 33 of the Federal Rules of Civil Procedure, in a proceeding, shall not exceed seventy-five, counting subparts, except that the Trademark Trial and Appeal Board, in its discretion, may allow additional interrogatories upon motion therefor showing good cause, or upon stipulation of the parties, approved by the Board. A motion for leave to serve additional interrogatories must be filed and granted prior to the service of the proposed additional interrogatories and must be accompanied by a copy of the interrogatories, if any, which have already been served by the moving party, and by a copy of the interrogatories proposed to be served. If a party upon which interrogatories have been served believes that the number of interrogatories exceeds the limitation specified in this paragraph, and is not willing to waive this basis for objection, the party shall, within the time for (and instead of) serving answers and specific objections to the interrogatories, serve a general objection on the ground of their excessive number. If the inquiring party, in turn, files a motion to compel discovery, the motion must be accompanied by a copy of the set(s) of the interrogatories which together are said to exceed the limitation, and must otherwise comply with the requirements of paragraph (e) of this section.

* * * * *

(e) *Motion for an order to compel disclosure or discovery.* (1) If a party fails to make required initial disclosures or expert testimony disclosure, or fails to designate a person pursuant to Rule 30(b)(6) or Rule 31(a) of the Federal Rules of Civil Procedure, or if a party, or such designated person, or an officer, director or managing agent of a party fails to attend a deposition or fails to answer any question propounded in a discovery deposition, or any interrogatory, or fails to produce and permit the inspection and copying of any document or thing, the party entitled to disclosure or seeking discovery may file a motion to compel disclosure, a designation, or attendance at a deposition, or an answer, or production and an opportunity to inspect and copy. A motion to compel initial disclosures or expert testimony disclosure must be filed prior to the close of the discovery period. A motion to compel discovery must be filed prior to the commencement of the first testimony period as originally set or as reset. A motion to compel discovery shall include a copy of the request for designation or of the relevant portion of the discovery deposition; or a copy of the interrogatory with any answer or objection that was made; or a copy of the request for production, any proffer of production or objection to production in response to the request, and a list and brief description of the documents or things that were not produced for inspection and copying. A motion to compel initial disclosures, expert testimony disclosure, or discovery must be supported by a written statement from the moving party that such party or the attorney therefor has made a good faith effort, by conference or correspondence, to resolve with the other party or the attorney therefor the issues presented in the motion but the parties were unable to resolve their differences. If issues raised in the motion are subsequently resolved by agreement of the parties, the moving party should inform the Board in writing of the issues in the motion which no longer require adjudication.

(2) When a party files a motion for an order to compel initial disclosures, expert testimony disclosure, or discovery, the case will be suspended by the Board with respect to all matters not germane to the motion. After the motion is filed and served, no party should file any paper that is not germane to the motion, except as otherwise specified in the Board's suspension order. Nor may any party serve any additional discovery until the period of suspension is lifted or expires by or under order of the Board. The filing of a motion to compel any disclosure or discovery shall not toll the time for a party to comply with any disclosure requirement or to respond to any outstanding discovery requests or to appear for any noticed discovery deposition.

(f) *Motion for a protective order.* Upon motion by a party obligated to make

initial disclosures or expert testimony disclosure or from whom discovery is sought, and for good cause, the Trademark Trial and Appeal Board may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the types of orders provided by clauses (1) through (8), inclusive, of Rule 26(c) of the Federal Rules of Civil Procedure. If the motion for a protective order is denied in whole or in part, the Board may, on such conditions (other than an award of expenses to the party prevailing on the motion) as are just, order that any party comply with disclosure obligations or provide or permit discovery.

(g) *Sanctions.* (1) If a party fails to participate in the required discovery conference, or if a party fails to comply with an order of the Trademark Trial and Appeal Board relating to disclosure or discovery, including a protective order, the Board may make any appropriate order, including those provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure, except that the Board will not hold any person in contempt or award expenses to any party. The Board may impose against a party any of the sanctions provided in Rule 37(b)(2) in the event that said party or any attorney, agent, or designated witness of that party fails to comply with a protective order made pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. A motion for sanctions against a party for its failure to participate in the required discovery conference must be filed prior to the deadline for any party to make initial disclosures.

(2) If a party fails to make required initial disclosures or expert testimony disclosure, and such party or the party's attorney or other authorized representative informs the party or parties entitled to receive disclosures that required disclosures will not be made, the Board may make any appropriate order, as specified in paragraph (g)(1) of this section. If a party, or an officer, director, or managing agent of a party, or a person designated under Rule 30(b)(6) or 31(a) of the Federal Rules of Civil Procedure to testify on behalf of a party, fails to attend the party's or person's discovery deposition, after being served with proper notice, or fails to provide any response to a set of interrogatories or to a set of requests for production of documents and things, and such party or the party's attorney or other authorized representative informs the party seeking discovery that no response will be made thereto, the Board may make any appropriate order, as specified in paragraph (g)(1) of this section.

(h) * * *

(2) When a party files a motion to determine the sufficiency of an answer or objection to a request for an admission, the case will be suspended by the Board with respect to all matters not germane to the motion. After filing and service of the motion, no party should file any paper that is not germane to the motion, except as otherwise specified in the Board's suspension order. Nor may any party thereafter serve any additional discovery until the period of suspension is lifted or expires by or under order of the Board. The filing of a motion to determine the sufficiency of an answer or objection to a request for admission shall not toll the time for a party to comply with any disclosure requirement or to respond to any outstanding discovery requests or to appear for any noticed discovery deposition.

(i) *Telephone and pretrial conferences.* (1) Whenever it appears to the Trademark Trial and Appeal Board that a stipulation or motion filed in an inter partes proceeding is of such nature that its approval or resolution by correspondence is not practical, the Board may, upon its own initiative or upon request made by one or both of the parties, address the stipulation or resolve the motion by telephone conference.

(2) Whenever it appears to the Trademark Trial and Appeal Board that questions or issues arising during the interlocutory phase of an inter partes proceeding have become so complex that their resolution by correspondence or telephone conference is not practical and that resolution would likely be facilitated by a conference in person of the parties or their attorneys with an Administrative Trademark Judge or an Interlocutory Attorney of the Board, the Board may, upon its own initiative or upon motion made by one or both of the parties, request that the parties or their attorneys, under circumstances which will not result in undue hardship for any party, meet with the Board at its offices for a disclosure, discovery or pretrial conference.

(j) *Use of discovery deposition, answer to interrogatory, admission or written disclosure.*

* * * * *

(3)(i) A discovery deposition, an answer to an interrogatory, an admission to a request for admission, or a written disclosure (but not a disclosed document), which may be offered in evidence under the provisions of paragraph (j) of this section, may be made of record in the case by filing the deposition or any part thereof with any exhibit to the part that is filed, or a copy of the interrogatory and answer thereto with any exhibit made part of the answer, or a copy of the request for admission and any exhibit thereto and the admission (or a statement that the party from which an admission was requested failed to respond thereto), or a copy of the written disclosure, together with a notice of reliance. The notice of reliance and the material submitted thereunder should be filed during the testimony period of the party that files the notice of reliance. An objection made at a discovery deposition by a party answering a question subject to the objection will be considered at final hearing.

(ii) A party that has obtained documents from another party through disclosure or under Rule 34 of the Federal Rules of Civil Procedure may not make the documents of record by notice of reliance alone, except to the extent that they are admissible by notice of reliance under the provisions of § 2.122(e).

* * * * *

(5) Written disclosures, an answer to an interrogatory, or an admission to a request for admission, may be submitted and made part of the record only by the receiving or inquiring party except that, if fewer than all of the written disclosures, answers to interrogatories, or fewer than all of the admissions, are offered in evidence by the receiving or inquiring party, the disclosing or responding party may introduce under a notice of reliance any other written disclosures, answers to interrogatories, or any other admissions, which should in fairness be considered so as to make not misleading what was offered by the receiving or inquiring party. The notice of reliance filed by the disclosing or responding party must be supported by a written statement explaining why the disclosing or responding party needs to rely upon each of the additional written disclosures or discovery responses listed in the disclosing or responding party's notice, and absent such statement the Board, in its discretion, may refuse to consider the additional written disclosures or responses.

(6) Paragraph (j) of this section will not be interpreted to preclude reading or use of written disclosures or documents, a discovery deposition, or answer to an interrogatory, or admission as part of the examination or cross-examination of any witness during the testimony period of any party.

(7) When a written disclosure, a discovery deposition, or a part thereof,

or an answer to an interrogatory, or an admission, has been made of record by one party in accordance with the provisions of paragraph (j)(3) of this section, it may be referred to by any party for any purpose permitted by the Federal Rules of Evidence.

(8) Written disclosures or disclosed documents, requests for discovery, responses thereto, and materials or depositions obtained through the disclosure or discovery process should not be filed with the Board, except when submitted with a motion relating to disclosure or discovery, or in support of or in response to a motion for summary judgment, or under a notice of reliance, when permitted, during a party's testimony period.

■ 11. Revise paragraphs (a) and (d), and add paragraph (e), to read as follows:

§ 2.121 Assignment of times for taking testimony.

(a) The Trademark Trial and Appeal Board will issue a trial order setting a deadline for each party's required pretrial disclosures and assigning to each party its time for taking testimony. No testimony shall be taken except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. The deadlines for pretrial disclosures and the testimony periods may be rescheduled by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. If a motion to reschedule any pretrial disclosure deadline and/or testimony period is denied, the pretrial disclosure deadline or testimony period and any subsequent remaining periods may remain as set. The resetting of the closing date for discovery will result in the rescheduling of pretrial disclosure deadlines and testimony periods without action by any party.

* * * * *

(d) When parties stipulate to the rescheduling of a deadline for pretrial disclosures and subsequent testimony periods or to the rescheduling of the closing date for discovery and the rescheduling of subsequent deadlines for pretrial disclosures and testimony periods, a stipulation presented in the form used in a trial order, signed by the parties, or a motion in said form signed by one party and including a statement that every other party has agreed thereto, shall be submitted to the Board.

(e) A party need not disclose, prior to its testimony period, any notices of reliance it intends to file during its testimony period. However, no later than fifteen days prior to the opening of each testimony period, or on such alternate schedule as may be provided by order of the Board, the party scheduled to present evidence must disclose the name and, if not previously provided, the telephone number and address of each witness from whom it intends to take testimony, or may take testimony if the need arises, general identifying information about the witness, such as relationship to any party, including job title if employed by a party, or, if neither a party nor related to a party, occupation and job title, a general summary or list of subjects on which the witness is expected to testify, and a general summary or list of the types of documents and things which may be introduced as exhibits during the testimony of the witness. Pretrial disclosure of a witness under this subsection does not substitute for issuance of a proper notice of examination under § 2.123(c) or § 2.124(b). If a party does not plan to take testimony from any witnesses, it must so state in its pretrial disclosure. When a party fails to make required pretrial disclosures, any adverse party or parties may have remedy by way of a motion to the Board to delay or reset any subsequent pretrial disclosure deadlines and/or testimony periods.

■ 12. Revise § 2.122(d)(1) to read as follows:

§ 2.122 Matters in evidence.

* * * * *

(d) * * *

(1) A registration of the opposer or petitioner pleaded in an opposition or petition to cancel will be received in evidence and made part of the record if the opposition or petition is accompanied by an original or photocopy of the registration prepared and issued by the United States Patent and Trademark Office showing both the current status of and current title to the registration, or by a current printout of information from the electronic database records of the USPTO showing the current status and title of the registration. For the cost of a copy of a registration showing status and title, see § 2.6(b)(4).

* * * * *

■ 13. Revise § 2.123(e)(3) to read as follows:

§ 2.123 Trial testimony in inter partes cases.

* * * * *

(e) * * *

(3) Every adverse party shall have full opportunity to cross-examine each witness. If pretrial disclosures or the notice of examination of witnesses served pursuant to paragraph (c) of this section are improper or inadequate with respect to any witness, an adverse party may cross-examine that witness under protest while reserving the right to object to the receipt of the testimony in evidence. Promptly after the testimony is completed, the adverse party, to preserve the objection, shall move to strike the testimony from the record, which motion will be decided on the basis of all the relevant circumstances. A motion to strike the testimony of a witness for lack of proper or adequate pretrial disclosure may seek exclusion of the entire testimony, when there was no pretrial disclosure, or may seek exclusion of that portion of the testimony that was not adequately disclosed in accordance with § 2.121(e). A motion to strike the testimony of a witness for lack of proper or adequate notice of examination must request the exclusion of the entire testimony of that witness and not only a part of that testimony.

* * * * *

■ 14. Amend § 2.126 as follows:

■ A. Revise paragraph (a)(6).

■ B. Remove paragraph (b).

■ C. Redesignate paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

§ 2.126 Form of submissions to the Trademark Trial and Appeal Board.

(a) * * *

(6) Exhibits pertaining to a paper submission must be filed on paper and comply with the requirements for a paper submission.

* * * * *

■ 15. Revise § 2.127(a), (c), and (e) to read as follows:

§ 2.127 Motions.

(a) Every motion must be submitted in written form and must meet the requirements prescribed in § 2.126. It shall contain a full statement of the grounds, and shall embody or be accompanied by a brief. Except as provided in paragraph (e)(1) of this section, a brief in response to a motion shall be filed within fifteen days from the date of service of the motion unless another time is specified by the Trademark Trial and Appeal Board, or the time is extended by stipulation of the parties approved by the Board, or upon motion granted by the Board, or upon order of the Board. If a motion for an extension is denied, the time for responding to the motion remains as specified under this section, unless otherwise ordered. Except as provided in paragraph (e)(1) of this section, a reply brief, if filed, shall be filed within fifteen days from the date of service of the brief in response to the motion. The time for filing a reply brief will not be

extended. The Board will consider no further papers in support of or in opposition to a motion. Neither the brief in support of a motion nor the brief in response to a motion shall exceed twenty-five pages in length in its entirety, including table of contents, index of cases, description of the record, statement of the issues, recitation of the facts, argument, and summary. A reply brief shall not exceed ten pages in length in its entirety. Exhibits submitted in support of or in opposition to a motion are not considered part of the brief for purposes of determining the length of the brief. When a party fails to file a brief in response to a motion, the Board may treat the motion as conceded. An oral hearing will not be held on a motion except on order by the Board.

* * * * *

(c) Interlocutory motions, requests, and other matters not actually or potentially dispositive of a proceeding may be acted upon by a single Administrative Trademark Judge of the Trademark Trial and Appeal Board or by an Interlocutory Attorney of the Board to whom authority so to act has been delegated.

* * * * *

(e)(1) A party may not file a motion for summary judgment until the party has made its initial disclosures, except for a motion asserting claim or issue preclusion or lack of jurisdiction by the Trademark Trial and Appeal Board. A motion for summary judgment, if filed, should be filed prior to the commencement of the first testimony period, as originally set or as reset, and the Board, in its discretion, may deny as untimely any motion for summary judgment filed thereafter. A motion under Rule 56(f) of the Federal Rules of Civil Procedure, if filed in response to a motion for summary judgment, shall be filed within thirty days from the date of service of the summary judgment motion. The time for filing a motion under Rule 56(f) will not be extended. If no motion under Rule 56(f) is filed, a brief in response to the motion for summary judgment shall be filed within thirty days from the date of service of the motion unless the time is extended by stipulation of the parties approved by the Board, or upon motion granted by the Board, or upon order of the Board. If a motion for an extension is denied, the time for responding to the motion for summary judgment may remain as specified under this section. A reply brief, if filed, shall be filed within fifteen days from the date of service of the brief in response to the motion. The time for filing a reply brief will not be extended. The Board will consider no further papers in support of or in opposition to a motion for summary judgment.

(2) For purposes of summary judgment only, the Board will consider any of the following, if a copy is provided with the party's brief on the summary judgment motion: written disclosures or disclosed documents, a discovery deposition or any part thereof with any exhibit to the part that is filed, an interrogatory and answer thereto with any exhibit made part of the answer, a request for production and the documents or things produced in response thereto, or a request for admission and any exhibit thereto and the admission (or a statement that the party from which an admission was requested failed to respond thereto).

* * * * *

■ 16. Revise § 2.129(a) to read as follows:

§ 2.129 Oral argument; reconsideration.

(a) If a party desires to have an oral argument at final hearing, the party shall request such argument by a separate notice filed not later than ten days after the due date for the filing of the last reply brief in the proceeding. Oral arguments will be heard by at least three Administrative Trademark Judges of the Trademark Trial and Appeal Board at the time specified in the notice of hearing. If any party appears at the specified time, that party will be heard. If the Board is prevented from hearing the case at the specified time, a new hearing date will be set. Unless otherwise permitted, oral arguments in an inter partes case will be limited to thirty minutes for each party. A party in the position of plaintiff may reserve part of the time allowed for oral argument to present a rebuttal argument.

* * * * *

■ 17. Revise § 2.133 (a) and (b) to read as follows:

§ 2.133 Amendment of application or registration during proceedings.

(a) An application subject to an opposition may not be amended in substance nor may a registration subject to a cancellation be amended or disclaimed in part, except with the consent of the other party or parties and the approval of the Trademark Trial and Appeal Board, or upon motion granted by the Board.

(b) If, in an inter partes proceeding, the Trademark Trial and Appeal Board finds that a party whose application or registration is the subject of the proceeding is not entitled to registration in the absence of a specified restriction to the application or registration, the Board will allow the party time in which to file a motion that the application or registration be amended to conform to the findings of the Board, failing which judgment will be entered against the party.

* * * * *

■ 18. Revise § 2.142(e)(1) to read as follows:

§ 2.142 Time and manner of ex parte appeals.

* * * * *

(e)(1) If the appellant desires an oral hearing, a request should be made by a separate notice filed not later than ten days after the due date for a reply brief. Oral argument will be heard by at least three Administrative Trademark Judges of the Trademark Trial and Appeal Board at the time specified in the notice of hearing, which may be reset if the Board is prevented from hearing the argument at the specified time or, so far as is convenient and proper, to meet the wish of the appellant or the appellant's attorney or other authorized representative.

* * * * *

■ 19. Revise § 2.173(a) to read as follows:

§ 2.173 Amendment of registration.

(a) A registrant may apply to amend a registration or to disclaim part of the mark in the registration. The registrant must submit a written request specifying the amendment or disclaimer and, if the registration is involved in an inter partes proceeding before the Trademark Trial and Appeal Board, the request must be filed by appropriate motion to the Board. This request must be signed by the registrant and verified or supported by a declaration under § 2.20, and accompanied by the required fee. If the amendment involves a change in the mark, the registrant must submit a new specimen showing the mark as used on or in connection with the goods or services, and a new drawing of the amended mark. The registration as amended must still contain registrable matter, and the mark as amended must be registrable as a whole. An amendment or disclaimer must not materially alter the character of the mark.

* * * * *

■ 20. Revise § 2.176 to read as follows:

§ 2.176 Consideration of above matters.

The matters in §§ 2.171 to 2.175 will be considered in the first instance by the Post Registration Examiners, except for requests to amend registrations involved in inter partes proceedings before the

Trademark Trial and Appeal Board, as specified in § 2.173(a), which shall be considered by the Board. If an action of the Post Registration Examiner is adverse, registrant may petition the Director to review the action under § 2.146. If the registrant does not respond to an adverse action of the Examiner within six months of the mailing date, the matter will be considered abandoned.

Dated: July 19, 2007.

Jon W. Dudas,

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

[FR Doc. E7–14702 Filed 7–31–07; 8:45 am]

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Federal Register

Wednesday,
August 1, 2007

Part IV

Office of Management and Budget

Statistical Policy Directive: Release and Dissemination of Statistical Products Produced by Federal Statistical Agencies; Notice

OFFICE OF MANAGEMENT AND BUDGET

Statistical Policy Directive: Release and Dissemination of Statistical Products Produced by Federal Statistical Agencies

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Notice of solicitation of comments.

SUMMARY: Under 44 U.S.C. 3504(e), the Office of Management and Budget (OMB) is soliciting public comment on a proposal to issue a new Statistical Policy Directive for the release and dissemination of statistical products produced by Federal statistical agencies. In its role as coordinator of the Federal statistical system, 44 U.S.C. 3504(e) requires OMB, among other responsibilities, to ensure the efficiency and effectiveness of the system as well as the integrity, objectivity, impartiality, utility, and confidentiality of information collected for statistical purposes. It also requires OMB to develop and oversee the implementation of Governmentwide policies, principles, standards, and guidelines concerning the presentation and dissemination of statistical information. The 2001 Information Quality Act (Pub. L. 106–554, Sec. 1(a)(3) [title V, Sec. 515], Dec. 21, 2000, 114 Stat. 2763, 2763A–153, 44 U.S.C. Section 3516 note) similarly requires OMB, as well as all other Federal agencies, to maximize the quality, objectivity, utility, and integrity of information, including statistical information, provided to the public.

To operate efficiently and effectively, our democracy relies on the flow of objective, credible statistics to support the decisions of governments, businesses, households, and other organizations. Any loss of trust in the integrity of the Federal statistical system and its products could lessen respondent cooperation with Federal statistical surveys, decrease the quality of statistical system products, and foster uncertainty about the validity of measures our Nation uses to monitor and assess its performance and progress.

To further support the quality and integrity of Federal statistical information, OMB is proposing a new Statistical Policy Directive designed to preserve and enhance the objectivity and transparency, in fact and in perception, of the processes used to release and disseminate the Government's statistical products. The procedures in the proposed directive are intended to ensure that statistical data releases adhere to data quality standards through equitable, policy-neutral, and timely release of information to the general public. Additional discussion of the proposal and a draft of the directive may be found in the **SUPPLEMENTARY INFORMATION** section below. OMB is seeking public comment on the desirability of issuing the proposed directive as well as suggestions to improve its clarity, efficiency, and usefulness.

DATES: *Effective Date:* To ensure consideration, all comments must be received in writing on or before October 1, 2007.

ADDRESSES: Please send all comments on this proposal to: Katherine K. Wallman, Chief Statistician, Office of Management and Budget, 10201 New Executive Office Building, Washington, DC 20503, telephone number: (202) 395–3093, fax number: (202) 395–7245. You may send comments via e-mail to *DisseminationDirective@omb.eop.gov* with subject Comments0107. Because of delays in the receipt of regular mail, respondents are encouraged to use electronic communications. All comments submitted in response to this notice will be made available to the public, including by posting them on OMB's Web site. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information.

Electronic Availability: This document is available on the Internet on the OMB Web site at *http://www.omb.gov/inforeg/ssp/dissemination.*

Availability of Comment Materials: In addition to posting on the OMB Web site, paper copies of all comments received will be available for public viewing at the Office of Management and Budget, Office of Information and Regulatory Affairs (OIRA) during normal business hours, 9 a.m. to 5:30 p.m., in 10201 New Executive Office Building, 725 17th Street, NW., Washington, DC 20503. Please call Mabel Echols at (202) 395–3094 to make an appointment if you wish to view the comments received in response to this notice.

FOR FURTHER INFORMATION CONTACT: Paul Bugg, 10201 New Executive Office Building, Washington, DC 20503, e-mail address: *pbugg@omb.eop.gov* with subject Dissemination Directive, telephone number: (202) 395–3095, fax number: (202) 395–7245.

SUPPLEMENTARY INFORMATION: Trust in the accuracy, objectivity, and reliability of Federal statistics is essential to the ongoing and increasingly complex policy and planning needs of governmental and private users of these products. Consequently, there has been a long-standing concern about the need to maintain public confidence in the objectivity of Federal statistics. For example, in 1962, the President's Committee to Appraise Employment and Unemployment Statistics, stated:

> The need to publish the information in a nonpolitical context cannot be overemphasized. * * * a sharper line should be drawn between the release of the statistics and their accompanying explanation and analysis, on the one hand, and the more general type of policy-oriented comment which is a function of the official responsible for policy making, on the other.

In 1971, the Nixon Administration was widely criticized for the way it publicly characterized some Bureau of Labor Statistics unemployment data at the time of their release. In response, the Congress instituted the monthly Joint Economic Committee hearings on the unemployment rate and OMB issued Statistical Policy Directive No. 3 to provide guidance to Executive branch agencies on the compilation and release of Principal Federal Economic Indicators. Directive No. 3 provides for the designation of statistical series that provide timely measures of economic activity as Principal Economic Indicators, and requires prompt but orderly release of such indicators. The stated purposes of Directive No. 3 are to preserve the time value of the economic indicators, strike a balance between timeliness and accuracy, provide for periodic evaluation of each indicator, prevent early access to information that may affect financial and commodity markets, and preserve the distinction between the policy-neutral release of data by statistical agencies and their interpretation by policy officials.

In 1973, the American Statistical Association—Federal Statistics Users' Conference Committee on the Integrity of Federal Statistics reported that:

> Nothing could undermine the politician and implementation of his policy recommendations as much as an accumulated and intense public distrust in the statistical basis for the decisions which the policy-maker must inevitably make, or in the figures by which the results of these decisions are measured. Unless definite action is taken to maintain public confidence in Federal statistics and in the system responsible for their production, there will be growing tendencies to distrust leadership.

With respect to trust in the Federal statistical system, President George H.W. Bush stated in 1990:

> It is of paramount importance to this Administration that these fundamental

principles of the Federal statistical system are strictly maintained so that the accuracy and integrity of Government data are not threatened.

In 1995, the Congress reauthorized the Paperwork Reduction Act (PRA), which makes OMB responsible, among other requirements, for coordination of the Federal statistical system to ensure the integrity, objectivity, impartiality, utility, and confidentiality of information collected for statistical purposes.

In 1996, the United States was a charter subscriber to the International Monetary Fund's Special Data Dissemination Standard (SDDS), which guides over 60 member nations in the provision of their economic and financial data to the public. The elements of the SDDS for access, integrity, and quality emphasize transparency in the compilation and dissemination of statistics. For example,

- To support ready and equal access, the SDDS prescribes (a) advance dissemination of release calendars and (b) simultaneous release to all interested parties.
- To assist users in assessing the integrity of the data disseminated under the SDDS, the SDDS requires (a) The dissemination of the terms and conditions under which official statistics are produced and disseminated; (b) the identification of internal government access to data before release; (c) the identification of ministerial commentary on the occasion of statistical release; and (d) the provision of information about revision and advance notice of major changes in methodology.
- To assist users in assessing data quality, the SDDS requires (a) The dissemination of documentation on statistical methodology and (b) the dissemination of component detail, reconciliations with related data, and statistical frameworks that make possible cross-checks and checks of reasonableness.

In 2001, the Congress passed the Information Quality Act, which directs OMB to issue Government-wide information quality guidelines to ensure the ''quality, objectivity, utility, and integrity'' of all information, including statistical information, disseminated by Federal agencies.

In 2005, the National Research Council (NRC) of the National Academy of Sciences published the third edition of its *Principles and Practices for a Federal Statistical Agency,* which enumerates three principles and eleven core practices for Federal statistical agencies. The principles address: (1) Relevance to policy issues, (2) credibility among data users, and (3) trust among data providers. Among the essential core practices, the NRC lists a strong measure of independence, wide dissemination of data, and commitment to quality and professional standards of practice.

The *Principles and Practices* report states that a credible and effective statistical organization:

> * * * must be, and must be perceived to be, free of political interference and policy advocacy. * * * Without the credibility that comes from a strong degree of independence, users may lose trust in the accuracy and objectivity of the agency's data, and data providers may become less willing to cooperate with agency requests. * * * [A statistical agency] must be impartial and avoid even the appearance that its collection, analysis, and reporting processes might be manipulated for political purposes* * *.
>
> Elements of an effective dissemination program include: A variety of avenues for data dissemination, chosen to reach as broad a public as reasonably possible; procedures for release of information that preclude actual or perceived political interference; adherence to predetermined release schedules for important indicators serves to prevent even the appearance of manipulation of release dates for political purposes.

In May 2006, the National Science Board, which is charged with serving as adviser to the President and Congress on policy matters related to science and engineering research and education, concluded that:

> A clear distinction should be made between communicating professional research results and data versus the interpretation of data and results in a context that seeks to influence, through the injection of personal viewpoints, public opinion or the formulation of public policy. Delay in taking these actions may contribute to a potential loss of confidence by the American public and broader research community regarding the quality and credibility of Government sponsored scientific research results.

Moreover, in June 2006, the Government Accountability Office issued a report on Data Quality that finds that expanded use of key dissemination practices would further safeguard the integrity of Federal statistical data. This report discusses the desirability of OMB's issuing a new Statistical Policy Directive that extends dissemination procedures similar to those of the NRC's recommended practices and the long-standing Statistical Policy Directive No. 3 on the *Compilation, Release, and Evaluation of Principal Federal Economic Indicators* more broadly to encompass a larger set of Federal statistical products.

The proposed Statistical Policy Directive, presented below, extends the applicable processes of the NRC's recommended practices and Statistical Policy Directive No. 3, which applies only to Principal Federal Economic Indicators, to a greater range of Federal statistical products. The proposed directive seeks to address concerns with equitable, policy-neutral, and timely release and dissemination of general-purpose statistical information to the public and to reinforce the integrity and transparency of the processes used to produce and release the Nation's statistical products. (The proposed directive is not intended to address other issues relating to statistical products, such as the appropriate funding levels for statistical activities and the policy decisions regarding what kinds of data an agency should collect and maintain, as well as the corresponding intra-governmental reporting relationships.) OMB welcomes comments on the desirability of issuing the proposed directive as well as suggestions to improve its clarity, efficiency, and usefulness.

Susan E. Dudley,

Administrator, Office of Information and Regulatory Affairs.

Statistical Policy Directive No. XX; Release and Dissemination of Statistical Products Produced by Federal Statistical Agencies

Authority and Purpose

This Directive provides guidance to Federal statistical agencies on the release and dissemination of statistical products. The Directive is issued under the authority of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 1104(d)), the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3504(e)), and Office of Management and Budget (OMB) policies including the Information Quality Act guidelines (67 FR 8451–8460) and OMB Circular No. A–130. Under the Information Quality Act (PL. 106–554; H.R. 5658, Section 515, 114 Stat. 2763A–153 to 2763A–154 (2000), 44 U.S.C. Section 3516 note) and associated guidelines, agencies are to maximize the quality, objectivity, utility, and integrity of information, including statistical information, provided to the public. This includes making information available on an equitable and timely basis. The procedures in this Directive are intended to ensure that statistical data releases adhere to data quality standards through equitable, policy-neutral, and timely release of information to the general public.

Introduction

Statistics produced by the Federal Government are used to shape policies,

manage and monitor programs, identify problems and opportunities for improvement, track progress, and measure change. These statistics must meet high standards of reliability, accuracy, timeliness, and objectivity in order to provide a sound and efficient basis for decisions and actions by governments, businesses, households, and other organizations. These data must be objective and free of bias in their presentation and available to all in forms that are readily accessible and understandable.

To be collected and used efficiently, statistical products must gain and preserve the trust of the respondent and user communities; data must be collected and distributed free of any perceived or actual partisan intervention. Widespread recognition of the Federal statistical system's policy-neutral data collection and dissemination fosters such trust. This trust, in turn, engenders greater cooperation from respondents and higher quality statistics for data users.

1. *Scope.* This Statistical Policy Directive applies to the full range of statistical products disseminated by Federal statistical agencies or units. However, the Directive excludes coverage of the Principal Federal Economic Indicators addressed in Statistical Policy Directive No. 3, *Compilation, Release, and Evaluation of Principal Federal Economic Indicators,* which have their own established release and evaluation procedures. Unless otherwise specified in statute, statistical agencies or units are directly and solely responsible for the content, quality, and dissemination of their products. When implementing this Directive, statistical agencies must follow all relevant Statistical Policy Directives and guidance including the principles and practices presented in OMB's Information Quality Guidelines and Statistical Policy Directives providing standards and guidelines for statistical surveys.

2. *Statistical Products.* Statistical products are, generally, information dissemination products that are published or otherwise made available for public use that describe, estimate, forecast, or analyze the characteristics of groups, customarily without identifying the persons, organizations, or individual data observations that comprise such groups. Statistical products include general-purpose tabulations, analyses, projections, forecasts, or other statistical reports. For purposes of this Directive, a ''statistical press release'' is an announcement to media of a statistical product release that contains the title, subject matter, release date, and Internet address of, and other availability information about, the statistical product, and may include any executive summary information or key findings section as shown in the statistical product. A statistical press release announcing or presenting statistical data is defined as a statistical product and is covered by the provisions of this Directive. Federal statistical agencies or units may issue their statistical products in printed and/or electronic form, but must provide access to them on their Internet sites. Agencies should assess the needs of data users and provide a range of products to address those needs by whatever means practicable. Information to help users interpret data accurately, including transparent descriptions of the sources and methodologies used to produce the data, must be equitably available for Federal statistical products. These products shall contain or reference appropriate information on the sources, methodologies, and limitations of the data as well as other information such as explanations of other related measures to assist users in the appropriate treatment and interpretation of the data.

3. *Statistical Agencies or Units.* As defined by the Confidential Information Protection and Statistical Efficiency Act of 2002 (116 STAT. 2963), a Federal statistical agency is an organizational unit of the executive branch whose activities are predominantly the collection, compilation, processing, or analysis of information for statistical purposes. Statistical purpose means the description, estimation, or analysis of the characteristics of groups, customarily without identifying the persons, organizations, or individual data observations that comprise such groups, as well as researching, developing, implementing, maintaining, or evaluating methods, administrative or technical procedures, or information resources that support such purposes. A statistical agency or unit may be labeled an administration, bureau, center, division, office, service, or similar title, so long as it is recognized as a distinct entity. When a statistical agency provides services for a separate sponsoring agency on a reimbursable basis, the provisions of this Directive normally shall apply to the sponsoring agency.

4. *Timing of Release.* The timing of the release of statistical products, including statistical press releases, regardless of physical form or characteristic, shall be the sole responsibility of the statistical agency or unit that is directly responsible for the content, quality, and dissemination of the data. Agencies should strive to minimize the interval between the period to which the data refer and the date when the product is released to the public.

5. *Notification of Release.* Prior to the beginning of the calendar year, the releasing statistical agency shall annually provide the public with a schedule of when each regular or recurring statistical product is expected to be released during the upcoming calendar year by publishing it on its Web site. Agencies must issue any revisions to the release schedule in a timely manner on their Web sites.

6. *Dissemination.* Statistical agencies must ensure that all users have equitable and timely access to data that are disseminated to the public. If there are revisions to the data after an initial release, notification must also be given to the public about these changes in an equitable and timely manner. A statistical agency should strive for the widest, most accessible, and appropriate dissemination of its statistical products and ensure transparency in its dissemination practices by providing complete documentation of its dissemination policies on its Web site. The statistical agency is responsible for ensuring that this documentation remains accurate by reviewing and updating it regularly so that it reflects the agency's current dissemination practices.

In unusual circumstances, the requirement that all users initially have equitable and timely access to statistical products may be waived by the releasing statistical agency if the head of the agency determines that the value of a particular type of statistical product, such as health or safety information, is so time-sensitive to specific stakeholders that normal procedures to ensure equitable and timely access to all users would unduly delay the release of urgent findings to those to whom the information is critical. All such instances must be reported to OMB within 30 calendar days of the agency's waiver determination.

Agencies should use a variety of vehicles to attain a data dissemination program designed to reach data users in an equitable and timely manner. Agencies must publish statistical products available to the public on their Web sites and may also provide them in printed or other electronic formats. In undertaking any dissemination of statistical products, agencies must continue to ensure that they have fulfilled their responsibilities to preserve the confidentiality and security of respondent data. When appropriate to facilitate in-depth research, and feasible

in the presence of resource constraints, statistical agencies should provide public access to microdata files with secure safeguards to protect the confidentiality of individually-identifiable responses and with readily accessible documentation, metadata, or other means to facilitate user access to and manipulation of the data.

Statistical agencies are encouraged to use a variety of forums and strategies to release their statistical products. These include conferences, exhibits, presentations, workshops, list serves, the Government Printing Office, public libraries, and outreach to the media including news conferences and statistical press releases as well as media briefings to improve the media's understanding of the data and the quality and extent of media coverage of the statistics.

a. Outreach to the Media

To accelerate and/or expand the dissemination of data to the public, statistical agencies are encouraged to issue a statistical press release when releasing their products. To maintain a clear distinction between statistical data and policy interpretations of such data, the statistical press release must be produced and issued by the statistical agency and must provide a policy-neutral description of the data; it must not include policy pronouncements. To the extent that any policy pronouncements are to be made regarding the data, those pronouncements are to be made by Federal executive policy officials, not by the statistical agency. Accordingly, these policy officials may issue separate independent statements on the data being released by the statistical agency, and these officials may review the draft statistical press release to ensure that it does not include policy pronouncements.

In cases in which the statistical unit currently relies on its parent agency for the public affairs function, the statistical agency should coordinate with public affairs officials from the parent organization on the dissemination aspects of the statistical press release process, including planning and scheduling of annual release dates.

b. Pre-Release Access to Final Statistical Products

To support the goal of maximizing the public's access to quality data, statistical agencies may provide pre-release access to their final statistical products. A statistical product is final when the releasing statistical agency determines that the product fully meets the agency's data quality standards and requires no further changes. The purpose of pre-release access is to foster improved public understanding of the data when they are first released and the accuracy of any initial commentary about the information contained in the product. Pre-release access to final statistical products may be provided under embargo or through secure pre-release access. The releasing statistical agency determines which final statistical products will be made available under these pre-release provisions and which method of pre-release will be employed.

c. Embargo

Embargo means that pre-release access is provided with the explicit acknowledgement of the receiving party that the information cannot be further disseminated or used in any unauthorized manner before a specific date and time.

The statistical agency may grant pre-release access via an embargo under the following conditions:

1. The agency shall establish arrangements and impose conditions on the granting of an embargo that are necessary to ensure that there is no unauthorized dissemination or use.

2. The agency shall ensure that any person or organization granted access under an embargo has been fully informed of, and has acknowledged acceptance of, these conditions.

3. In all cases, pre-release access via an embargo shall precede the official release time only to the extent necessary for an orderly release of the data.

4. If an embargo is broken, the agency must release the data to the public immediately.

d. Secure Pre-Release Access

For some data that are particularly sensitive or move markets, statistical agency heads may choose to provide secure pre-release access. Secure pre-release access means that pre-release access is provided only within the confines of secure physical facilities with no external communications capability. When the head of a releasing statistical agency determines that secure pre-release access is required, the agency shall provide pre-release access to final statistical products only when it uses secure pre-release procedures.

7. *Announcement of Changes in Data Series.* Statistical agencies shall announce, in an appropriate and accessible manner as far in advance of the change as possible, significant planned changes in data collection, analysis, or estimation methods that may affect the interpretation of their data series. In the first report affected by the change, the agency must include a complete description of the change and its effects and place the description on its Internet site, if the report is not otherwise available there.

8. *Revisions and Corrections of Data.* For some statistical products, statistical agencies produce preliminary estimates or initial releases that will subsequently be updated and finalized. Whenever preliminary data are released, they must be identified as preliminary and the release must indicate that an updated or final revision is expected. In applicable cases, the expected date of such revisions must be included. Reference to the preliminary release and appropriate explanations of the methodology and reasons for the revisions must be provided or referenced in any updated or final releases.

Consistent with each agency's information quality guidelines, statistical agencies must also establish a policy for handling unscheduled corrections due to previously unrecognized errors. Agencies have an obligation to alert users as quickly as possible to any such changes, to explain corrections or revisions that result from any unscheduled corrections, and to make appropriate changes in all product formats—including statistical press releases.

9. *Granting of Exceptions.* Prior to taking any action that may violate the provisions of this Directive, the head of a releasing statistical agency shall consult with OMB's Administrator for Information and Regulatory Affairs. If the Administrator determines that the action is in violation of the provisions of this Directive, the head of the releasing statistical agency may apply for an exception. The Administrator may authorize exceptions to the provisions in sections 4, 5, 6, 7, and 8 of this Directive. Any agency requesting an exception must demonstrate to the satisfaction of the Administrator that the proposed exception is necessary and is consistent with the purposes of this Directive.

[FR Doc. E7–14908 Filed 7–31–07; 8:45 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.

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