Federal Register

1–13–04 Tuesday
Vol. 69 No. 8 Jan. 13, 2004

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(ISSN 0097-6326)

Federal Register

1–13–04 Tuesday
Vol. 69 No. 8 Jan. 13, 2004

Pages 1893–2052

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DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

7 CFR Part 868

RIN 0580–AA84

Fees for Processed Commodity Analytical Services

AGENCY: Grain Inspection, Packers and Stockyards Administration,USDA.

ACTION: Final rule.

SUMMARY: The Federal Grain Inspection Service (FGIS), a program of the Grain Inspection, Packers and Stockyards Administration(GIPSA), is increasing the fees for processed commodity analytical services performed under the Agricultural MarketingAct (AMA) of 1946 and removing certain tests from the fee schedule. These changes are needed to cover rising fixed costs and increased operational costs resulting from the mandatedJanuary 2003 Federal pay increase. GIPSA anticipates that this increase in user fees will generate approximately $135,000 in additional yearly revenue.

EFFECTIVE DATE: February 12, 2004.

FOR FURTHER INFORMATION CONTACT: Steven Tanner, Director,Technical Services Division, at his e-mail address: *Steven.N.Tanner@usda.gov* or telephone him at (816) 891–0401.

SUPPLEMENTARY INFORMATION:

Executive Order 12866, Regulatory Flexibility Act, and the Paperwork Reduction Act

This rule has been determined to be nonsignificant for the purpose of Executive Order 12866 and, therefore, has not been reviewed by the Office of Management and Budget (OMB).

Also, pursuant to the requirements set forth in the Regulatory Flexibility Act, Donna Reifschneider, Administrator,GIPSA, has determined that this final 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.*).

GIPSA regularly reviews its user-fee-financed programs to determine if the fees are adequate. Additionally, GIPSA has and will continue to seek out cost saving opportunities and implement appropriate changes to reduce costs. Such actions can provide alternatives to new or increased fees. However, even with these efforts, GIPSA has determined that its existing fee schedule will not generate sufficient revenues to cover program costs for providing processed commodity testing services. Further revenue losses are projected if adjustments to the existing fee schedule are not made. In Fiscal Year (FY) 2002, GIPSA's operating costs for the processed commodity testing program were $233,707 with revenue of $104,380 that resulted in a negative margin of $129,327.

GIPSA has reviewed the financial position of the processed commodity testing program and concluded that $135,000 in additional yearly revenue is needed to fully recover operating costs. This is based on projected program costs of approximately of $240,000 a year and an estimated testing workload of approximately 1,700 samples per year. These revisions are designed to generate revenue sufficient to cover, as nearly as practicable, operational costs resulting from a steep decline in requests for services and the associated loss of revenue and increased operational costs resulting from the mandated 4.1 percent January 2003 Federal pay increase. In FY 1999, the number of samples tested was 16,377, which generated $1,475,579 in revenue; in FY 2000, 12,872 samples were tested, with revenue of $1,212,215; in FY 2001, 3,620 samples were tested, with revenue of $219,033; and in FY 2002, 1755 samples were tested, with revenue of $104,380. The changes to the fee schedule will increase the fees charged to businesses for voluntary processed commodity analytical services and generate approximately $135,000 in additional revenue. Some of these businesses, which consist of processors and shippers of products, such as wheat flour, vegetable oil, and corn meal, may meet the criteria for small entities established by the Small Business Administration criteria for small businesses. Even so, the new fees are not excessive and should not significantly affect those entities. It is estimated that there will be nine entities affected. Further, those entities are under no obligation to use GIPSA services and, therefore, any decision on their part to discontinue the use of this service should not prevent them from marketing their products. Due to the decline in demand of the processed commodity analytical testing services, GIPSA will conduct another analysis of the demand for this program's services, including all costs and revenues generated specific to the program, one year after operating under the new fee schedule.

There will be no additional reporting or record keeping requirements imposed by this action. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 35), the information collection and record keeping requirements in part 800 have been previously approved by OMB under control number 0580–0013. GIPSA has not identified any other Federal rules which may duplicate, overlap, or conflict with this rule.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have a retroactive effect. This action 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 that must be exhausted prior to any judicial challenge to the provisions of this rule.

Background

On July 18, 2003, GIPSA proposed in the **Federal Register** (68 FR 42644) to increase fees for processed commodity analytical services performed under the AMA and remove certain tests from the fee schedule. Under the provisions of the AMA (7 U.S.C. 1621, *et seq.*), GIPSA provides official processed commodity testing services upon request and collects reasonable fees from the customers for performing these services. Section 203(h) of the AMA (7 U.S.C. 1622(h)) provides for the establishment and collection of fees that are reasonable and, as nearly as practicable, cover the costs of the services rendered. These fees cover the GIPSA administrative and supervisory costs for the performance of

official testing services, including personnel compensation and benefits, travel, rent, communication, utilities, contractual services, supplies, and equipment.

The processed commodity testing services fees were last amended on April 4, 2001, and became effective May 4, 2001 (66 FR 17775). These fees were to cover, as nearly as practicable, the level of operating costs as projected for FY 2001 and FY 2002, respectively. GIPSA continually monitors its cost, revenue, and operating reserve levels to ensure that there are sufficient resources for operations. Further, GIPSA has implemented cost-saving measures in the processed commodity program in an effort to provide more cost-effective services. The cost containment measures included a reduction in full-time commodity testing laboratory personnel and increased cross utilization of personnel from other GIPSA programs.

GIPSA regularly reviews its user-fee-financed programs to determine if the fees are adequate and continues to seek out cost saving opportunities and implement appropriate changes to reduce costs. Such actions can provide alternatives to fee increases. However, even with these efforts, GIPSA's previous fee schedule did not generate sufficient revenues to cover program costs. Using the most recent data available, GIPSA's FY 2002 operating costs for this program were $233,707 with revenue of $104,380 that resulted in a negative margin of $129,327.

GIPSA has reviewed the financial position of its processed commodity testing program. Based on this review, GIPSA has concluded that it needs to generate $135,000 in additional yearly revenue to recover program costs.

Comment Review

GIPSA did not receive any comments in response to the proposed rulemaking published on July 18, 2003, at 68 FR 42644.

Final Action

Section 203(h) of the AMA (7 U.S.C. 1622(h)) provides for the establishment and collection of fees that are reasonable and, as nearly as practicable, cover the costs of the services rendered. These fees cover the GIPSA administrative and supervisory costs for the performance of official testing services, including personnel compensation and benefits, travel, rent, communication, utilities, contractual services, supplies, and equipment.

Accordingly, GIPSA is revising the fees for processed commodity analytical services performed under the AMA in 7 CFR 868.90, paragraph (d), Table 2—Fees for Laboratory Test Services.

List of Subjects in 7 CFR Part 868

Administrative practice and procedure, Agricultural commodities.

■ For reasons set out in the preamble, 7 CFR Part 868 is amended as follows:

PART 868—GENERAL REGULATIONS AND STANDARDS FOR CERTAIN AGRICULTURAL COMMODITIES

■ 1. The authority citation for part 868 continues to read as follows:

Authority: Secs. 202–208, 60 Stat. 1087, as amended (7 U.S.C. 1621, *et. seq.*)

■ 2. Section 868.90, paragraph (d) is revised to read as follows:

868.90 Fees for certain Federal inspection services.

* * * * *

(d) Laboratory tests referenced in table 2 of this section will be charged at the applicable laboratory fee.

TABLE 2.—FEES FOR LABORATORY TEST SERVICES [1]

Laboratory tests	Fees
(1) Aflatoxin (Quantitative—HPLC)	$182.00
(2) Aflatoxin (Quantitative—Test Kit)	87.00
(3) Aflatoxin (Qualitative—Test Kit)	47.00
(4) Appearance and odor	7.00
(5) Ash	17.00
(6) Brix	16.00
(7) Calcium	27.00
(8) Carotenoid Color	27.00
(9) Cold test (oil)	20.00
(10) Color test (syrups)	13.00
(11) Cooking tests (pasta)	13.00
(12) Crude fat	20.00
(13) Crude fiber	27.00
(14) Falling number	24.00
(15) Free fatty acid	24.00
(16) Insoluble impurities (oils and shortenings)	9.00
(17) Iron enrichment	30.00
(18) Lovibond color	20.00
(19) Moisture	13.00
(20) Moisture and volatile matter	17.00
(21) Oxidative stability index (OSI)	54.00
(22) Peroxide Value	27.00
(23) Popping ratio	38.00
(24) Protein	16.00
(25) Sanitation (light filth)	47.00
(26) Sieve test	11.00
(27) Smoke Point	43.00
(28) Solid fat index	168.00
(29) Visual exam	22.00
(30) Vomitoxin (Qualitative—Test Kit)	61.00
(31) Vomitoxin (Quantitative—Test Kit)	81.00
(32) Other laboratory analytical services (per hour per service representative)	67.00

[1] When laboratory tests/services are provided for GIPSA by a private laboratory, the applicant will be assessed a fee, which, as nearly as practicable, covers the costs to GIPSA for the service provided.

Donna Reifschneider,
Administrator, Grain Inspection, Packers and Stockyards Administration.
[FR Doc. 04–569 Filed 1–12–04; 8:45 am]
BILLING CODE 3410–EN–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 7

[Docket No. 04–03]

RIN 1557–AC78

Bank Activities and Operations

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is publishing its final rule amending its visitorial powers regulation in order to clarify issues that have arisen in connection with the scope of the OCC's visitorial powers.

EFFECTIVE DATE: February 12, 2004.

FOR FURTHER INFORMATION CONTACT: For questions concerning the final rule, contact Andra Shuster, Counsel, or Mark Tenhundfeld, Assistant Director, Legislative and Regulatory Activities Division, (202) 874–5090.

SUPPLEMENTARY INFORMATION: On February 7, 2003, the OCC published a notice of proposed rulemaking in the **Federal Register** (68 FR 6363) to implement the American Homeownership and Economic Opportunity Act of 2000 (AHEOA) and clarify our visitorial powers regulation (NPRM). In addition, we proposed to amend parts 5, 7, 9, and 34 of our regulations for other purposes and to make various technical changes to correct citations or footnote numbering.

On December 17, 2003, the OCC published a final rule that addressed all of the foregoing parts of the proposal except visitorial powers (68 FR 70122). This final rule relates solely to the visitorial powers proposal (proposal).

The OCC received 55 comments on the NPRM. Of these, 53 comments addressed the visitorial powers proposal. These comments included three from national banks, one from an operating subsidiary of a national bank, six from bank holding companies, five from banking trade associations, two from bank membership organizations, one from a community group association, two from non-profit consumer groups, one from a state bank supervisors' association, 30 from state bank supervisors' offices, one from a securities administrators' membership organization, and one from a law enforcement association.

While many of the commenters supported the proposal, some were opposed, and many offered suggestions for changes. For the reasons discussed later in this preamble, we have adopted the visitorial powers provisions of the NPRM with certain modifications also described later.

A. Background

Current 12 CFR 7.4000(a) provides that only the OCC or an authorized representative of the OCC may exercise visitorial powers with respect to national banks, subject to exceptions provided in Federal law. Section 7.4000(a) goes on to define the regulatory, supervisory, and enforcement actions included within our visitorial powers, while § 7.4000(b) sets out several exceptions to our exclusive authority that are created by Federal law.[1]

These provisions interpret and implement 12 U.S.C. 484. Paragraph (a) of that section states—

> No national bank shall be subject to any visitorial powers except as authorized by Federal law, vested in the courts of justice or such as shall be, or have been exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

Paragraph (b) of the statute then permits lawfully authorized state auditors or examiners to review a national bank's records "solely to ensure compliance with applicable State unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with such laws."

In recent years, various questions have arisen with respect to the scope of the OCC's visitorial powers over national banks. In general, the questions fall into two broad categories: First, what activities conducted by a national bank are subject to the OCC's *exclusive* visitorial powers? Second, what is the meaning of certain exceptions to the OCC's exclusive visitorial powers that are provided in the statute, specifically the exception for visitorial powers "vested in the courts of justice?"

The NPRM invited comments on proposed amendments to § 7.4000 to clarify the application of section 484 to both areas.

[1] Paragraph (c) of 12 CFR 7.4000 clarifies that the OCC owns reports of examination and addresses a bank's obligations with respect to these reports. This paragraph is unaffected by this rulemaking.

B. Description of the Proposal

The proposal contained two types of changes to § 7.4000. First, we proposed to add a new paragraph (3) to § 7.4000(a) that identifies the scope of the activities of national banks for which the OCC's visitorial powers are exclusive, pursuant to section 484. The proposal provided that the OCC has exclusive visitorial authority over national bank activities that are permissible under Federal law or regulation or OCC issuance or interpretation, including how those activities are conducted. Second, we proposed to revise § 7.4000(b) to clarify the OCC's interpretation of the "vested in the courts of justice" exception. The proposal provided that national banks are subject to the visitorial power inherently vested in courts and that the "vested in the courts of justice" exception did not create or expand any authority of states or other governmental entities to regulate or supervise national banks. As we will discuss in greater detail later in this preamble, both of these changes serve to clarify that Federal law commits the supervision of national banks' Federally-authorized banking business exclusively to the OCC, (except where Federal law provides otherwise), and does not apportion that responsibility among the OCC and the states; and that state authorities may not achieve indirectly by resort to judicial actions what section 484 prohibits them from achieving directly through state regulatory or supervisory mechanisms. The proposal also added an exception in proposed new § 7.4000(b)(vi) recognizing that functional regulators may exercise the authority over national banks conferred by the Gramm-Leach-Bliley Act (GLBA).[2]

C. Overview of Comments Received

Many commenters supported the proposal, noting that the clarification of the visitorial powers regulations would be helpful. One commenter said that subjecting national banks' Federally-authorized activities to state regulation would be inconsistent with the purposes of the National Bank Act. Others noted that additional layers of state supervision would have the effect of making the operations of national banks less efficient and more costly. Commenters also stated that they supported the proposal's clarification of

[2] Pub. L. 106–102, 113 Stat. 1338 (Nov. 12, 1999). For example, section 301 of the GLBA (codified at 15 U.S.C. 6711) provides that national banks' insurance activities are functionally regulated by the states, subject to the applicability of state law provisions in section 104 of that law (codified at 15 U.S.C. 6701). *Id.* at section 301, 113 Stat. at 1407, codified at 15 U.S.C. 6711.

the "courts of justice" exception. A number of commenters supporting the proposal suggested that, while the reference in the preamble is helpful, the OCC should add language to the regulation text to explicitly state that the OCC's exclusive visitorial authority applies to operating subsidiaries.

We also received a number of comments that opposed the proposal. These commenters advanced four principal points: first, that the visitorial powers amendments are inconsistent with the fundamental tenets of the dual banking system, pursuant to which national banks are subject to state regulation; second, that the amendments are inconsistent with the presumptive applicability of state law to national banks, as endorsed by the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 (the Riegle-Neal Act);[3] third, that the OCC's visitorial power over national banks is not exclusive; and, finally, that the OCC lacks authority to prevent states from exercising visitorial powers over national bank operating subsidiaries. The following discussion addresses each of these points.

D. Discussion

1. The Exclusivity of the OCC's Visitorial Authority is Integral to—Not Inconsistent With—the Dual Banking System

Many commenters opposed to the proposal argued that the amendments would amount to a "field preemption" that would be inconsistent with what they aver to be a fundamental tenet of the dual banking system, namely, that states have the authority to regulate the business operations of all banks, including national banks, unless Congress preempts state law in specific areas.

This argument mischaracterizes the essence of the dual banking system. Differences in national and state bank powers and in the supervision and regulation of national and state banks are not inconsistent with the dual banking system; rather they are the defining characteristics of it. As one noted commenter has observed, "[t]he very core of the dual banking system is the simultaneous existence of different regulatory options that are *not* alike in terms of statutory provisions, regulatory implementation and administrative policy."[4] The Federal grant of national bank powers and the uniformity of the standards that govern their exercise, coupled with the OCC's exclusive visitorial authority, are fundamental distinctions between the national banking system and the system of state-chartered and regulated banks that comprises the other half of the dual banking system.

Neither the case law nor scholarly literature recognizes a definition of dual banking incorporating the notion that national banks are subject to state supervision and regulation of activities they are authorized to conduct under Federal banking law.[5] What the case law *does* recognize is that "states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law."[6] Application of these laws to national banks and their implementation by state authorities typically does not affect the content or extent of the Federally-authorized business of banking conducted by national banks, but rather establishes the legal infrastructure that surrounds and supports the ability of national banks—and others—to do business.[7] In other words, these state laws provide a framework for a national bank's ability to exercise powers granted under Federal law; they do not obstruct or condition a national bank's exercise of those powers.[8]

The argument that the proposed amendments generally amount to an impermissible "field preemption" is also misplaced. First, the regulatory proposal and the final regulation would not have the effect of preempting substantive state laws, but rather would clarify the appropriate agency for enforcing those state laws that are applicable to national banks. Concerns about "field preemption" are misplaced since the rule pertains only to state laws that would provide for state "visitation" of national banks. The proposal and this final rule interpret the text of a Federal statute, 12 U.S.C. 484, that expressly confines the scope of permissible supervision over national banks to what is provided in Federal law, including the limited exception for state inspection of certain records that is contained in section 484. Thus, Congress has spoken to the issue. Our amendments to our visitorial powers rule seek to define the terms used in the statute in order to provide greater certainty to affected parties with regard to the specific issue of visitation.

2. No Presumption Against Preemption Applies in the Case of the National Banking Laws, a Conclusion That Is Confirmed by the Riegle-Neal Act

Commenters also argued that the amendments in the proposal are inconsistent with the presumptive application of state law to national banks, which they assert was specifically endorsed by Congress in the Riegle-Neal Act.[9]

However, case law, whether decided before or after Riegle-Neal was enacted, is consistent in holding that there is no presumption against preemption in the national bank context. The Supreme Court has said that a presumption against preemption "is not triggered when the State regulates in an area where there has been a history of significant federal presence."[10] Courts have consistently held that the regulation of national banks is an area where there has been an extensive history of significant Federal presence. As recently observed by the U.S. Court

[3] Pub. L. 103–328, 108 Stat. 2338 (Sept. 29, 1994).

[4] Kenneth E. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 Stan. L. Rev. 1, 41 (1977).

[5] The following is typical of the way the dual banking system is described in recent scholarly articles:

"Depository financial institutions in the United States, including banks, credit unions, and thrifts, are unique in that their incorporators and/or management have a choice between state and federal charters, regulatory authorities, and governing statutes. No other industry has separate and distinct laws governing its powers, regulation, and organizational structure. This phenomenon is known as the 'dual banking system'."

John J. Schroeder, *"Duel" Banking Sytem? State Bank Parity Laws: An Examination of Regulatory Practice, Constitutional Issues, and Philosophical Questions*, 36 Ind. L. Rev. 197, at 197 (2003), *citing* Arthur E. Wilmarth, Jr., The Dual Banking System—A Legal History (Sept. 30, 1991) (unpublished paper presented at the Education Foundation of State Bank Supervisors (EFSBS) Seminar for State Banking Department Attorneys).

[6] *Bank of America* v. *City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002).

[7] The OCC is publishing in the **Federal Register** today a final rule amending parts 7 and 34 of the OCC's regulations to clarify that these state "infrastructure" statutes would generally not be preempted by Federal law.

[8] *See Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 33–34 (1996).

[9] Commenters rely on the legislative history of the Riegle-Neal Act as support for their assertions. This history demonstrates that Congress intended that the Riegle-Neal Act would *not* disrupt the application of traditional principles of Federal preemption to questions involving national banks. We note, however, that under well-established principles of statutory construction, it is not necessary to resort to legislative history to determine the meaning of a statute unless the text of the statute is ambiguous, which is not the case here. *See, e.g., Burlington Northern R.R. Co.* v. *Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987) (unless there are exceptional circumstances, judicial inquiry into the meaning of a statute is complete once the court finds that the terms of the statute are unambiguous.) (citation omitted); *see also* 2A Norman J. Singer, Sutherland, *Statutes and Statutory Construction* § 48.01, at 410 (6th ed. 2000) ("Generally, a court would look to the legislative history for guidance when the enacted text was capable of two reasonable readings or when no one path of meaning was clearly indicated.").

[10] *U.S.* v. *Locke*, 529 U.S. 89, 108 (2000) (explaining *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

of Appeals for the Ninth Circuit, "since the passage of the National Bank Act in 1864, the federal presence in banking has been significant." The court thus specifically concluded that "the presumption against preemption of state law is inapplicable." [11] Indeed, when analyzing national bank powers, the Supreme Court has interpreted "grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." [12]

The relevant text of the Riegle-Neal Act is fully consistent with these conclusions. In fact, it is entirely consistent with the proposal and final rule in providing that even when state law may be applicable to interstate branches of national banks, the OCC is to enforce such laws, *i.e.*, the OCC retains exclusive visitorial authority:

(A) In general

The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches shall apply to any branch in the host State of an out-of-State national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, *except*—

(i) When Federal law preempts the application of such State laws to a national bank; * * *

(B) Enforcement of applicable State laws

The provisions of any State law to which a branch of a national bank is subject under this paragraph *shall be enforced*, with respect to such branch, by the *Comptroller of the Currency*.[13]

Thus, although Riegle-Neal section 36(f) clarifies that the laws of the host state regarding community reinvestment, consumer protection, and fair lending would be applicable to branches of an out-of-state national bank located in the host state, *unless preempted*, the Riegle-Neal Act further and unambiguously provides that it is the OCC that has the authority to enforce such state laws to the extent they are *not* preempted.

3. Section 484 Grants Visitorial Authority to the OCC, to the Exclusion of the States

Some commenters argued that the OCC's visitorial power is not exclusive because (1) the text of the statute does not contain an explicit grant of exclusive authority to the OCC; and (2) courts have permitted states to exercise concurrent authority to seek enforcement of state laws. These two contentions are addressed in turn.

a. The Text of Section 484

Commenters who opposed the proposal argued that the OCC may not rely on 12 U.S.C. 484 as the basis for our exclusive jurisdiction because that section is silent on precisely who has visitorial powers over national banks. A review of the history of section 484 shows that this reading of the statute is fundamentally mistaken.

In the Act of June 3, 1864, later named the National Bank Act, the visitorial powers provision appeared in the *same section* as the Comptroller's examination authority. In that context, it was clear that visitorial authority was exclusive to the Comptroller, subject to a single exception for powers "vested in the several courts of law and chancery." Section 54 of the National Bank Act provided in relevant part:

And be it further enacted, That the comptroller of the currency, with the approbation of the Secretary of the Treasury, as often as shall be deemed necessary or proper, shall appoint a suitable person or persons to make an examination of the affairs of every banking association. * * * And the association shall not be subject to any other visitorial powers than such as are authorized by this act, except such as are vested in the several courts of law and chancery.[14]

These examination and visitorial provisions of section 54 were codified together in 1875 at section 5240 of the Revised Statutes of the United States. Section 5240 explicitly gave the OCC visitorial authority over national banks *and* precluded the exercise of visitorial authority by any other source, except insofar as expressly allowed by one of the exceptions, including the exception covering visitations "as authorized by Federal law." In context, the meaning of the text is unmistakable. The Comptroller is given the power to examine and supervise national banks—that is, to serve as the "visitor" of the bank—and that power, as well as any other "visitorial" power is denied to any other entity unless Federal law provides otherwise.

The examination and visitorial provisions were split, slightly revised, then later reunited, in subsequent codifications,[15] but Congress has never altered the original meaning of these grants of authority to the OCC. The visitorial provision has been substantively amended only twice, once in 1913 and once in 1982.[16] Both times, the amendments were consistent with the exclusive grant of visitorial authority in the original enactment. In both cases, the legislative history, though sparse, contains no indication that Congress intended to change the exclusivity of its original grant of authority to the Comptroller. In fact, the 1982 amendment that added the exception allowing state authorities to review national bank records to ascertain compliance with state escheat or unclaimed property laws would have been unnecessary if the language of section 484 permitted state examination and enforcement of applicable state law. As codified today, the examination and visitorial provisions appear in separate sections of the United States Code. Substantive consequences do not attach to the placement of the provisions in the Code, however, and neither provision may be read in isolation to suggest a meaning that is inconsistent with the law as enacted by the Congress.

Moreover, exclusivity is inherent in the structure of the statute, both as originally enacted and today. The visitorial powers provision first sets forth a complete prohibition, then subjects that prohibition to certain exceptions.[17] The inference to be drawn from this structure is that the prohibition applies unless a visitorial power is covered by one of the

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[11] *Bank of America*, 309 F.3d at 558–59 (citations omitted).

[12] *Barnett*, 517 U.S. at 32. The *Barnett* Court went on to elaborate:

[W]here Congress has not expressly conditioned the grant of 'power' upon a grant of state permission, the Court has ordinarily found that no such condition applies. In *Franklin Nat. Bank*, the Court made this point explicit. It held that Congress did not intend to subject national banks' power to local restrictions, because the federal power-granting statute there in question contained 'no indication that Congress [so] intended * * * as it has done *by express language* in several other instances.'

Id. at 34 (emphasis in original) (citations omitted).

[13] 12 U.S.C. 36(f)(1) (emphasis added).

[14] Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, codified at 12 U.S.C. 481–484.

[15] The examination provision is currently codified at 12 U.S.C. 481.

[16] In 1913, the exception for Congress and its committees was added, the reference to the Act of June 3, 1864 changed to "other than such as are authorized by *law*," and the word "bank" substituted for the word "association." Amendments in 1982 added the exception allowing state authorities to review national bank records to ascertain compliance with state escheat or unclaimed property laws, added the word "Federal" before the word "law," and changed "bank" to "national bank."

[17] Commenters cited to *First Union Nat'l Bank* v. *Burke*, 48 F. Supp. 2d 132 (D. Conn. 1999), in support of their contention that the OCC's visitorial power is not exclusive. We disagree that the court's opinion is dispositive of the issues considered here. The opinion did not analyze the purpose, plain language, and structure of section 484. Moreover, we note that the *Burke* court agreed that a state may not directly enforce state law against national banks.

enumerated exceptions. As noted above, the statute's description of the exceptions has changed—though the changes have been modest—over time. But none of these exceptions allows for the allocation of any general bank supervisory responsibility to the states.

As we discussed when we issued the visitorial powers proposal, any allocation of general supervisory authority over national banks to the states would be inconsistent with the history and purpose of the National Bank Act, as well as with the express language of the statute. Congress enacted the National Currency Act (Currency Act) in 1863 and the National Bank Act the year after for the purpose of establishing a new national banking system that would operate distinctly and separately from the existing system of state banks. The Currency Act and National Bank Act were enacted to create a uniform and secure national currency and a system of national banks designed to help stabilize and support the post-Civil War national economy.

Both proponents and opponents of the new national banking system expected that it would supersede the existing system of state banks.[18] Given this anticipated impact on state banks and the resulting diminution of control by the states over banking in general,[19] proponents of the national banking system were concerned that states[20] would attempt to undermine it. Remarks of Senator Sumner illustrate the sentiment of many legislators of the time: "Clearly, the bank must not be subjected to any local government, State or municipal; it must be kept absolutely and exclusively under that Government from which it derives its functions."[21]

The allocation of any supervisory responsibility for the new national banking system to the states would have been inconsistent with this need to protect national banks from state interference.[22] Congress, accordingly, established a Federal supervisory regime and created a Federal agency within the Department of Treasury—the OCC—to carry it out. Congress granted the OCC the broad authority "to make a thorough examination into all the affairs of [a national bank]," [23] and solidified this Federal supervisory authority by vesting the OCC with exclusive visitorial powers over national banks. These provisions assured, among other things, that the OCC would have comprehensive authority to examine all the affairs of a national bank, *and* protected national banks from potential state hostility by establishing that the authority to examine and supervise national banks is vested *only* in the OCC, unless otherwise provided by Federal law.[24]

Courts have consistently recognized the unique status of the national banking system and the limits placed on states by the National Bank Act. The Supreme Court stated in one of the first cases to address the role of the national banking system that "[t]he national banks organized under the [National Bank Act] are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end."[25] Subsequent opinions of the Supreme Court have been equally clear about national banks' unique role and status.[26]

In *Guthrie* v. *Harkness*,[27] the Supreme Court recognized how the National Bank Act furthered the objectives of Congress:

> Congress had in mind in passing this section [section 484] that in other sections of the law it had made full and complete provision for investigation by the Comptroller of the Currency and examiners appointed by him, and, authorizing the appointment of a receiver, to take possession of the business with a view to winding up the affairs of the bank. It was the intention that this statute should contain a full code of provisions upon the subject, and that no state law or enactment should undertake to exercise the right of visitation over a national corporation. Except in so far as such corporation was liable to control in the courts

[18] Representative Samuel Hooper, who reported the bill to the House, stated in support of the legislation that one of its purposes was "to render the law [*i.e.*, the Currency Act] so perfect that the State banks may be induced to organize under it, in preference to continuing under their State charters." Cong. Globe, 38th Cong. 1st Sess. 1256 (Mar. 23, 1864). While he did not believe that the legislation was necessarily harmful to the state bank system, Rep. Hooper did "look upon the system of State banks as having outlived its usefulness." *Id.* Opponents of the legislation believed that it was intended to "take from the States * * * all authority whatsoever over their own State banks, and to vest that authority * * * in Washington." Cong. Globe, 38th Cong., 1st Sess. 1267 (Mar. 24, 1864) (statement of Rep. Brooks). Rep. Brooks made that statement to support the idea that the legislation was intended to transfer control over banking from the states to the Federal government. Given that the legislation's objective was to replace state banks with national banks, its passage would, in Rep. Brooks's opinion, mean that there would be no state banks left over which the states would have authority. Thus, by observing that the legislation was intended to take authority over state banks from the states, Rep. Brooks was not suggesting that the Federal government would have authority over state banks; rather, he was explaining the bill in a context that assumed the demise of state banks. Rep. Pruyn opposed the bill stating that the legislation would "be the greatest blow yet inflicted upon the States." Cong. Globe, 38th Cong., 1st Sess. 1271 (Mar. 24, 1864). *See also* John Wilson Million, *The Debate on the National Bank Act of 1863*, 2). Pol. Econ. 251, 267 (1893–94) regarding the Currency Act. ("Nothing can be more obvious from the debates than that the national system was to supersede the system of state banks.").

[19] *See, e.g., Tiffany* v. *Nat'l Bank of Missouri*, 85 U.S. 409, 412–413 (1874) ("It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. * * * National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks."); *Beneficial Nat'l Bank* v. *Anderson*, 123 S. Ct. 2058, 2064 (2003) ("[T]his Court has also recognized the special nature of federally chartered banks. Uniform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'") (citation omitted). *See also* Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* 725–34 (1957); Paul Studenski & Herman E. Krooss, *Financial History of the United States* 154–55 (1952).

[20] For ease of reference, we use the term "state" in this preamble in a way that includes other non-Federal governmental entities.

[21] Cong. Globe, 38th Cong., 1st Sess., at 1893 (Apr. 27, 1864); *see also Beneficial Nat'l Bank*, 123 S.Ct. at 2064.

[22] In a report of the Comptroller of the Currency made pursuant to the Currency Act, Hugh McCulloch, then Comptroller, discussed the need to protect national banks from variation in interest rates among the states by making a change in the law to provide for uniform interest rates. He referred to the Supreme Court decision in *M'Culloch* v. *Maryland*, 17 U.S. 316 (1819), which prohibited the state of Maryland from imposing taxes on the Bank of the United States under the Federal statute establishing the bank, as support for Congress having the authority to make this change by likening the Maryland taxation statute to a state statute on interest. Office of the Comptroller of the Currency, Report on the Finances, Nov. 28, 1863, at 52–53.

[23] Act of June 3, 1864, c. 106, § 54, 13 Stat. 116, codified at 12 U.S.C. 481.

[24] Writing shortly after the Currency Act and National Bank Act were enacted, then-Secretary of the Treasury, and formerly the first Comptroller of the Currency, Hugh McCulloch observed that "Congress has assumed entire control of the currency of the country, and, to a very considerable extent, of its banking interests, prohibiting the interference of State governments." Letter of Secretary of the Treasury, serial set collection, CIS No. 1239 S.misdoc.100, 39th Cong., 1st Sess., Misc. Doc. No. 100, at 2 (Apr. 23, 1866).

[25] *Farmers' & Mechanics' Nat'l Bank* v. *Dearing*, 91 U.S. 29, 33 (1875).

[26] *See Marquette Nat'l Bank of Minneapolis* v. *First Omaha Service Corp.*, 439 U.S. 299, 314–315 (1978) ("Close examination of the National Bank Act of 1864, its legislative history, and its historical context makes clear that, . . . Congress intended to facilitate . . . a 'national banking system'." (citation omitted)); *Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 375 (1954) ("The United States has set up a system of national banks as federal instrumentalities to perform various functions such as providing circulating medium and government credit, as well as financing commerce and acting as private depositories."); *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283 (1896) ("National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States.").

[27] 199 U.S. 148, 159 (1905).

of justice, this act was to be the full measure of visitorial power.

The Supreme Court also has recognized the clear intent on the part of Congress to limit the authority of states over national banks precisely so that the nationwide system of banking that was created in the Currency Act could develop and flourish. For instance, in *Easton* v. *Iowa*,[28] the Court stated that Federal legislation affecting national banks'—

> has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states. * * * It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute. * * * [W]e are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and *confusion would necessarily result from control possessed and exercised by two independent authorities.*

And in *Farmers' & Mechanics' National Bank*, after observing that national banks are means to aid the government, the Court stated—

> Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this is "an abuse, because it is the usurpation of power which a single State cannot give."[29]

Our proposed amendment clarifying the scope of the visitorial powers authorized to the OCC pursuant to section 484 is consistent with the historical meaning of the term "visitation" and with cases discussing section 484. The Supreme Court in *Guthrie* noted that the term "visitorial" as used in section 484 derives from English common law, which used the term "visitation" to refer to the act of a superintending officer who visits a corporation to examine its manner of conducting business and enforce observance of the laws and regulations.[30] "'Visitors of corporations have power to keep them within the legitimate sphere of their operations, and to correct all abuses of authority, and to nullify all irregular proceedings.'"[31] The *Guthrie* Court also noted that visitorial powers include bringing "judicial proceedings" against a corporation to enforce compliance with applicable law.[32]

b. Concurrent Enforcement Jurisdiction

Several commenters asserted that states retain jurisdiction concurrent with the OCC to enforce compliance with state laws against national banks in both state and Federal court.[33] The cases cited by commenters in support of this contention are examples of the use of courts for private civil cases in pursuit of personal claims against national banks, which, unlike attempts by state authorities to exercise authority over national banks using the courts, do not amount to visitations.[34] Other cases cited by commenters appear inapposite or outdated.[35]

A few commenters cited *First National Bank in St. Louis* v. *Missouri*[36] to support their position that states may bring enforcement actions directly against national banks.[37] In *St. Louis*, the court upheld a state's ability to preclude, through an action *quo warranto*, a national bank's exercise of a power that was not then authorized to it, namely, intrastate branching.

St. Louis presents a unique set of circumstances, now outdated, and did not discuss the scope of section 484; thus the case provides little help in construing section 484. The principal issue in the case was whether a national bank had the power to branch intrastate despite a state law prohibition on branching. The Court looked for express authority to branch intrastate in the text of the National Bank Act and, finding none, concluded that the activity was not authorized. The Court then went on to permit Missouri to enforce its intrastate branching prohibition against the national bank. To the extent that *St. Louis* is still relevant, the case holds that a state may enforce a prohibition against a national bank where: (a) the national bank is found to lack the fundamental authority to engage in an activity;[38] (b) the state has a law prohibiting the activity entirely; and (c) no Federal enforcement mechanism is available to preclude the bank from violating the applicable state law.

The principal means in use today for testing the application of state law to national banks—declaratory judgment—was unavailable to the states prior to the enactment of the Declaratory Judgment Act in 1934, 28 U.S.C. 2201 through 2202. If this type of action had been available at the time of the *St. Louis* case, there would have been no need for the state to bring a *quo warranto* action. Subsequent cases concerning the power of national banks to branch have typically been brought as declaratory judgments.[39]

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[28] 188 U.S. 220, 229, 231–32 (1903) (emphasis added).

[29] 91 U.S. at 34 (citations omitted).

[30] *Guthrie*, 199 U.S. at 158, citing *First Nat'l Bank of Youngstown* v. *Hughes*, 6 F. 737, 740 (C.C.D. Ohio 1881), *appeal dismissed*, 106 U.S. 523 (1883)). Because "visitation" assumes the act of a sovereign body, private actions brought by individuals against banks in pursuit of personal claims ordinarily are outside the scope of visitorial powers rules. This point is discussed further in the analysis of the arguments asserting concurrent jurisdiction between state and Federal courts over national banks, *infra*.

[31] *Id.* (citation omitted).

[32] *Id. See also Peoples Bank of Danville* v. *Williams*, 449 F. Supp. 254, 259 (W. D. Va. 1978) (visitorial powers involve the exercise of the right of inspection, superintendence, direction, or regulation over a bank's affairs). For a detailed discussion of the historical scope and content of visitorial powers generally, *see* Roscoe Pound, *Visitatoriol Jurisdiction Over Corporations in Equity*, 49 Harv. L. Rev. 369 (1935–36).

[33] We note that the National Bank Act did confer jurisdiction on both state and Federal courts over actions against national banks. *See* Act of June 3, 1864, § 57. Nothing in the grant of jurisdiction says or implies that state authorities may use the judiciary as the medium to supervise, examine, or regulate the business of national banks, as commenters have asserted.

[34] *First Nat'l Bank of Charlotte* v. *Morgan*, 132 U.S. 141 (1889) (private action for usury against national banks may be brought in state court); *Bank of Bethel* v. *Pahquioque Bank*, 81 U.S. 383 (1872) (private creditors may sue national bank in state court).

[35] *See, e.g., Guthrie*, 199 U.S. 148 (private civil action by a stockholder to compel, by writ of mandamus, the directors of a national bank to permit a stockholder to inspect the bank's books; private civil action, no state executive visitation involved); *Colorodo Nat'l Bank of Denver* v. *Bedford*, 310 U.S. 41 (1940) (action for declaratory judgment; consistent with the OCC's final regulation, which does not regard actions for declaratory judgment as visitorial); *Waite* v. *Dowley*, 94 U.S. 527 (1877) (substantive preemption case that did not involve visitorial powers); and *First Nat'l Bank of Youngstown*, 6 F. at 741 (no visitation involved where state taxation authorities used court to compel production of bank's records in aid of taxation of individual depositors; state actions did "not contemplate inspection, supervision, or regulation of [the bank's] business, or an enforcement of its laws or regulations.").

[36] 263 U.S. 640 (1924).

[37] In *St. Louis*, the state of Missouri brought a *quo warranto* action to stop a national bank from operating a branch in the state. The state had a law prohibiting branch banking. The Supreme Court held that the state statute was applicable to national banks and could be enforced by the state. *Quo warranto* is "[a] common law writ designed to test whether a person exercising power is legally entitled to do so. An extraordinary proceeding, prerogative in nature, addressed to preventing a continued exercise of authority unlawfully asserted. * * * It is intended to prevent exercise of powers that are not conferred by law, and is not ordinarily available to regulate the manner of exercising such powers." Black's Law Dictionary (6th ed. 1990) (citation omitted). Today, such an issue would be raised via an action for a declaratory judgment.

[38] The power to branch intrastate was subsequently authorized for national banks by the McFadden Act in 1927. Act of February 25, 1927, c. 191, § 7, 44 Stat. 1228, codified at 12 U.S.C. 36.

[39] *See, e.g., Jackson* v. *First Nat'l Bank of Voldosta*, 349 F.2d 71 (5th Cir. 1965); *State of Utah, ex rel., Dep't of Finonciol Institutions* v. *Zions First*

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Moreover, the OCC has enforcement authority today that did not exist when *St. Louis* was decided. Congress authorized the OCC to bring enforcement actions predicated on, *inter alia*, violations of state law in 1966.[40] Thus, if state law that would regulate an aspect of a national bank's Federally-authorized banking business is not preempted, it would be enforced by the OCC, not the states.[41]

The essential elements of *St. Louis* thus are entirely consistent with our construction of the "courts of justice" exception as proposed. Moreover, our construction is consistent with the text and history of section 484, the purpose of that section in the context of the national banking laws, and with other U.S. Supreme Court and lower Federal court precedents. The exception preserves the powers that are inherent in the courts. As we noted in the preamble to the proposal, Congress clearly did not intend to create new visitorial authority that could be exercised by state authorities when it recognized the authority of courts of justice. It would be completely contrary to the express purposes of section 484 to read the "vested in the courts of justice" exception as a new Federal authorization for state authorities to accomplish exactly what Congress deliberately and expressly intended states *not* to be able to do—namely, inspect and supervise the activities of national banks and compel their adherence to a variety of state-set standards.

This purpose is effectuated by the plain language of the statute. The exception permits the exercise of "visitorial powers" that are "*vested* in the courts of justice," powers, in other words, that *courts possess*. Section 484 does not create new powers for state executive, legislative, or administrative authorities to supervise and regulate national banks. It grants no *new* authority and thus does not authorize states to bring suits or enforcement actions that they do not otherwise have the power to bring.

To read the *exception* as an authorization to permit state authorities to inspect, regulate, supervise, direct, or restrict the activities of national banks simply by filing a complaint in a court would be to *create* a visitorial power that states do not otherwise possess under Federal law. Section 484 by its express terms simply does not create such boundless visitorial powers for state authorities. Where section 484 *does* recognize visitorial authority for states in section 484(b), by contrast, it is specific and narrow, and expressly stated as an *exception* to the general exclusivity of the OCC's visitorial powers recognized in section 484(a).

Under this construction of section 484, states remain free to seek a declaratory judgment from a court as to whether a particular state law applies to the Federally-authorized business of a national bank or is preempted. However, if a court rules that a state law is not preempted, enforcement of a national bank's compliance with a law that would govern the content or the conditions for conduct of a national bank's Federally-authorized banking business is within the OCC's exclusive purview.[42] In addition, it does not preclude actions brought by other governmental entities pursuant to a Federal grant of authority.[43]

4. The OCC Has Exclusive Visitorial Authority Over National Bank Operating Subsidiaries to the Same Extent as It Has That Authority Over the Parent National Bank

Commenters also asserted that the OCC lacks the authority to prevent states from exercising visitorial authority over national bank operating subsidiaries because they are state-chartered corporations and because section 484 does not specifically refer to operating subsidiaries. Some suggested that a curtailing of state authority over state corporations violates the 10th Amendment to the Constitution.[44] These points are discussed in order, however, it is important to note that the issue of the application of state law to national bank operating subsidiaries is dealt with in a different, preexisting regulation, 12 CFR 7.4006, which we did not propose to change. For the reasons discussed below, we continue to hold the view that under 12 U.S.C. 24(Seventh) and 12 CFR 7.4006, the standards of section 484 apply to national bank operating subsidiaries to the same extent as their parent national bank, and such a result is entirely consistent with Constitutional principles.

a. The OCC's Exclusive Visitorial Authority Over Operating Subsidiaries

Pursuant to their authority under 12 U.S.C. 24(Seventh), national banks have long used separately incorporated entities as a means to engage in activities that the bank itself is authorized to conduct. When established in accordance with OCC regulations and approved by the OCC, an operating subsidiary is a Federally-authorized and Federally-licensed means by which a national bank may conduct Federally-authorized activities. Courts have consistently treated operating subsidiaries as equivalent to national banks in determining their powers and status under Federal law, unless Federal law requires otherwise.[45] Operating subsidiaries are consolidated with—that is, their assets and liabilities are indistinguishable from—the parent bank for accounting purposes, regulatory reporting purposes, and for purposes of applying many Federal statutory or regulatory limits.[46] They are, in essence, no more than incorporated departments of the bank itself.[47]

Nat'l Bank of Ogden, Utah, 615 F.2d 903 (10th Cir. 1980).

[40] Pub. L. 89–695, section 202, 80 Stat. 1028 (Oct. 16, 1966). For a violation of an applicable state law, the OCC may issue cease and desist orders, exercise its removal and prohibition authority, or impose civil money penalties. *See* 12 U.S.C. 1818(b), (e), and (i)(2).

[41] *See Nat'l State Bank, Elizabeth, N.J.* v. *Long*, 630 F.2d 981, 988 (3rd Cir. 1980). *See also State of Arizona* v. *Hispanic Air Conditioning and Heating, Inc.*, CV 2000–003625, Superior Court of Arizona, Ruling at 27–28, Conclusions of Law, paragraphs 46–55 (Aug. 25, 2003). In this action involving a national bank defendant, the court found that restitution and remedial action ordered by OCC pursuant to its visitorial powers was comprehensive and significantly broader than that available through state court proceedings and that it provided more relief to consumers than the court found a legal basis for imposing under state law. The court also noted that ordering the remedies requested by the state would impermissibly affect the exercise of the OCC's administrative enforcement powers.

[42] *See Nat'l State Bank, Elizabeth, N.J.*, 630 F.2d at 988 ("[W]e find ourselves unable to agree with the district court's determination that state officials have the power to issue cease and desist orders against national banks for violations of the [state's] antiredlining statute. Congress has delegated enforcement of statutes and regulations against national banks to the Comptroller of the Currency."); *see also First Union Nat'l Bank*, 48 F. Supp. 2d at 145–46.

[43] *See, e.g., Bank of America Nat'l Trust & Savings Ass'n* v. *Douglas*, 105 F.2d 100 (D.C. Cir. 1939) (service of subpoenas on a national bank by the SEC in connection with an investigation under the Securities Exchange Act of 1934).

[44] The Tenth Amendment reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[45] *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (sale of annuities by operating subsidiary); *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388 (1987) (securities brokerage operating subsidiary); *American Ins. Ass'* v. *Clarke*, 865 F. 2d 278 (D.C. Cir. 1988) (bond insurance subsidiary); *M & M Leasing Corp.* v. *Seattle First Nat'l Bank*, 563 F. 2d 1377 (9th Cir. 1977) (auto leasing subsidiary); and *Valley Nat'l Bank* v. *Lavecchia*, 59 F. Supp. 2d 432 (D. N.J. 1999) (title insurance subsidiary); *Budnik* v. *Bank of America Mortgage*, 2003 U.S. Dist. LEXIS 22542 (N.D. IL 2003) (mortgage subsidiary).

[46] *See* 12 CFR 5.34(e)(4) (requring application of, *e.g.*, statutory lending limit and limit on investment in bank premises to a national bank and its operating subsidiaries on a consolidated basis).

[47] The authority of national banks to conduct business through operating subsidiaries has been recognized for many years. For example, rulings

As a matter of Federal law, operating subsidiaries conduct their activities subject to the same terms and conditions as apply to the parent bank, including being subject to the exclusive visitorial authority of the OCC.[48] Where Congress wanted a different result, it specifically provided for it. For example, section 111 of GLBA makes provision for state regulation of functionally regulated bank subsidiaries conducting securities and insurance activities, treating such subsidiaries as if they were instead subsidiaries of the institution's holding company.[49] Similarly, section 133 of GLBA seeks to clarify the status of bank and thrift subsidiaries and affiliates for purposes of any provisions of the Federal Trade Commission Act applied by the Federal Trade Commission.[50]

Our regulations make clear that activities conducted in operating subsidiaries must be permissible for a national bank to engage in directly either as part of, or incidental to, the business of banking.[51] Moreover, the operating subsidiary is acting "pursuant to the same authorization, terms and conditions that apply to the conduct of such activities by its parent national bank."[52] This includes state laws that purport to govern the activities conducted in the operating subsidiary. OCC regulations specifically provide that "[u]nless otherwise provided by Federal law or OCC regulation, State laws apply to national bank operating subsidiaries to the same extent that those laws apply to the parent national bank."[53] Our regulations reflect express Congressional recognition in section 121 of the GLBA that national banks may own subsidiaries that engage "solely in activities that national banks are permitted to engage in directly and are conducted subject to the same terms and conditions that govern the conduct of such activities by national banks."[54] The "terms and conditions" that govern the conduct of operating subsidiary activities referenced in this provision include how, and by whom, the operating subsidiary is examined and supervised. Thus, operating subsidiaries are licensed, examined and supervised by the same Federal banking agency—the OCC—that examines and supervises national banks, using the same methodology as in the case of national banks.

Courts that have recently considered the issue have confirmed this conclusion. In *Wells Fargo Bank, N.A.* v. *Boutris*,[55] a Federal district court issued a permanent injunction enjoining the California Department of Corporations from exercising visitorial powers over a national bank operating subsidiary. The court noted the existing case law and concluded that the OCC's operating subsidiary regulation is within the agency's authority delegated to it by Congress and is a reasonable interpretation.[56]

Section 7.4006 of our rules already provides that State law applies to national bank operating subsidiaries to the same extent as it applies to the parent bank.[57] Thus, state laws purportedly forming the basis for the exercise of state regulatory or supervisory authority over national bank operating subsidiaries, which are inapplicable to the parent national bank, are similarly inapplicable to the bank's operating subsidiary. This conclusion is reinforced by the holdings of the court in the *Wells Fargo* and *National City* cases, just described.

b. The Tenth Amendment

Recent case law also confirms that the final rule does not conflict with the 10th Amendment. In the *Wells Fargo* case, *supra*, the California commissioner argued that the OCC was interfering with the state's sovereignty under the 10th Amendment by taking away its power to regulate and enforce laws against state-chartered corporations. The court held that once the OCC authorized the operating subsidiary of the national bank, it ceased being subject to the visitorial power of the state commissioner and that this change was not shown to infringe on California's rights under the 10th Amendment. The court noted that "the Constitution authorizes Congress to establish national banks" and that "*[t]he National Bank Act's effect of 'carving out from state control supervisory authority' over an OCC-authorized operating subsidiary of a national bank does not violate California's Tenth Amendment rights.*"[58]

A few commenters cite *Hopkins Federal Savings & Loan Association* v. *Cleary*,[59] as support for the assertion that the 10th Amendment prohibits the Federal government from interfering with a state's jurisdiction over corporations created under that state's laws. In that case, the court held that a Federal statute (HOLA), which permitted the conversion of state savings associations into Federal savings associations notwithstanding state law to the contrary, was unconstitutional because it conflicted with the 10th Amendment.

The essence of the Hopkins case was that Congress had attempted to confer rights on a state-chartered entity that were greater than those conferred by the state, namely a more liberal voting requirement for a conversion. As stated by the *Hopkins* Court, "[t]he critical question [was] whether along with such a power [of the U.S. Congress to create Federal building and loan associations] there goes the power also to put an end to corporations created by the states and turn them into different corporations created by the nation."[60] The Court's characterization of the issue highlights the distinction between the state-chartered building and loan associations in the *Hopkins* case and national bank operating subsidiaries. The Court found the law—unconstitutionally—attempted to displace a preexisting state interest by permitting the abandonment of a state bank charter notwithstanding contrary state law. After discussing why the state should retain the right to determine

published in the Comptroller's Manual in the mid-1960s permitted national banks to own, *e.g.*, mortgage companies and finance companies. A July 30, 1965 letter by Comptroller James J. Saxon concluded that the prohibition on stock ownership by national banks in 12 U.S.C. § 24 (Seventh) does not apply "when such ownership is a proper incident to banking," as is the case with operating subsidiaries. *See also* 12 CFR 250.14, an interpretation by the Board of Governors of the Federal Reserve System adopted in 1968, which reaches the same conclusion regarding state member banks.

[48] 12 CFR 5.34(e)(3); 12 CFR 7.4006.

[49] 12 U.S.C. 1844(c)(4).

[50] 15 U.S.C. 41 note. *See Minnesota* v. *Fleet Mortgage Corp.*, 181 F. Supp. 2d 995 (D. Minn. 2001). In addition, in the case of national bank "*financial* subsidiaries," which engage in activities *beyond* those permissable for the bank itself, Congress provided special standards regarding the application of state laws. Pub. L. 106–102, section 104, 113 Stat. 1338, 1352 (1999), codified at 15 U.S.C. 6701.

[51] *See* 12 CFR 5.34(e)(1).

[52] 12 CFR 5.34(e)(3).

[53] 12 CFR 7.4006.

[54] Pub. L. 106–102, section 121, 113 Stat. 1338, 1373 (1999), codified at 12 U.S.C. 24a(g)(3)(A).

[55] 265 F. Supp. 2d 1162 (E.D. Cal. 2003).

[56] *See also National City Bank of Indiana* v. *Boutris*, 2003 WL 215367818 (E.D. Cal. July 2, 2003) (also enjoining California officials from exercising visitorial powers over a national bank operating subsidiar); *Budnik supra* note 45, at 5–7 citing the *Wells Fargo* case with approval.

Moreover, the Office of Thrift Supervision (OTS) takes the same approach with respect to operating subsidiaries of Federal thrifts that we take for national banks. 12 CFR 559.3(n) of the OTS regulations provides that state law applies to Federal savings associations' operating subsidiaries to the extent that the law applies to the parent thrift. This OTS regulation has been upheld by both Federal and state courts. *See WFS Financial Inc.* v. *Dean*, 79 F. Supp. 2d 1024 (W.D. Wis. 1999); *see also Chaires* v. *Chevy Chase Bank, F.S.B.*, 748 A.2d 34, 44 (Md. App. 2000).

[57] 12 CFR 7.4006.

[58] *Wells Fargo*, 265 F. Supp. 2d at 1170, (citing *M'Culloch*, 17 U.S. at 424–25 and *First Union Nat'l Bank*, 48 F. Supp. 2d at 148 (emphasis added). *See also Nat'l City Bank of Indiana*, 2003 WL 21536818 at 3 and 4.

[59] 296 U.S. 315(1935).

[60] *Id.* at 336.

when and how a state thrift is dissolved, the court noted that it would be "an intrusion for another government to regulate by statute or decision, *except when reasonably necessary for the fair and effective exercise of some other and cognate power explicitly conferred.*"[61]

Hopkins is thus factually inapposite for two reasons. First, nothing in this final rule addresses changes in charter type or *corporate* status by state-chartered entities. Second, as we have explained, once it is established or acquired, a national bank operating subsidiary is a means by which the national bank exercises Federally authorized powers. The operating subsidiary conducts its activities pursuant to a license granted under OCC regulations, which also constitutes a Federal "license" under the Administrative Procedure Act.[62] In contrast to the state-chartered thrift institutions in *Hopkins,* its operation and activities are thus properly within the purview of Federal regulation.[63]

Later, the Court stated "[w]e are not concerned at this time with the applicable rule in situations where the central government is at liberty (*as it is under the commerce clause when such a purpose is disclosed*) to exercise a power that is exclusive as well as paramount * * * *No question is here as to the scope * * * of the power to regulate transactions affecting interstate or foreign commerce.*"[64] Thus, *Hopkins* explicitly does not address the limits of state and Federal government authority, respectively, when a state corporation is engaged in activities that are carried out under Federal law subject to Federal authority.

Case law since *Hopkins* has clarified the interplay between the 10th Amendment and the Commerce Clause. As noted by the Supreme Court in *United States* v. *Lopez,* 514 U.S. 549 (1995), the Supreme Court in the first half of the 19th century viewed the Commerce Clause as a limit on state legislation that discriminated against interstate commerce. Now, however, the Commerce Clause is viewed more as a grant of authority to Congress. *Id.* at 556. That power has its limits; it "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *Id.* at 557, quoting *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 37 (1937). But if an activity fits within one of the categories of activity that Congress may regulate under its commerce power,[65] or other Constitutional authority, the regulation will be upheld.

This year the U.S. Supreme Court affirmed *per curiam* that the Commerce Clause permits Congress to regulate activity affecting intrastate lending. In *Citizens Bank* v. *Alafabco Inc.,* 123 S. Ct. 2037 (2003), the Court found that a debt restructuring agreement, involving a national bank located in Alabama and an Alabama corporation, had a sufficient nexus with interstate commerce to make an arbitration provision in that agreement enforceable under the Federal Arbitration Act, 9 U.S.C. 2. The Court stated, "Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent "a general practice * * * subject to federal control.'" *Citizens Bank,* 123 S. Ct. at 2040 (emphasis in original) (citations omitted). After articulating the reasons why the debt restructuring agreements involved commerce within the meaning of the Commerce Clause, the Court stated "[n]o elaborate explanation is needed to make evident the broad impact of commercial lending on the national economy or Congress' power to regulate that activity pursuant to the Commerce Clause."[66]

Clearly, national bank operating subsidiaries, licensed by the OCC, engaging in activities permissible for their parent national banks and subject to the same terms and conditions are on the same footing for purposes of the 10th Amendment. Given that they, like their parent banks, engage in activities that have a substantial effect on interstate commerce, regulation of the subsidiaries' activities would be within Congress' authority under the 10th Amendment.

E. Description of the Final Rule

Based upon the foregoing discussion and analysis, the OCC has adopted the final rule with certain modifications that do not alter the fundamentals of the rule as proposed. We have amended the language in § 7.4000(a)(3) slightly to simplify it. In addition, we have amended the regulation text in the final rule in § 7.4000(b)(2). This provision no longer makes reference to the specific powers of the courts of justice "to issue orders or writs compelling the production of information or witnesses" since this is implicit. In addition, we have simplified the language which states that the exception for courts of justice does not authorize states or other governmental entities to exercise visitorial powers over national banks.

F. Regulatory Analysis

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

Pursuant to section 605(b) of the RFA, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed. The amendments to the regulations simply identify the scope of activities for which the agency's visitorial powers are exclusive and clarify how an exception to such powers applies. These amendments do not impose any new requirements or burdens. As such, they will not result in any adverse economic impact.

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[61] *Id.* at 337 (emphasis added).

[62] Under the Administrative Procedure Act, Federal agencies may grant licenses after following certain procedures. 5 U.S.C. 558(c). National banks must comply with licensing requirements contained in 12 CFR 5.34(b) in order to establish or acquire an operating subsidiary. These requirements are consistent with the Administrative Procedure Act.

[63] Where a state entity is not within the purview of Federal regulations, the OCC's rules require consideration of state law before any approval or changes in corporate form. For example, where a state-chartered nonbank affiliate of a national bank wishes to merge with a national bank (with the resulting entity being a national bank), the law of the state in which the nonbank affiliate is organized must permit the state entity to engage in the merger. *See* 12 CFR 5.33(g)(4)(i) as set forth in a final rule published on December 17, 2003, 68 FR 70122.

[64] *Hopkins,* 296 U.S. at 338, 343 (emphasis added) (citations omitted).

[65] Those categories were articulated in *Lopez* as follows: "First Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.,* those activities that substantially affect interstate commerce. *Id.* at 558–59 (citiations omitted)

[66] *Citizens Bank,* 123 St. 2041. *See also Lewis* v. *BT Investments Managers, Inc.* 447 U.S. 27, 38–39(1980), ("[B]anking and related financial activities are of profound local concern * * * Nonetheless, it does not follow that these same activities lack important interstate attributes"); *Perez* v. *United States,* 402 U.S. 146, 154 (1971) "Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce").

Executive Order 12866

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that this final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

Executive Order 13132

Executive Order 13132, entitled "Federalism," (Order) requires Federal agencies, including the OCC, to certify their compliance with that Order when they transmit to the Office of Management and Budget any draft final regulation that has Federalism implications. Under the Order, a regulation has Federalism implications if it has "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." In the case of a regulation that has Federalism implications and that preempts state law, the Order imposes certain consultation requirements with state and local officials; requires publication in the preamble of a Federalism summary impact statement; and requires the OCC to make available to the Director of the Office of Management and Budget any written communications submitted by state and local officials. By the terms of the Order, these requirements apply to the extent that they are practicable and permitted by law and, to that extent, must be satisfied before the OCC promulgates a final regulation.

In the proposal, we noted that the regulation may have Federalism implications. It is not clear that the Order applies in situations where an agency is implementing a statute that has preemptive effect. Nevertheless, in formulating the proposal and the final rule, the OCC has adhered to the fundamental Federalism principles and the Federalism policymaking criteria.

Moreover, the OCC has satisfied the requirements set forth in the Order for regulations that have Federalism implications and preempt state law. The steps taken to comply with these requirements are set forth below.

Consultation. The Order requires that, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has Federalism implications and that preempts state law unless, prior to the formal promulgation of the regulation, the agency consults with state and local officials early in the process of developing the proposed regulation. We have consulted with state and local officials on the issues addressed herein through the rulemaking process. Following the publication of the proposed rule, representatives from the Conference of State Bank Supervisors (CSBS) met with the OCC to clarify their understanding of the proposal and, subsequently, the CSBS submitted a detailed comment letter regarding the proposal. Thirty-two additional comments were also submitted on the proposal by other state and local officials and state banking regulators. Pursuant to the Order, we will make these comments available to the Director of the OMB. Subsequent public statements by representatives of the CSBS have restated their concerns, and CSBS representatives have further discussed these concerns with the OCC on several additional occasions.

The Order requires a Federalism summary impact statement which addresses the following in addition to the consultation discussed above:

Nature of concerns expressed. The Order requires a summary of the nature of the concerns of the state and local officials and the agency's position supporting the need to issue the regulation. The nature of the state and local official commenters' concerns and the OCC's position supporting the need to issue the regulation are set forth in the preamble, but may be summarized as follows. Broadly speaking, the states disagree with our interpretation of the applicable law, they are concerned about the impact the proposal will have on the dual banking system, and they are concerned about the ability of the OCC to protect consumers adequately.

Extent to which the concerns have been addressed. The Order requires a statement of the extent to which the concerns of state and local officials have been met. The concerns are addressed in order.

a. There is fundamental disagreement between state and local officials and the OCC regarding the meaning of section 484 as well as the Congressional intent behind the statute. The nature of the disagreement is discussed at length in the materials that precede this Federalism impact statement. For the reasons set forth in those materials, we believe that the language of section 484, its legislative history, and the application of that section by courts lead to the conclusion that the OCC has exclusive visitorial authority to enforce applicable state laws. The concerns of the state and local officials could only be fully met if the OCC were to take a position that is contrary to the express provisions of the statute and judicial precedent. Nevertheless, to respond to some of the issues raised, the language in the final regulation has been refined, and this preamble further explains that the OCC's visitorial powers are exclusive with respect to the Federally-authorized banking business of national banks.

b. Similarly, we fundamentally disagree with the state and local officials about whether this proposal will undermine the dual banking system. As set forth in the preamble, differences in national and state bank powers and in the supervision and regulation of national and state banks are not inconsistent with the dual banking system; rather they are the defining characteristics of it. The dual banking system is universally understood to refer to the chartering and supervision of state-chartered banks by state authorities and the chartering and supervision of national banks by Federal authority, the OCC. Thus, we believe that the final rule preserves, rather than undermines, the dual banking system.

c. Finally, we stand ready to work with the states in the enforcement of applicable laws. The OCC has extended invitations to state Attorneys General and state banking departments to enter into discussions that would lead to a memorandum of understanding about the handling of consumer complaints and the pursuit of remedies, and we remain eager to do so.

We believe the OCC has the resources to enforce applicable laws, as is evidenced by the enforcement actions that have generated hundreds of millions of dollars for consumers in restitution, that have required national banks to disassociate themselves from payday lenders, and that have ordered national banks to stop abusive practices. These actions are listed on the OCC's Web site at *http://www.occ.treas.gov/*

enforce/enf_search.htm. Indeed, as recently observed by the Superior Court of Arizona, Maricopa County, in an action brought by Arizona against a national bank, among others, the restitution and remedial action ordered by the OCC in that matter against the bank was "comprehensive and significantly broader in scope than that available through [the] state court proceedings." *State of Arizona* v. *Hispanic Air Conditioning and Heating, Inc.*, CV 2000–003625, Ruling at 27, Conclusions of Law, paragraph 50 (Aug. 25, 2003). Thus, the OCC has ample legal authority and resources to ensure that consumers are adequately protected.

List of Subjects in 12 CFR Part 7

Credit, Insurance, Investments, National banks, Reporting and recordkeeping requirements, Securities, Surety bonds.

Authority and Issuance

■ For the reasons set forth in the preamble, the OCC amends part 7 of chapter I of title 12 of the Code of Federal Regulations as follows:

PART 7—BANK ACTIVITIES AND OPERATIONS

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

Authority: 12 U.S.C. 1 *et seq.*, 71, 71a, 92, 92a, 93, 93a, 481, 484, 1818.

Subpart D—Preemption

■ 2. In § 7.4000:
■ a. Add a new paragraph (a)(3); and
■ b. Revise paragraph (b) to read as follows:

§ 7.4000 Visitorial powers.

(a) * * *

(3) Unless otherwise provided by Federal law, the OCC has exclusive visitorial authority with respect to the content and conduct of activities authorized for national banks under Federal law.

(b) *Exceptions to the general rule.* Under 12 U.S.C. 484, the OCC's exclusive visitorial powers are subject to the following exceptions:

(1) *Exceptions authorized by Federal law.* National banks are subject to such visitorial powers as are provided by Federal law. Examples of laws vesting visitorial power in other governmental entities include laws authorizing state or other Federal officials to:

(i) Inspect the list of shareholders, provided that the official is authorized to assess taxes under state authority (12 U.S.C. 62; this section also authorizes inspection of the shareholder list by shareholders and creditors of a national bank);

(ii) Review, at reasonable times and upon reasonable notice to a bank, the bank's records solely to ensure compliance with applicable state unclaimed property or escheat laws upon reasonable cause to believe that the bank has failed to comply with those laws (12 U.S.C. 484(b));

(iii) Verify payroll records for unemployment compensation purposes (26 U.S.C. 3305(c));

(iv) Ascertain the correctness of Federal tax returns (26 U.S.C. 7602);

(v) Enforce the Fair Labor Standards Act (29 U.S.C. 211); and

(vi) Functionally regulate certain activities, as provided under the Gramm-Leach-Bliley Act, Pub. L. 106–102, 113 Stat. 1338 (Nov. 12, 1999).

(2) *Exception for courts of justice.* National banks are subject to such visitorial powers as are vested in the courts of justice. This exception pertains to the powers inherent in the judiciary and does not grant state or other governmental authorities any right to inspect, superintend, direct, regulate or compel compliance by a national bank with respect to any law, regarding the content or conduct of activities authorized for national banks under Federal law.

(3) *Exception for Congress.* National banks are subject to such visitorial powers as shall be, or have been, exercised or directed by Congress or by either House thereof or by any committee of Congress or of either House duly authorized.

* * * * *

John D. Hawke, Jr.,

Comptroller of the Currency.

[FR Doc. 04–585 Filed 1–12–04; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Parts 7 and 34

[Docket No. 04–04]

RIN 1557–AC73

Bank Activities and Operations; Real Estate Lending and Appraisals

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is publishing a final rule amending parts 7 and 34 of our regulations to add provisions clarifying the applicability of state law to national banks' operations. The provisions concerning preemption identify types of state laws that are preempted, as well as the types of state laws that generally are not preempted, with respect to national banks' lending, deposit-taking, and other operations. In tandem with these preemption provisions, we are also adopting supplemental anti-predatory lending standards governing national banks' lending activities.

EFFECTIVE DATE: February 12, 2004.

FOR FURTHER INFORMATION CONTACT: For questions concerning the final rule, contact Michele Meyer, Counsel, or Mark Tenhundfeld, Assistant Director, Legislative and Regulatory Activities Division, (202) 874–5090.

SUPPLEMENTARY INFORMATION:

I. Introduction

The OCC is adopting this final rule to specify the types of state laws that do not apply to national banks' lending and deposit taking activities *and* the types of state laws that generally *do* apply to national banks. Other state laws not specifically listed in this final rule also would be preempted under principles of preemption developed by the U.S. Supreme Court, if they obstruct, impair, or condition a national bank's exercise of its lending, deposit-taking, or other powers granted to it under Federal law.

This final rule also contains a new provision prohibiting the making of any type of consumer loan based predominantly on the bank's realization of the foreclosure value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. (A consumer loan for this purpose is a loan made for personal, family, or household purposes). This anti-predatory lending standard applies uniformly to all consumer lending activities conducted by national banks, wherever located. A second anti-predatory lending standard in the final rule further specifically prohibits national banks from engaging in practices that are unfair and deceptive under the Federal Trade Commission Act (FTC Act) [1] and regulations issued thereunder, in connection with all types of lending.

The provisions concerning preemption of state laws are contained in 12 CFR part 34, which governs national banks' real estate lending, and in three new sections to part 7 added by this final rule: § 7.4007 regarding deposit-taking activities; § 7.4008 regarding non-real estate lending

[1] 15 U.S.C. 45(a)(1).

activities; and § 7.4009 regarding the other Federally-authorized activities of national banks. The first anti-predatory lending standard appears both in part 34, where it applies with respect to real estate consumer lending, and in part 7, with respect to other consumer lending. The provision prohibiting a national bank from engaging in unfair or deceptive practices within the meaning of section 5 of the FTC Act and regulations promulgated thereunder [2] similarly appears in both parts 34 and 7.

II. Description of Proposal

On August 5, 2003, the OCC published a notice of proposed rulemaking (NPRM or proposal) in the **Federal Register** (68 FR 46119) to amend parts 7 and 34 of our regulations to add provisions clarifying the applicability of state law to national banks. These provisions identified the types of state laws that are preempted, as well as the types of state laws that generally are not preempted, in the context of national bank lending, deposit-taking, and other Federally-authorized activities.

A. Proposed Revisions to Part 34—Real Estate Lending

Part 34 of our regulations implements 12 U.S.C. 371, which authorizes national banks to engage in real estate lending subject to "such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." Prior to the adoption of this final rule, subpart A of part 34 explicitly preempted state laws concerning five enumerated areas with respect to national banks and their operating subsidiaries.[3] Those are state laws concerning the loan to value ratio; the schedule for the repayment of principal and interest; the term to maturity of the loan; the aggregate amount of funds that may be loaned upon the security of real estate; and the covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan. Section 34.4(b) stated that the OCC would apply recognized principles of Federal preemption in considering whether state laws apply to other aspects of real estate lending by national banks.

Pursuant to our authority under 12 U.S.C. 93a and 371, we proposed to amend § 34.4(a) and (b) to provide a more extensive enumeration of the types of state law restrictions and requirements that do, and do not, apply to the real estate lending activities of national banks. To the five types of state laws already listed in the regulations, proposed § 34.4(a) added a fuller, but non-exhaustive, list of the types of state laws that are preempted, many of which have already been found to be preempted by the Federal courts or OCC opinions. As also explained in the preamble to the NPRM, consistent with the applicable Federal judicial precedent, other types of state laws that wholly or partially obstruct the ability of national banks to fully exercise their real estate lending powers might be identified and, if so, preemption of those laws would be addressed by the OCC on a case-by-case basis.

We also noted in the preamble that the nature and scope of the statutory authority to set "requirements and restrictions" on national banks' real estate lending may enable the OCC to "occupy the field" of the regulation of those activities. We invited comment on whether our regulations, like those of the Office of Thrift Supervision (OTS),[4] should state explicitly that Federal law occupies the field of real estate lending. We noted that such an occupation of the field necessarily would be applied in a manner consistent with other Federal laws, such as the Truth-in-Lending Act (TILA) [5] and the Equal Credit Opportunity Act (ECOA).[6]

Under proposed § 34.4(b), certain types of state laws are not preempted and would apply to national banks to the extent that they do not significantly affect the real estate lending operations of national banks or are otherwise consistent with national banks' Federal authority to engage in real estate lending.[7] These types of laws generally pertain to contracts, collection of debts, acquisition and transfer of property, taxation, zoning, crimes, torts, and homestead rights. In addition, any other law that the OCC determines to interfere to only an insignificant extent with national banks' lending authority or is otherwise consistent with national banks' authority to engage in real estate lending would not be preempted.

The proposal retained the general rule stated in § 34.3 that national banks may "make, arrange, purchase, or sell loans or extensions of credit, or interests therein, that are secured by liens on, or interests in, real estate, subject to terms, conditions, and limitations prescribed by the Comptroller of the Currency by regulation or order." That provision was unchanged, other than by designating it as paragraph (a).

The proposal added a new paragraph (b), prescribing an explicit, safety and soundness-based anti-predatory lending standard to the general statement of authority concerning lending. Proposed § 34.3(b) prohibited a national bank from making a loan subject to 12 CFR part 34 based predominantly on the foreclosure value of the borrower's collateral, rather than on the borrower's repayment ability, including current and expected income, current obligations, employment status, and other relevant financial resources.

This standard augments the other standards that already apply to national bank real estate lending under Federal laws. These other standards include those contained in the OCC's Advisory Letters on predatory lending; [8] section 5 of the FTC Act,[9] which makes unlawful "unfair or deceptive acts or practices" in interstate commerce; and many other Federal laws that impose standards on lending practices.[10] The NPRM invited commenters to suggest other anti-predatory lending standards that would be appropriate to apply to national bank real estate lending activities.

As a matter of Federal law, national bank operating subsidiaries conduct their activities subject to the same terms and conditions as apply to the parent banks, except where Federal law provides otherwise. *See* 12 CFR 5.34(e)(3) and 7.4006. *See also* 12 CFR 34.1(b) (real estate lending activities specifically). Thus, by virtue of regulations in existence prior to the proposal, the proposed changes to part 34, including the new anti-predatory lending standard, applied to both national banks and their operating subsidiaries.

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[2] 12 CFR part 227.

[3] Prior 12 CFR 34.1(b) and 34.4(a).

[4] 12 CFR 560.2.

[5] 15 U.S.C. 1601 *et seq.*

[6] 15 U.S.C. 1691 *et seq.*

[7] Federal law may explicitly resolve the question of whether state laws apply to the activities of national banks. There are instances where Federal law specifically incorporates state law standards, such as the fiduciary powers statute at 12 U.S.C. 92a(a). The language used in this final rule "[e]xcept where made applicable by Federal law" refers to this type of situation.

[8] See OCC Advisory Letter 2003–2, "Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices" (Feb. 21, 2003) and OCC Advisory Letter 2003–3, "Avoiding Predatory and Abusive Lending Practices in Brokered and Purchased Loans" (Feb. 21, 2003). These documents are available on the OCC's Web site at *http://www.occ.treas.gov/advlst03.htm.*

[9] 15 U.S.C. 45(a)(1).

[10] There is an existing network of Federal laws applicable to national banks that protect consumers in a variety of ways. In addition to TILA and ECOA, national banks are also subject to the standards contained in the Real Estate Settlement Procedures Act, 12 U.S.C. 2601 *et seq.*, the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, the Home Mortgage Disclosure Act, 12 U.S.C. 2801 *et seq.*, the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, the Truth in Savings Act, 12 U.S.C. 4301 *et seq.*, the Consumer Leasing Act, 15 U.S.C. 1667, and the Fair Debt Collection Practices Act, 15 U.S.C. 1692 *et seq.*

B. Proposed Amendments to Part 7—Deposit-Taking, Other Lending, and Bank Operations

The proposal also added three new sections to part 7: § 7.4007 regarding deposit-taking activities, § 7.4008 regarding non-real estate lending activities, and § 7.4009 regarding other national bank operations. The structure of the proposed amendments was the same for §§ 7.4007 and 7.4008 and was similar for § 7.4009. For §§ 7.4007 and 7.4008, the proposal first set out a statement of the authority to engage in the activity. Second, the proposal stated that state laws that obstruct, in whole or in part, a national bank's exercise of the Federally-authorized power in question are not applicable, and listed several types of state laws that are preempted. As with the list of preempted state laws set forth in the proposed amendments to part 34, this list reflects judicial precedents and OCC interpretations concerning the types of state laws that can obstruct the exercise of national banks' deposit-taking and non-real estate lending powers. Finally, the proposal listed several types of state laws that, as a general matter, are not preempted.

As with the proposed amendments to part 34, the proposed amendment to part 7 governing non-real estate lending included a safety and soundness-based anti-predatory lending standard. As proposed, § 7.4008(b) stated that a national bank shall not make a loan described in § 7.4008 based predominantly on the foreclosure value of the borrower's collateral, rather than on the borrower's repayment ability, including current and expected income, current obligations, employment status, and other relevant financial resources. The preamble to the NPRM pointed out that non-real estate lending also is subject to section 5 of the FTC Act.

For proposed § 7.4009, as with proposed §§ 7.4007 and 7.4008, the NPRM first stated that a national bank could exercise all powers authorized to it under Federal law. To address questions about the extent to which state law may permissibly govern powers or activities that have not been addressed by Federal court precedents or OCC opinions or orders, proposed new § 7.4009(b) provided that state laws do not apply to national banks if they obstruct, in whole or in part, a national bank's exercise of powers granted to it under Federal law. Next, proposed § 7.4009(c) noted that the provisions of this section apply to any national bank power or aspect of a national bank's operation that is not otherwise covered by another OCC regulation that specifically addresses the applicability of state law. Finally, the proposal listed several types of state laws that, as a general matter, are not preempted.

As with the proposed changes to part 34, and for the same reasons, the proposal's changes to part 7 would be applicable to both national banks and their operating subsidiaries by virtue of an existing OCC regulation.

III. Overview of Comments

The OCC received approximately 2,600 comments, most of which came from the following groups:

Realtors. The vast majority—approximately 85%—of the opposing comments came from realtors and others representing the real estate industry, who expressed identical concerns about the possibility that national banks' *financial subsidiaries* would be permitted to engage in real estate brokerage activities [11] and that, if that power were authorized, the proposal would permit them to do so without complying with state real estate brokerage licensing laws. This final rule will not have that result because it does not apply to the activities of national bank financial subsidiaries. Thus, should the Department of the Treasury (Treasury) and the Board of Governors of the Federal Reserve System (Board) proposal to permit financial subsidiaries and financial holding companies to engage in real estate brokerage activities go forward, this final rule would not affect the application of state real estate licensing requirements to national bank financial subsidiaries.

Many realtor comments also raised arguments concerning the impact of this rulemaking on consumers and market competition and some argued that preemption of state licensing requirements related to real estate *lending* is inappropriate on the basis of field or conflict preemption. These issues also were raised by other commenters and are addressed in sections IV and VI of this preamble.

Community and consumer advocates. In addition to the comments from realtors, the OCC received opposing comments from community and consumer advocates. These commenters argued that the OCC should not adopt further regulations preempting state law and, in particular, should not adopt in the final rule an "occupation of the field" preemption standard for national banks' real estate lending activities. The community and consumer advocates also asserted that the proposed "obstruct, in whole or in part" preemption standard is inconsistent with, and a lowering of, the preemption standards articulated by the U.S. Supreme Court. Whatever the standard, the community and consumer advocates expressed concern that preemption would allow national banks to escape some state tort, contract, debt collection, zoning, property transfer, and criminal laws, and would expose consumers to wide-spread predatory and abusive practices by national banks. These commenters asserted that the OCC's proposed anti-predatory lending standard is insufficient and urged the OCC to further strengthen consumer protections in parts 7 and 34, including prohibiting specific practices characterized as unfair or deceptive. These issues are addressed in sections IV and VI of this preamble.

State officials and members of Congress. State banking regulators, the Conference of State Bank Supervisors (CSBS), the National Conference of State Legislators, individual state legislators, the National Association of Attorneys General (NAAG), and individual state attorneys general questioned the legal basis of the proposal and argued that the OCC lacks authority to adopt it. These commenters, like the community and consumer advocates, also challenged the OCC's authority to adopt in the final rule either a "field occupation" preemption standard or the proposed "obstruct, in whole or in part" standard. These commenters raised concerns about the effect of the proposal, if adopted, on the dual banking system, and its impact on what they assert is the states' authority to apply and enforce consumer protection laws against national banks, and particularly against operating subsidiaries. Several members of Congress submitted comments, or forwarded letters from constituents and state officials, that echoed these concerns. The arguments concerning the dual banking system are addressed in the discussion of Executive Order 13132 later in this preamble.[12] The remaining issues raised by the state commenters are addressed in sections IV and VI of this preamble.[13]

[11] Pursuant to procedures established by the Gramm-Leach-Bliley Act, Pub. L. 106–102, 113 Stat. 1338 (Nov. 12, 1999), for determining that an activity is "financial in nature," and thus permissible for financial holding companies and financial subsidiaries, the Board and Treasury jointly published a proposal to determine that real estate brokerage is "financial in nature." *See* 66 FR 307 (Jan. 3, 2001). No final action has been taken on the proposal.

[12] *See also* OCC publication entitled *National Banks and the Dual Banking System* (Sept. 2003).

[13] *See also* Letter from John D. Hawke, Jr., Comptroller of the Currency, to Senator Paul S. Sarbanes (Dec. 9, 2003), available on the OCC's Web site at *http://www.occ.treas.gov/foia/SarbanesPreemptionletter.pdf*; and identical letters sent to nine other Senators; and Letters from John

National banks and banking industry trade groups. National banks, other financial institutions, and industry groups supported the proposal. Many of these commenters argued that Congress has occupied the fields of deposit-taking and lending in the context of national banks and urged the OCC to adopt a final rule reflecting an extensive occupation of the field approach. These commenters concluded that various provisions of the National Bank Act establish broad statutory authority for the activities and regulation of national banks, and that these provisions suggest strongly that Congress did in fact intend to occupy the fields in question. In addition to these express grants of authority, the commenters noted that national banks may, under 12 U.S.C. 24(Seventh), "exercise * * * all such incidental powers as shall be necessary to carry on the business of banking," and that this provision has been broadly construed by the Supreme Court.[14] These commenters concluded that this broad grant of Federal powers, coupled with equally broad grants of rulemaking authority to the OCC,[15] effectively occupy the field of national bank regulation.

Many of the supporting commenters also urged the adoption of the proposal for the reasons set forth in its preamble. These commenters agreed with the OCC's assertion in the preamble that banks with customers in more than one state "face uncertain compliance risks and substantial additional compliance burdens and expense that, for practical purposes, materially impact their ability to offer particular products and services."[16] The commenters stated that, in effect, a national bank must often craft different products or services (with associated procedures and policies, and their attendant additional costs) for each state in which it does business, or elect not to provide all of its products or services (to the detriment of consumers) in one or more states. These commenters believe that the proposal, if adopted, would offer much-needed clarification of when state law does or does not apply to the activities of a national bank and its operating subsidiaries. Such clarity, these commenters argued, is critical to helping national banks maintain and expand provision of financial services. Without such clarity, these commenters assert, the burdens and costs, and uncertain liabilities arising under a myriad of state and local laws, are a significant diversion of the resources that national banks otherwise can use to provide services to customers nationwide, and a significant deterrent to their willingness and ability to offer certain products and services in certain markets. These issues are addressed in sections IV and VI of this preamble.

IV. Reason and Authority for the Regulations

A. The Regulations Are Issued in Furtherance of the OCC's Responsibility To Ensure That the National Banking System Is Able To Operate As Authorized by Congress

As the courts have recognized, Federal law authorizes the OCC to issue rules that preempt state law in furtherance of our responsibility to ensure that national banks are able to operate to the full extent authorized under Federal law, notwithstanding inconsistent state restrictions, and in furtherance of their safe and sound operations.

Federal law is the exclusive source of all of national banks' powers and authorities. Key to these powers is the clause set forth at 12 U.S.C. 24(Seventh) that permits national banks to exercise "all such incidental powers as shall be necessary to carry on the business of banking." This flexible grant of authority furthers Congress's long-range goals in establishing the national banking system, including financing commerce, establishing private depositories, and generally supporting economic growth and development nationwide.[17] The achievement of these goals required national banks that are safe and sound and whose powers are dynamic and capable of evolving so that they can perform their intended roles. The broad grant of authority provided by 12 U.S.C. 24(Seventh), as well as the more targeted grants of authority provided by other statutes,[18] enable national banks to evolve their operations in order to meet the changing needs of our economy and individual consumers.[19]

The OCC is charged with the fundamental responsibility of ensuring that national banks operate on a safe and sound basis, and that they are able to do so, if they choose, to the full extent of their powers under Federal law. This responsibility includes enabling the national banking system to operate as authorized by Congress, consistent with the essential character of a national banking system and without undue confinement of their powers. Federal law gives the OCC broad rulemaking authority in order to fulfill these responsibilities. Under 12 U.S.C. 93a, the OCC is authorized "to prescribe rules and regulations to carry out the responsibilities of the office"[20] and, under 12 U.S.C. 371, to "prescribe by regulation or order" the "restrictions and requirements" on national banks" real estate lending power without state-imposed conditions.[21]

In recent years, the financial services marketplace has undergone profound changes. Markets for credit (both consumer and commercial), deposits, and many other financial products and services are now national, if not international, in scope. These changes are the result of a combination of factors, including technological innovations, the erosion of legal barriers, and an increasingly mobile society.

Technology has expanded the potential availability of credit and made possible virtually instantaneous credit decisions. Mortgage financing that once took weeks, for example, now can take only hours. Consumer credit can be obtained at the point of sale at retailers and even when buying a major item such as a car. Consumers can shop for investment products and deposits on-line. With respect to deposits, they can compare rates and duration of a variety of deposit products offered by financial institutions located far from where the consumer resides.

Changes in applicable law also have contributed to the expansion of markets for national banks and their operating subsidiaries. These changes have affected both the type of products that may be offered and the geographic region in which banks—large and small—may conduct business. As a result of these changes, banks may branch across state lines and offer a broader array of products than ever before. An even wider range of

D. Hawke, Jr., Comptroller of the Currency, to Representatives Sue Kelly, Peter King, Carolyn B. Maloney, and Carolyn McCarthy (Dec. 23, 2003).

[14] *See, e.g., Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 258 n.2 (1995) (VALIC).

[15] *See, e.g.*, 12 U.S.C. 93a.

[16] 68 FR 46119, 46120.

[17] For a more detailed discussion of Congress's purposes in establishing a national banking system that would operate to achieve these goals distinctly and separately from the existing system of state banks, *see* the preamble to the proposal, 68 FR 46119, 46120, and *National Banks and the Dual Banking System*, *supra* note 12.

[18] *See, e.g.*, 12 U.S.C. 92a (authorizing national banks to engage in fiduciary activities) and 371 (authorizing national banks to engage in real estate lending activities).

[19] The Supreme Court expressly affirmed the dynamic, evolutionary character of national bank powers in *VALIC*, in which it held that the "business of banking" is not limited to the powers enumerated in 12 U.S.C. 24(Seventh) and that the OCC has the discretion to authorize activities beyond those specifically enumerated in the statute. *See* 513 U.S. at 258 n.2.

[20] 12 U.S.C. 93a.

[21] 12 U.S.C. 371(a).

customers can be reached through the use of technology, including the Internet. Community national banks, as well as the largest national banks, use new technologies to expand their reach and service to customers.

Our modern society is also highly mobile. Forty million Americans move annually, according to a recent Congressional report issued in connection with enactment of the Fair and Accurate Credit Transactions Act of 2003.[22] And when they move, they often have the desire, if not the expectation, that the financial relationships and status they have established will be portable and will remain consistent.

These developments highlight the significance of being able to conduct a banking business pursuant to consistent, national standards, regardless of the location of a customer when he or she first becomes a bank customer or the location to which the customer may move *after* becoming a bank customer. They also accentuate the costs and interference that diverse and potentially conflicting state and local laws have on the ability of national banks to operate under the powers of their Federal charter. For national banks, moreover, the ability to operate under uniform standards of operation and supervision is fundamental to the character of their national charter.[23] When national banks are unable to operate under national standards, it also implicates the role and responsibilities of the OCC.

These concerns have been exacerbated recently, by increasing efforts by states and localities to apply state and local laws to bank activities. As we have learned from our experience supervising national banks, from the inquiries received by the OCC's Law Department, by the extent of litigation in recent years over these state efforts, and by the comments we received on the proposal, national banks' ability to conduct operations to the full extent authorized by Federal law has been curtailed as a result.

Commenters noted that the variety of state and local laws that have been enacted in recent years—including laws regulating fees, disclosures, conditions on lending, and licensing—have created higher costs and increased operational challenges.[24] Other commenters noted the proliferation of state and local anti-predatory lending laws and the impact that those laws are having on lending in the affected jurisdictions. As a result, national banks must either absorb the costs, pass the costs on to consumers, or eliminate various products from jurisdictions where the costs are prohibitive. Commenters noted that this result is reached even in situations where a bank concludes that a law is preempted, simply so that the bank may avoid litigation costs or anticipated reputational injury.

As previously noted, the elimination of legal and other barriers to interstate banking and interstate financial service operations has led a number of banking organizations to operate, in multi-state metropolitan statistical areas, and on a multi-state or nationwide basis, exacerbating the impact of the overlay of state and local standards and requirements on top of the Federal standards and OCC supervisory requirements already applicable to national bank operations. When these multi-jurisdictional banking organizations are subject to regulation by each individual state or municipality in which they conduct operations, the problems noted earlier are compounded.

Even the efforts of a single state to regulate the operations of a national bank operating only within that state can have a detrimental effect on that bank's operations and consumers. As we explained in our recent preemption determination and order responding to National City Bank's inquiry concerning the Georgia Fair Lending Act (GFLA),[25] the GFLA caused secondary market participants to cease purchasing certain Georgia mortgages and many mortgage lenders to stop making mortgage loans in Georgia. National banks have also been forced to withdraw from some products and markets in other states as a result of the impact of state and local restrictions on their activities.

When national banks are unable to operate under uniform, consistent, and predictable standards, their business suffers, which negatively affects their safety and soundness. The application of multiple, often unpredictable, different state or local restrictions and requirements prevents them from operating in the manner authorized under Federal law, is costly and burdensome, interferes with their ability to plan their business and manage their risks, and subjects them to uncertain liabilities and potential exposure. In some cases, this deters them from making certain products available in certain jurisdictions.[26]

The OCC therefore is issuing this final rule in furtherance of its responsibility to enable national banks to operate to the full extent of their powers under Federal law, without interference from inconsistent state laws, consistent with the national character of the national banking system, and in furtherance of their safe and sound operations. The final rule does not entail any new powers for national banks or any expansion of their existing powers. Rather, we intend only to ensure the soundness and efficiency of national banks' operations by making clear the standards under which they do business.

B. Pursuant to 12 U.S.C. 93a and 371, the OCC May Adopt Regulations That Preempt State Law

The OCC has ample authority to provide, by regulation, that types of state laws are not applicable to national banks. As mentioned earlier, 12 U.S.C. 93a grants the OCC comprehensive rulemaking authority to further its responsibilities, stating that—

Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office * * *.[27]

This language is significantly broader than that customarily used to convey rulemaking authority to an agency, which is typically focused on a particular statute. This was recognized, some 20 years ago, by the United States Court of Appeals for the D.C. Circuit in

[22] *See* S. Rep. No. 108–166, at 10 (2003) (quoting the hearing testimony of Secretary of the Treasury Snow).

[23] As we explained last year in the preamble to our amendments to part 7 concerning national banks' electronic activities, "freedom from State control over a national bank's powers protects national banks from conflicting local laws unrelated to the purpose of providing the uniform, nationwide banking system that Congress intended." 67 FR 34992, 34997 (May 17, 2002).

[24] Illustrative of comments along these lines were those of banks who noted that various state laws would result in the following costs: (a) Approximately $44 million in start-up costs incurred by 6 banks as a result of a recently-enacted California law mandating a minimum payment warning; (b) 250 programming days required to change one of several computer systems that needed to be changed to comply with anti-predatory lending laws enacted in three states and the District of Columbia; and (c) $7.1 million in costs a bank would incur as a result of complying with mandated annual statements to credit card customers.

[25] *See* 68 FR 46264 (Aug. 5, 2003).

[26] As was recently observed by Federal Reserve Board Chairman Alan Greenspan (in the context of amendments to the Fair Credit Reporting Act), "[l]imits on the flow of information among financial market participants, or increased costs resulting from restrictions that differ based on geography, may lead to an increase in the price or a reduction in the availability of credit, as well as a reduction in the optimal sharing of risk and reward." Letter of February 28, 2003, from Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System, to The Honorable Ruben Hinojosa (emphasis added).

[27] 12 U.S.C. 93a.

its decision confirming that 12 U.S.C. 93a authorizes the OCC to issue regulations preempting state law. In *Conference of State Bank Supervisors* v. *Conover*,[28] the Conference of State Bank Supervisors (CSBS) sought to overturn a district court decision upholding OCC regulations that provided flexibility regarding the terms on which national banks may make or purchase adjustable rate mortgages (ARMs) and that preempted inconsistent state laws. The regulations provided generally that national banks may make or purchase ARMs without regard to state law limitations. The district court granted the OCC's motion for summary judgment on the ground that the regulations were within the scope of the OCC's rulemaking powers granted by Congress.

On appeal, the CSBS asserted that 12 U.S.C. 93a grants the OCC authority to issue only "housekeeping" procedural regulations. In support of this argument, the CSBS cited a remark from the legislative history of 12 U.S.C. 93a by Senator Proxmire that 12 U.S.C. 93a "carries with it no new authority to confer on national banks powers which they do not have under existing law." CSBS also cited a statement in the conference report that 12 U.S.C. 93a "carries no authority [enabling the Comptroller] to permit otherwise impermissible activities *of national banks* with specific reference to the provisions of the McFadden Act and the Glass-Steagall Act." [29]

The Court of Appeals rejected the CSBS's contentions concerning the proper interpretation of 12 U.S.C. 93a. The Court of Appeals explained first that the challenged regulations (like this final rule) did not confer any new powers on national banks. Moreover,

> [t]hat the Comptroller also saw fit to preempt those state laws that conflict with his responsibility to ensure the safety and soundness of the national banking system, *see* 12 U.S.C. § 481, does not constitute an expansion of the powers of national *banks*.[30]

Nor did the Court of Appeals find support for the CSBS's position in the conference report:

> As the "specific reference" to the McFadden and Glass-Steagall Acts indicates, the "impermissible activities" which the Comptroller is not empowered to permit are activities that are impermissible under federal, not state, law.[31]

The court summarized its rationale for holding that 12 U.S.C. 93a authorized the OCC to issue the challenged regulations by saying:

> It bears repeating that the entire legislative scheme is one that contemplates the operation of state law only in the absence of federal law and where such state law does not conflict with the policies of the National Banking Act. *So long as he does not authorize activities that run afoul of federal laws governing the activities of the national banks, therefore, the Comptroller has the power to preempt inconsistent state laws.*[32]

The authority under 12 U.S.C. 93a described by the court in *CSBS* v. *Conover* thus amply supports the adoption of regulations providing that specified types of state laws purporting to govern as applied to national banks' lending and deposit-taking activities are preempted.

Under 12 U.S.C. 371, the OCC has the additional and specific authority to provide that the specified types of laws relating to national banks' real estate lending activities are preempted. As we have described and as recognized in *CSBS* v. *Conover*,[33] 12 U.S.C. 371 grants the OCC unique rulemaking authority with regard to national banks' real estate lending activities. That section states:

> [a]ny national banking association may make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order.[34]

The language and history of 12 U.S.C. 371 confirm the real estate lending powers of national banks and that only the OCC "subject to other applicable Federal law "and not the states may impose restrictions or requirements on national banks' exercise of those powers. The Federal powers conferred by 12 U.S.C. 371 are subject *only* "to section 1828(o) of this title and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order." [35]

Thus, the exercise of the powers granted by 12 U.S.C. 371 is not conditioned on compliance with any state requirement, and state laws that attempt to confine or restrain national banks' real estate lending activities are inconsistent with national banks' real estate lending powers under 12 U.S.C. 371.

This conclusion is consistent with the fact that national bank real estate lending authority has been extensively regulated at the *Federal* level since the power first was codified. Beginning with the enactment of the Federal Reserve Act of 1913,[36] national banks' real estate lending authority has been governed by the express terms of 12 U.S.C. 371. As originally enacted in 1913, section 371 contained a limited grant of authority to national banks to lend on the security of "improved and unencumbered farm land, situated within its Federal reserve district." [37] In addition to the geographic limits inherent in this authorization, the Federal Reserve Act also imposed limits on the term and amount of each loan as well as an aggregate lending limit. Over the years, 12 U.S.C. 371 was repeatedly amended to broaden the types of real estate loans national banks were permitted to make, to expand geographic limits, and to modify loan term limits and per-loan and aggregate lending limits.

In 1982, Congress removed these "rigid statutory limitations" [38] in favor of a broad provision that is very similar to the current law and that authorized national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interests in real estate, subject to such terms, conditions, and limitations as may be prescribed by the Comptroller of the Currency by order, rule, or regulation." [39] The purpose of the 1982 amendment was "to provide national banks with the ability to engage in more creative and flexible financing, and to become stronger participants in the home financing market." [40] In 1991, Congress removed the term "rule" from this phrase and enacted an additional requirement, codified at 12 U.S.C.

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[28] 710 F.2d 878 (D.C. Cir. 1983).

[29] *Id.* at 885 (emphasis in original).

[30] *Id.* (emphasis in original).

[31] *Id.*

[32] *Id.* at 878 (emphasis added).

[33] In *CSBS* v. *Conover*, the court also held that the authority conferred by 12 U.S.C. 371, as the statute read at the time relevant to the court's decision, conferred authority upon the OCC to issue the preemptive regulations challenged in that case. The version of section 371 considered by the court authorized national banks to make real estate loans "subject to such terms, conditions, and limitations" as prescribed by the Comptroller by order, rule or regulations. The court said that the "restrictions and requirements" language contained in the statute today was "not substantially different" from the language that it was considering in that case. *Id.* at 884.

[34] 12 U.S.C. 371(a).

[35] *Id.* As noted *supra* at note 7, Federal legislation occasionally provides that national banks shall conduct certain activities subject to state law standards. For example, national banks conduct insurance sales, solicitation, and cross-marketing activities subject to certain types of state restrictions expressly set out in the Gramm-Leach-Bliley Act. See 15 U.S.C. 6701(d)(2)(B). There is no similar Federal legislation subjecting national banks' real estate lending activities to state law standards.

[36] Federal Reserve Act, Dec. 23, 1913, ch. 6, 38 Stat. 251, as amended.

[37] *Id.* section 24, 38 Stat. 273.

[38] S. Rep. No. 97–536, at 27 (1982).

[39] Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97–320, section 403, 96 Stat. 1469, 1510–11 (1982).

[40] S. Rep. No. 97–536, at 27 (1982).

1828(o), that national banks (and other insured depository institutions) conduct real estate lending pursuant to uniform standards adopted at the Federal level by regulation of the OCC and the other Federal banking agencies.[41]

Thus, the history of national banks' real estate lending activities under 12 U.S.C. 371 is one of extensive Congressional involvement gradually giving way to a streamlined approach in which Congress has delegated broad rulemaking authority to the Comptroller. The two versions of 12 U.S.C. 371—namely, the lengthy and prescriptive approach prior to 1982 and the more recent statement of broad authority qualified only by reference to Federal law —may be seen as evolving articulations of the same idea.

C. The Preemption Standard Applied in This Final Rule Is Entirely Consistent With the Standards Articulated by the Supreme Court

State laws are preempted by Federal law, and thus rendered invalid with respect to national banks, by operation of the Supremacy Clause of the U.S. Constitution.[42] The Supreme Court has identified three ways in which this may occur. First, Congress can adopt express language setting forth the existence and scope of preemption.[43] Second, Congress can adopt a framework for regulation that "occupies the field" and leaves no room for states to adopt supplemental laws.[44] Third, preemption may be found when state law actually conflicts with Federal law. Conflict will be found when either: (i) compliance with both laws is a "physical impossibility;"[45] or (ii) when the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[46]

In *Barnett Bank of Marion County* v. *Nelson*,[47] the Supreme Court articulated preemption standards used by the Supreme Court in the national bank context to determine, under the Supremacy Clause of the U.S. Constitution, whether Federal law conflicts with state law such that the state law is preempted. As observed by the Supreme Court in *Barnett*, a state law will be preempted if it conflicts with the exercise of a national bank's Federally authorized powers.

The Supreme Court noted in *Barnett* the many formulations of the conflicts standard. The Court stated:

In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers. See, *e.g.*, *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 247–252 (1944) (state statute administering abandoned deposit accounts did not "unlawful[ly] encroac[h] on the rights and privileges of national banks"); *McClellan* v. *Chipman*, 164 U.S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destro[y] or hampe[r]" national banks" functions); *National Bank* v. *Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government").[48]

The variety of formulations quoted by the Court—"unlawfully encroach," "hamper," "interfere with or impair national banks' efficiency"—defeats any suggestion that any one phrase constitutes the exclusive standard for preemption. As the Supreme Court explained in *Hines* v. *Davidowitz:*[49]

There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. *But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.* Our primary function is to determine whether, under the circumstances of this particular case, [the state law at issue] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[50]

Thus, in *Hines*, the Court recognized that the Supremacy Clause principles of preemption can be articulated in a wide variety of formulations that do not yield substantively different legal results. The variation among formulations that carry different linguistic connotations does not produce different legal outcomes.

We have adopted in this final rule a statement of preemption principles that is consistent with the various formulations noted earlier. The phrasing used in the final rule—obstruct,[51] impair,[52] or condition[53]"—differs somewhat from what we proposed. This standard conveys the same substantive point as the proposed standard, however; that is, that state laws do not apply to national banks if they impermissibly contain a bank's exercise of a federally authorized power. The words of the final rule, which are drawn directly from applicable Supreme Court precedents, better convey the range of effects on national bank powers that the Court has found to be impermissible. The OCC intends this phrase as the distillation of the various preemption constructs articulated by the Supreme Court, as recognized in *Hines* and *Barnett*, and not as a replacement construct that is in any way inconsistent with those standards.

In describing the proposal, we invited comment on whether it would be appropriate to assert occupation of the entire field of real estate lending. Some commenters strongly urged that we do so, and that we go beyond real estate lending to cover other lending and deposit-taking activities as well. Upon further consideration of this issue and

[41] *See* section 304 of the Federal Deposit Insurance Corporation Improvement Act, codified at 12 U.S.C. 1828(o). These standards governing national banks' real estate lending are set forth in Subpart D of 12 CFR part 34.

[42] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

[43] *See Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977).

[44] *See Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[45] *Florida Lime & Avacada Growers, Inc.* v. *Paul*, 373 U.S. 132, 143 (1963).

[46] *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 31 (1996) (quoting *Hines*).

[47] 517 U.S. 25 (1996).

[48] *Id.* at 33–34. Certain commenters cite *Nat'l Bank* v. *Commanwealth* for the proposition that national banks are subject to state law. These commenters, however, omit the important caveat, quoted by the *Barnett* Court, that state law applies only where it does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government."

[49] 312 U.S. 52 (1941).

[50] *Id.* at 67 (emphasis added) (citations omitted).

[51] *See Hines*, 312 U.S. at 76.

[52] *See Nat'l Bank* v. *Commanwealth*, 76 U.S. at 362; *Davis* v. *Elmira Savings Bank*, 161 U.S. 275, 283 (1896); McClellan, 164 U.S. at 357.

[53] *See Barnett*, 517 U.S. at 34; *Franklin Nat'l Bank of Franklin Square* v. *New York*, 347 U.S. 373, 375–79 (1954).

careful review of comments submitted pertaining to this point, we have concluded, as the Supreme Court recognized in *Hines* and reaffirmed in *Barnett*, that the effect of labeling of this nature is largely immaterial in the present circumstances. Thus, we decline to adopt the suggestion of these commenters that we declare that these regulations "occupy the field" of national banks' real estate lending, other lending, and deposit-taking activities. We rely on our authority under both 12 U.S.C. 93a and 371, and to the extent that an issue arises concerning the application of a state law not specifically addressed in the final regulation, we retain the ability to address those questions through interpretation of the regulation, issuance of orders pursuant to our authority under 12 U.S.C. 371, or, if warranted by the significance of the issue, by rulemaking to amend the regulation.

V. Description of the Final Rule

A. Amendments to Part 34

1. Section 34.3(a). The final rule retains the statement of national banks' real estate lending authority, now designated as § 34.3(a), that national banks may "make, arrange, purchase, or sell loans or extensions of credit, or interests therein, that are secured by liens on, or interests in, real estate (real estate loans), subject to 12 U.S.C. 1828(o) and such restrictions and requirements as the Comptroller of the Currency may prescribe by regulation or order."

2. Section 34.3(b). New § 34.3(b) adds an explicit safety and soundness-derived anti-predatory lending standard to the general statement of authority concerning lending. Many bank commenters voiced concern that the proposed anti-predatory lending standard, by prohibiting a national bank from making a loan based predominantly on the foreclosure value of a borrower's collateral without regard to the borrower's repayment ability, would also prohibit a national bank from engaging in legitimate, non-predatory lending activities. These commenters noted that reverse mortgage, small business, and high net worth loans are often made based on the value of the collateral.

We have revised the anti-predatory lending standard in the final rule to clarify that it applies to consumer loans only, (*i.e.*, loans for personal, family, or household purposes), and to clarify that it is intended to prevent borrowers from being unwittingly placed in a situation where repayment is unlikely without the lender seizing the collateral. Where the bargain agreed to by a borrower and a lender involves an understanding by the borrower that it is likely or expected that the collateral will be used to repay the debt, such as with a reverse mortgage, it clearly is not objectionable that the collateral will then be used in such a manner. Moreover, the final rule's anti-predatory lending standard is not intended to apply to business lending or to situations where a borrower's net worth would support the loan under customary underwriting standards.

Thus, we have revised the anti-predatory lending standard so that it focuses on consumer loans and permits a national bank to use a variety of reasonable methods to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.

Several commenters urged the OCC to expressly affirm that a national bank's lending practices must be conducted in conformance with section 5 of the FTC Act, which makes unlawful "unfair or deceptive acts or practices" in interstate commerce,[54] and regulations promulgated thereunder. As discussed in more detail in section VI of this preamble, the OCC has taken actions against national banks under the FTC Act where the OCC believed they were engaged in unfair or deceptive practices. As demonstrated by these actions, the OCC recognizes the importance of national banks and their operating subsidiaries acting in conformance with the standards contained in section 5 of the FTC Act. We therefore agree that an express reference to those standards in our regulation would be appropriate and have added it to the final rules.[55]

3. *State laws that are preempted (§ 34.4(a)).* Pursuant to 12 U.S.C. 93a and 371, the final rule amends § 34.4(a) to add to the existing regulatory list of types of state law restrictions and requirements that are not applicable to national banks. This list, promulgated under our authority "to prescribe rules and regulations to carry out the responsibilities of the office" and to prescribe the types of restrictions and requirements to which national banks' real estate lending activities shall be subject, reflects our experience with types of state laws that can materially affect and confine—and thus are inconsistent with—the exercise of national banks' real estate lending powers.[56]

The final rule revises slightly the introductory clause used in proposed § 34.4(a) in order to conform this section more closely to the amended sections of part 7 discussed later in this preamble. Thus, the final rule provides: "Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks." The final rule then expands the current list of the types of state law restrictions and requirements that are not applicable to national banks.

Many of the supporting commenters requested that the final rule clarify the extent to which particular state or local laws that were not included in the proposal are preempted. For example, these commenters suggested that the final rule address particular state laws imposing various limitations on mortgage underwriting and servicing.

We decline to address most of these suggestions with the level of specificity requested by the commenters. Identifying state laws in a more generic way avoids the impression that the regulations only cover state laws that appear on the list. The list of the types of preempted state laws is not intended to be exhaustive, and we retain the ability to address other types of state laws by order on a case-by-case basis, as appropriate, to make determinations whether they are preempted under the applicable standards.[57]

4. *State laws that are not preempted (§ 34.4(b)).* Section 34.4(b) also provides that certain types of state laws are not preempted and would apply to national banks to the extent that they are consistent with national banks' Federal authority to engage in real estate lending because their effect on the real estate

[54] 15 U.S.C. 45(a)(1).

[55] It is important to note here that we lack the authority to do what some commenters essentially urged, namely, to specify by regulation that particular practices, such as loan "flipping" or "equity stripping," are unfair or deceptive. While we have the ability to take enforcement actions against national banks if they engage in unfair or deceptive practices under section 5 of the FTC Act, the OCC does not have rulemaking authority to define specific practices as unfair or deceptive under section 5. *See* 15 U.S.C. 57a(f).

[56] As we noted in our discussion of this list in the preamble to the proposal, the "OCC and Federal courts have thus far concluded that a wide variety of state laws are preempted, either because the state laws fit within the express preemption provisions of an OCC regulation or because the laws conflict with a Federal power vested in national banks." *See* 68 FR 46119, 46122–46123. The list is also substantially identical to the types of laws specified in a comparable regulation of the OTS. See 12 CFR 560.2(b).

[57] *See, e.g.*, OCC Determination and Order concerning the Georgia Fair Lending Act, *supra* footnote 25.

lending operations of national banks is only incidental. These types of laws generally pertain to contracts, rights to collect debts, acquisition and transfer of property, taxation, zoning, crimes, torts,[58] and homestead rights. In addition, any other law the effect of which is incidental to national banks' lending authority or otherwise consistent with national banks' authority to engage in real estate lending would not be preempted.[59] In general, these would be laws that do not attempt to regulate the manner or content of national banks' real estate lending, but that instead form the legal infrastructure that makes it practicable to exercise a permissible Federal power.

One category of state law included in the proposed list of state laws generally not preempted was "debt collection." Consistent with Supreme Court precedents addressing this type of state law,[60] we have revised the language of the final rule to refer to national banks' "right to collect debts."

B. Amendments to Part 7—Deposit-Taking, Other Consumer Lending, and National Bank Operations

The final rule adds three new sections to part 7: § 7.4007 regarding deposit-taking activities, § 7.4008 regarding non-real estate lending activities, and § 7.4009 regarding national bank operations. The structure of the amendments is the same for §§ 7.4007 and 7.4008 and is similar for § 7.4009.

For § 7.4007, the final rule first sets out a statement of the authority to engage in the activity. Second, the final rule notes that state laws that obstruct, impair, or condition a national bank's ability to fully exercise the power in question are not applicable, and lists several types of state laws that are preempted. Types of state laws that are generally preempted under § 7.4007 include state requirements concerning abandoned and dormant accounts, checking accounts, disclosure requirements, funds availability, savings account orders of withdrawal, state licensing or registration requirements, and special purpose savings services. Finally, the final rule lists types of state laws that, as a general matter, are not preempted. Examples of these laws include state laws concerning contract, rights to collect debt, tort, zoning, and property transfers. These lists are not intended to be exhaustive, and the OCC retains the ability to address other types of state laws on a case-by-case basis to make preemption determinations under the applicable standards.

For § 7.4008, the final rule also sets out a statement of the authority to engage in the activity (non-real estate lending), notes that state laws that obstruct, impair, or condition a national bank's ability to fully exercise this power are not applicable, and lists several types of state laws that are, or are not, preempted. Section 7.4008 also includes a safety and soundness-based anti-predatory lending standard. Final § 7.4008(b) states that "[a] national bank shall not make a consumer loan subject to this § 7.4008 based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors." Separately, § 7.4008(c) also includes a statement that a national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the FTC Act and regulations promulgated thereunder in connection with making non-real estate related loans. The standards set forth in § 7.4008(b) and (c), plus an array of Federal consumer protection standards,[61] ensure that national banks are subject to consistent and uniform Federal standards, administered and enforced by the OCC, that provide strong and extensive customer protections and appropriate safety and soundness-based criteria for their lending activities.

In § 7.4009, the final rule first states that national banks may exercise all powers authorized to them under Federal law.[62] Second, the final rule states that except as otherwise made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its authorized powers do not apply to the national bank.[63] Finally, the final rule lists several types of state laws that, as a general matter, are *not* preempted. For the reasons outlined earlier in the discussion of the amendments to 12 CFR part 34, the reference to debt collection laws has been revised to refer to state laws concerning national banks' "rights to collect debts."

The OCC's regulations adopted in this final rule address the applicability of state law with respect to a number of specific types of activities. The question may persist, however, about the extent to which state law may permissibly govern powers or activities that have not been addressed by Federal court precedents or OCC opinions or orders. Accordingly, as noted earlier, new § 7.4009 provides that state laws do not apply to national banks if they obstruct, impair, or condition a national bank's ability to fully exercise the powers authorized to it under Federal law, including the content of those activities and the manner in which and standards whereby they are conducted.

As explained previously, in some circumstances, of course, Federal law directs the application of state standards to a national bank. The wording of § 7.4009 reflects that a Federal statute may require the application of state

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[58] See *Bank of America* v. *City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002).

[59] The label a state attaches to its laws will not affect the analysis of whether that law is preempted. For instance, laws related to the transfer of real property may contain provisions that give borrowers the right to "cure" a default upon acceleration of a loan if the lender has not foreclosed on the property securing the loan. Viewed one way, this could be seen as part of the state laws governing foreclosure, which historically have been within a state's purview. However, as we concluded in the OCC Determination and Order concerning the GFLA, to the extent that this type of law limits the ability of a national bank to adjust the terms of a particular class of loans once there has been a default, it would be a state law limitation "concerning * * * (2) The schedule for the repayment of principal and interest; [or] (3) The term to maturity of the loan * * *" 12 CFR 34.4(a). In such a situation, we would be governed by the effect of the state statute.

[60] See, *e.g.*, *Nat'l Bank* v. *Commonwealth*, 76 U.S. at 362 (national banks "are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, *their right to collect their debts*, and their liability to be sued for debts, are all based on State law.") (emphasis added); *see also McClellan*, 164 U.S. at 356–57 (quoting *Nat'l Bank* v. *Commonwealth*).

[61] See *supra* note 10.

[62] As noted in the proposal, the OTS has issued a regulation providing generally that state laws purporting to address the operations of Federal savings associations are preempted. See 12 CFR 545.2. The extent of Federal regulation and supervision of Federal savings associations under the Home Owners' Loan Act is substantially the same as for national banks under the national banking laws, a fact that warrants similar conclusions about the applicability of state laws to the conduct of the Federally authorized activities of both types of entities. *Compare*, *e.g.*, 12 U.S.C. 1464(a) (OTS authorities with respect to the organization, incorporation, examination, operation, regulation, and chartering of Federal savings associations) *with* 12 U.S.C. 21 (organization and formation of national banking associations), 12 U.S.C. 481 (OCC authority to examine national banks and their affiliates), 12 U.S.C. 484 (OCC's exclusive visitorial authority), and 12 U.S.C. 93a (OCC authority to issue regulations).

[63] As noted previously, the final rule makes changes to the introductory clause concerning the applicability of state law in 12 CFR 34.4(a), 7.4007(b), 7.4008(d), and 7.4009(b) to make the language of these sections more consistent with each other.

law,[64] or it may incorporate—or "Federalize"—state standards.[65] In those circumstances, the state standard obviously applies. State law may also apply if it only incidentally affects a national bank's Federally authorized powers or if it is otherwise consistent with national banks' uniquely Federal status. Like the other provisions of this final rule, § 7.4009 recognizes the potential applicability of state law in these circumstances. This approach is consistent with the Supreme Court's observation that national banks "are governed in their daily course of business far more by the laws of the state than of the nation."[66] However, as noted previously, these types of laws typically do not regulate the manner or content of the business of banking authorized for national banks, but rather establish the legal infrastructure that makes practicable the conduct of that business.

C. Application of Amendments to Operating Subsidiaries

As a matter of Federal law, national bank operating subsidiaries conduct their activities under a Federal license, subject to the same terms and conditions as apply to the parent banks, except where Federal law provides otherwise. *See* 12 CFR 5.34 and 7.4006. *See also* 12 CFR 34.1(b)(real estate activities specifically).[67] Thus, by virtue of preexisting OCC regulations, the changes to parts 7 and 34, including the new anti-predatory lending standards applicable to lending activities, apply to both national banks and their operating subsidiaries. The final rule makes no change to these existing provisions.

VI. The OCC's Commitment to Fair Treatment of National Bank Customers and High Standards of National Bank Operations

The OCC shares the view of the commenters that predatory and abusive lending practices are inconsistent with national objectives of encouraging home ownership and community revitalization, and can be devastating to individuals, families, and communities. We will not tolerate such practices by national banks and their operating subsidiaries. Our Advisory Letters on predatory lending,[68] our pioneering enforcement positions resulting in substantial restitution to affected consumers, and the anti-predatory lending standards adopted in this final rule reflect our commitment that national banks operate pursuant to high standards of integrity in all respects. The provisions of this final rule, clarifying that certain state laws are not applicable to national banks' operations, do not undermine the application of these standards to all national banks, for the protection of all national bank customers—wherever they are located.

Advisory Letters 2003–2, which addresses loan originations, and 2003–3, which addresses loan purchases and the use of third party loan brokers, contain the most comprehensive supervisory standards ever published by any Federal financial regulatory agency to address predatory and abusive lending practices and detail steps for national banks to take to ensure that they do not engage in such practices. As explained in the Advisory Letters, if the OCC has evidence that a national bank has engaged in abusive lending practices, we will review those practices not only to determine whether they violate specific provisions of law such as the Homeowners Equity Protection Act of 1994 (HOEPA), the Fair Housing Act, or the Equal Credit Opportunity Act, but also to determine whether they involve unfair or deceptive practices that violate the FTC Act. Indeed, several practices that we identify as abusive in our Advisory Letters—such as equity stripping, loan flipping, and the refinancing of special subsidized mortgage loans that originally contained terms favorable to the borrower—generally can be found to be unfair or deceptive practices that violate the FTC Act.

Moreover, our enforcement record, including the OCC's pioneering actions using the FTC Act to address consumer abuses that were not specifically prohibited by regulation, demonstrates our commitment to keeping abusive practices out of the national banking system. For example, *In the Matter of Providian Nat'l Bank, Tilton, New Hampshire*,[69] pursuant to the FTC Act, the OCC required payment by a national bank to consumers in excess of $300 million and imposed numerous conditions on the conduct of future business. Since the Providian settlement in 2000, the OCC has taken action under the FTC Act to address unfair or deceptive practices and consumer harm involving five other national banks.[70]

Most recently, on November 7, 2003, the OCC entered into a consent order with Clear Lake National Bank that requires the bank to reimburse fees and interest charged to consumers in a series of abusive home equity loans. More than $100,000 will be paid to 30 or more borrowers. This is the first case brought by a Federal regulator under the FTC Act that cites the unfair nature of the terms of the loan. The OCC also found that the loans violated HOEPA, the Truth in Lending Act, and Real Estate Settlement Procedures Act.[71]

The OCC also has moved aggressively against national banks engaged in payday lending programs that involved consumer abuses. Specifically, we concluded four enforcement actions against national banks that had entered into contracts with payday lenders for loan originations, and in each case ordered the bank to terminate the relationship with the payday lender.[72]

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[64] *See, e.g.*, 15 U.S.C. 6711 (insurance activities of national banks are "functionally regulated" by the states, subject to the provisions on the operation of state law contained in section 104 of the Gramm-Leach-Bliley Act).

[65] *See, e.g.*, 12 U.S.C. 92a (permissible fiduciary activities for national banks determined by reference to state law).

[66] *Nat'l Bank* v. *Commonwealth*, 76 U.S. at 362 (holding that shares held by shareholders of a national bank were lawfully subject to state taxation).

[67] For a detailed discussion of this issue, *see* the OCC's visitorial powers rulemaking also published today in the **Federal Register**.

[68] *See supra* note 8.

[69] Enforcement Action 2000–53 (June 28, 2000), *available* at the OCC's Web site in the "Popular FOIA Requests" section at *http://www.occ.treas.gov/foia/foiadocs.htm*.

[70] *See In the Matter of First Consumers National Bank, Beavertan, Oregan*, Enforcement Action 2003–100 (required restitution of annual fees and overlimit fees for credit cards); *In the Matter of Household Bank (SB), N.A., Las Vegas, Nevada*, Enforcement Action 2003–17 (required restitution regarding private label credit cards); *In the Matter of First National Bank in Broakings, Broakings, South Dakota*, Enforcement Action 2003–1 (required restitution regarding credit cards); *In the Matter of First National Bank of Marin, Las Vegas, Nevada*, Enforcement Action 2001–97 (restitution regarding credit cards); and *In the Matter of Direct Merchants Credit Card Bank, N.A., Scottsdale, Arizona*, Enforcement Action 2001–24 (restitution regarding credit cards). These orders can be found on the OCC's Web site within the "Papular FOIA Requests" section at *http://www.occ.treas.gov/foia/faiadocs.htm*.

[71] *See In the Matter of Clear Lake National Bank, San Antanio, Texas*, Enforcement Action 2003–135 (Nav. 7, 2003), available at *http://www.occ.treas.gov/FTP/EAs/ea2003–135.pdf*. We believe these enforcement actions, which have generated hundreds of millions of dollars for consumers in restitution, also demanstrate that the OCC has the resources to enforce applicable laws. Indeed, as recently observed by the Superior Court of Arizona, Maricapa County, in an action brought by Arizona against a national bank, among others, the restitution and remedial action ordered by the OCC in that matter against the bank was "comprehensive and significantly broader in scope that that available through [the] state court proceedings." *State of Arizona* v. *Hispanic Air Conditioning and Heating, Inc.*, CV 2000–003625, Ruling at 27, Conclusions of Law, paragraph 50 (Aug. 25, 2003).

[72] *See In the Matter of Peaples National Bank, Paris, Texas*, Enforcement Action 2003–2; *In the Matter of First National Bank in Brookings, Brookings, South Dakata*, Enforcement Action 2003–1; *In the Matter of Galeta National Bank, Goleta, California*, Enforcement Action 2002–93; and *In the Matter of Eagle National Bank, Upper Darby, Pennsylvania*, Enforcement Action 2001–

Continued

Other than these isolated incidences of abusive practices that have triggered the OCC's aggressive supervisory response, evidence that national banks are engaged in predatory lending practices is scant. Based on the absence of such information—from third parties, our consumer complaint database, and our supervisory process—we have no reason to believe that such practices are occurring in the national banking system to any significant degree. Although several of the commenters suggested this conclusion is implausible given the significant share of the lending market occupied by national banks, this observation is consistent with an extensive study of predatory lending conducted by the Department of Housing and Urban Development (HUD) and the Treasury Department,[73] and even with comments submitted in connection with an OTS rulemaking concerning preemption of state lending standards by *46* State Attorneys General.

Less than one year ago, nearly two dozen State Attorneys General signed a brief in litigation that reached the same conclusion. That case involved a revised regulation issued by the Office of Thrift Supervision to implement the Alternative Mortgage Transaction Parity Act (AMTPA). The revised regulation seeks to distinguish between Federally supervised thrift institutions and non-bank mortgage lenders and makes non-bank mortgage lenders subject to state law restrictions on prepayment penalties and late fees. In *supporting* the OTS's decision to retain preemption of state laws for supervised depository institutions and their subsidiaries but *not* for unsupervised housing creditors, the State Attorneys General stated:

Based on consumer complaints received, as well as investigations and enforcement actions undertaken by the Attorneys General, predatory lending abuses are largely confined to the subprime mortgage lending market and to *non-depository institutions. Almost all of the leading subprime lenders are mortgage companies and finance companies, not banks or direct bank subsidiaries.*[74]

It is relevant for purposes of this final rule that the preemption regulations adopted by the OCC are substantially identical to the preemption regulations of the OTS that have been applicable to Federal thrifts for a number of years. It does not appear from public commentary—nor have the state officials indicated—that OTS preemption regulations have undermined the protection of customers of Federal thrifts. In their brief in the OTS litigation described above, the State Attorneys General referenced "the burdens of federal supervision," in concluding that there "clearly is a substantial basis for OTS's distinction"[75] between its supervised institutions and state housing creditors.

These considerations are equally applicable in the context of national banks, and were recognized, *again,* by all 50 State Attorneys General, in their comment letter to the OCC on this very regulation, which stated:

It is true that most complaints and state enforcement actions involving mortgage lending practices have not been directed at banks. However, most major subprime mortgage lenders are now subsidiaries of bank holding companies, (*although not direct bank operating subsidiaries*).[76]

The OCC is firmly committed to assuring that abusive practices—whether in connection with mortgage lending or other national bank activities—continue to have no place in the national banking system.

VII. Regulatory Analysis

CDRI Act Delayed Effective Date

This final rule takes effect 30 days after the date of its publication in the **Federal Register**, consistent with the delayed effective date requirement of the Administrative Procedure Act. *See* 5. U.S.C. 553(d). Section 302 of the Riegle Community Development and Regulatory Improvement Act of 1994 (CDRI Act), 12 U.S.C. 4802(b), provides that regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions may not take effect before the first day of the quarter following publication unless the agency finds that there is good cause to make the rule effective at an earlier date. The regulations in this final rule require national banks to adhere to explicit safety and soundness-based anti-predatory lending standards. These standards prohibit national banks from engaging in certain harmful lending practices, thereby benefiting consumers. The final rule imposes no additional reporting, disclosure, or other requirements on national banks. Accordingly, in order for the benefits to become available as soon as possible, the OCC finds that there is good cause to dispense with the requirements of the CDRI Act.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b) (RFA), the regulatory flexibility analysis otherwise required under section 604 of the RFA is not required if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short, explanatory statement in the **Federal Register** along with its rule.

Pursuant to section 605(b) of the RFA, the OCC hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not needed. The amendments to the regulations identify the types of state laws that are preempted, as well as the types of state laws that generally are not preempted, in the context of national bank lending, deposit-taking, and other activities. These amendments simply provide the OCC's analysis and do not impose any new requirements or burdens. As such, they will not result in any adverse economic impact.

Executive Order 12866

The OCC has determined that this final rule is not a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995, Pub. L. 104–4 (2 U.S.C. 1532) (Unfunded Mandates Act), requires that an agency prepare a budgetary impact statement

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104. These orders can also be found on the OCC's Web site within the "Popular FOIA Requests" section at *http://www.occ.treas.gov/foia/foiadocs.htm.*

[73] A Treasury-HUD joint report issued in 2000 found that predatory lending practices in the subprime market are less likely to occur in lending by—

banks, thrifts, and credit unions that are subject to extensive oversight and regulation * * *. The subprime mortgage and finance companies that dominate mortgage lending in many low-income and minority communities, while subject to the same consumer protection laws, are not subject to as much federal oversight as their prime market counterparts—who are largely federally-supervised banks, thrifts, and credit unions. The absence of such accountability may create an environment where predatory practices flourish because they are unlikely to be detected.

Departments of Housing and Urban Development and the Treasury, "Curbing Predatory Home Mortgage Lending: A Joint Report" 17–18 (June 2000), *available at http://www.treas.gov/press/releases/report3076.htm.*

In addition, the report found that a significant source of abusive lending practices is non-regulated mortgage brokers and similar intermediaries who, because they "do not actually take on the credit risk of making the loan, * * * may be less concerned about the loan's ultimate repayment, and more concerned with the fee income they earn from the transaction." *Id.* at 40.

[74] Brief for Amicus Curiae State Attorneys General, *Nat'l Home Equity Mortgage Ass'n* v. *OTS,* Civil Action No. 02–2506 (GK) (D.D.C.) at 10–11 (emphasis added).

[75] *Id.* at 10.

[76] National Association of Attorneys General comment letter on the proposal at 10 (Oct. 6, 2003) (emphasis added).

before promulgating any rule likely to result in a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. The OCC has determined that this final rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $100 million or more in any one year. Accordingly, this rulemaking is not subject to section 202 of the Unfunded Mandates Act.

Executive Order 13132

Executive Order 13132, entitled "Federalism" (Order), requires Federal agencies, including the OCC, to certify their compliance with that Order when they transmit to the Office of Management and Budget any draft final regulation that has Federalism implications. Under the Order, a regulation has Federalism implications if it has "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." In the case of a regulation that has Federalism implications and that preempts state law, the Order imposes certain consultation requirements with state and local officials; requires publication in the preamble of a Federalism summary impact statement; and requires the OCC to make available to the Director of the Office of Management and Budget any written communications submitted by state and local officials. By the terms of the Order, these requirements apply to the extent that they are practicable and permitted by law and, to that extent, must be satisfied before the OCC promulgates a final regulation.

In the proposal, we noted that the regulation may have Federalism implications. Therefore, in formulating the proposal and the final rule, the OCC has adhered to the fundamental Federalism principles and the Federalism policymaking criteria. Moreover, the OCC has satisfied the requirements set forth in the Order for regulations that have Federalism implications and preempt state law. The steps taken to comply with these requirements are set forth below.

Consultation. The Order requires that, to the extent practicable and permitted by law, no agency shall promulgate any regulation that has Federalism implications and that preempts state law unless, prior to the formal promulgation of the regulation, the agency consults with state and local officials early in the process of developing the proposal. We have consulted with state and local officials on the issues addressed herein through the rulemaking process. Following the publication of the proposal, representatives from the Conference of State Bank Supervisors (CSBS) met with the OCC to clarify their understanding of the proposal and, subsequently, the CSBS submitted a detailed comment letter regarding the proposal. As mentioned previously, additional comments were also submitted on the proposal by other state and local officials and state banking regulators. Pursuant to the Order, we will make these comments available to the Director of the OMB. Subsequent, public statements by representatives of the CSBS have restated their concerns, and CSBS representatives have further discussed these concerns with the OCC on several additional occasions.

In addition to consultation, the Order requires a Federalism summary impact statement that addresses the following:

Nature of concerns expressed. The Order requires a summary of the nature of the concerns of the state and local officials and the agency's position supporting the need to issue the regulation. The nature of the state and local official commenters' concerns and the OCC's position supporting the need to issue the regulation are set forth in the preamble, but may be summarized as follows. Broadly speaking, the states disagree with our interpretation of the applicable law, they are concerned about the impact the rule will have on the dual banking system, and they are concerned about the ability of the OCC to protect consumers adequately.

Extent to which the concerns have been addressed. The Order requires a statement of the extent to which the concerns of state and local officials have been met.

a. There is fundamental disagreement between state and local officials and the OCC regarding preemption in the national bank context. For the reasons set forth in the materials that precede this Federalism impact statement, we believe that this final rule is necessary to enable national banks to operate to the full extent of their powers under Federal law, and without interference from inconsistent state laws; consistent with the national character of the national banks; and in furtherance of their safe and sound operations. We also believe that this final rule has ample support in statute and judicial precedent. The concerns of the state and local officials could only be fully met if the OCC were to take a position that is contrary to Federal law and judicial precedent. Nevertheless, to respond to some of the issues raised, the language in this final regulation has been refined, and this preamble further explains the standards used to determine when preemption occurs and the criteria for when state laws generally would *not* be preempted.

b. Similarly, we fundamentally disagree with the state and local officials about whether this final rule will undermine the dual banking system. As discussed in the OCC's visitorial powers rulemaking also published today in the **Federal Register**, differences in national and state bank powers and in the supervision and regulation of national and state banks are not inconsistent with the dual banking system; rather, they are the defining characteristics of it. The dual banking system is universally understood to refer to the chartering and supervision of state-chartered banks by state authorities and the chartering and supervision of national banks by Federal authority, the OCC. Thus, we believe that the final rule preserves, rather than undermines, the dual banking system.

c. Finally, we stand ready to work with the states in the enforcement of applicable laws. The OCC has extended invitations to state Attorneys General and state banking departments to enter into discussions that would lead to a memorandum of understanding about the handling of consumer complaints and the pursuit of remedies, and we remain eager to do so. Moreover, as discussed in the preamble, we believe the OCC has the resources to enforce applicable laws, as is evidenced by the enforcement actions that have generated hundreds of millions of dollars for consumers in restitution, that have required national banks to disassociate themselves from payday lenders, and that have ordered national banks to stop abusive practices. Thus, the OCC has ample legal authority and resources to ensure that consumers are adequately protected.

List of Subjects

12 CFR Part 7

Credit, Insurance, Investments, National banks, Reporting and recordkeeping requirements, Securities, Surety bonds.

12 CFR Part 34

Mortgages, National banks, Real estate appraisals, Real estate lending

standards, Reporting and recordkeeping requirements.

Authority and Issuance

■ For the reasons set forth in the preamble, parts 7 and 34 of chapter I of title 12 of the Code of Federal Regulations are amended as follows:

PART 7—BANK ACTIVITIES AND OPERATIONS

■ 1. The authority citation for part 7 is revised to read as follows:

Authority: 12 U.S.C. 1 *et seq.*, 71, 71a, 92, 92a, 93, 93a, 481, 484, and 1818.

Subpart D—Preemption

■ 2. A new § 7.4007 is added to read as follows:

§ 7.4007 Deposit-taking.

(a) *Authority of national banks.* A national bank may receive deposits and engage in any activity incidental to receiving deposits, including issuing evidence of accounts, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

(b) *Applicability of state law.* (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized deposit-taking powers are not applicable to national banks.

(2) A national bank may exercise its deposit-taking powers without regard to state law limitations concerning:

(i) Abandoned and dormant accounts;[3]

(ii) Checking accounts;

(iii) Disclosure requirements;

(iv) Funds availability;

(v) Savings account orders of withdrawal;

(vi) State licensing or registration requirements (except for purposes of service of process); and

(vii) Special purpose savings services; [4]

(c) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the deposit-taking powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' deposit-taking powers:

(1) Contracts;

(2) Torts;

(3) Criminal law; [5]

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

(6) Taxation;

(7) Zoning; and

(8) Any other law the effect of which the OCC determines to be incidental to the deposit-taking operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

■ 3. A new § 7.4008 is added to read as follows:

§ 7.4008 Lending.

(a) *Authority of national banks.* A national bank may make, sell, purchase, participate in, or otherwise deal in loans and interests in loans that are not secured by liens on, or interests in, real estate, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any other applicable Federal law.

(b) *Standards for loans.* A national bank shall not make a consumer loan subject to this § 7.4008 based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.

(c) *Unfair and deceptive practices.* A national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and regulations promulgated thereunder in connection with loans made under this § 7.4008.

(d) *Applicability of state law.* (1) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized non-real estate lending powers are not applicable to national banks.

(2) A national bank may make non-real estate loans without regard to state law limitations concerning:

(i) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(ii) The ability of a creditor to require or obtain insurance for collateral or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(iii) Loan-to-value ratios;

(iv) The terms of credit, including the schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(v) Escrow accounts, impound accounts, and similar accounts;

(vi) Security property, including leaseholds;

(vii) Access to, and use of, credit reports;

(viii) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(ix) Disbursements and repayments; and

(x) Rates of interest on loans.[6]

(e) *State laws that are not preempted.* State laws on the following subjects are not inconsistent with the non-real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' non-real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law;[7]

(4) Rights to collect debts;

(5) Acquisition and transfer of property;

(6) Taxation;

(7) Zoning; and

[3] This does not apply to state laws of the type upheld by the United States Supreme Court in *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233 (1944), which obligate a national bank to "pay [deposits] to the persons entitled to demand payment according to the law of the state where it does business." *Id.* at 248–249.

[4] State laws purporting to regulate national bank fees and charges are addressed in 12 CFR 7.4002.

[5] *But see* the distinction drawn by the Supreme Court in *Easton* v. *Iowa*, 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States." The Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction * * *. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

[6] The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. *See* 12 U.S.C. 85; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

[7] *See supra* note 5 regarding the distinction drawn by the Supreme Court in *Easton* v. *Iowa*, 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States."

(8) Any other law the effect of which the OCC determines to be incidental to the non-real estate lending operations of national banks or otherwise consistent with the powers set out in paragraph (a) of this section.

■ 4. A new § 7.4009 is added to read as follows:

§ 7.4009 Applicability of state law to national bank operations.

(a) *Authority of national banks.* A national bank may exercise all powers authorized to it under Federal law, including conducting any activity that is part of, or incidental to, the business of banking, subject to such terms, conditions, and limitations prescribed by the Comptroller of the Currency and any applicable Federal law.

(b) *Applicability of state law.* Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its powers to conduct activities authorized under Federal law do not apply to national banks.

(c) *Applicability of state law to particular national bank activities.* (1) The provisions of this section govern with respect to any national bank power or aspect of a national bank's operations that is not covered by another OCC regulation specifically addressing the applicability of state law.

(2) State laws on the following subjects are not inconsistent with the powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national bank powers:

(i) Contracts;

(ii) Torts;

(iii) Criminal law [8]

(iv) Rights to collect debts;

(v) Acquisition and transfer of property;

(vi) Taxation;

(vii) Zoning; and

(viii) Any other law the effect of which the OCC determines to be incidental to the exercise of national bank powers or otherwise consistent with the powers set out in paragraph (a) of this section.

PART 34—REAL ESTATE LENDING AND APPRAISALS

Subpart A—General

■ 5. The authority citation for part 34 continues to read as follows:

Authority: 12 U.S.C. 1 *et seq.*, 29, 93a, 371, 1701j–3, 1828(o), and 3331 *et seq.*

■ 6. In § 34.3, the existing text is designated as paragraph (a), and new paragraphs (b) and (c) are added to read as follows:

§ 34.3 General rule.

* * * * *

(b) A national bank shall not make a consumer loan subject to this subpart based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms. A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.

(c) A national bank shall not engage in unfair or deceptive practices within the meaning of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and regulations promulgated thereunder in connection with loans made under this part.

■ 7. Section 34.4 is revised to read as follows:

§ 34.4 Applicability of state law.

(a) Except where made applicable by Federal law, state laws that obstruct, impair, or condition a national bank's ability to fully exercise its Federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without regard to state law limitations concerning:

(1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;

(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;

(3) Loan-to-value ratios;

(4) The terms of credit, including schedule for repayment of principal and interest, amortization of loans, balance, payments due, minimum payments, or term to maturity of the loan, including the circumstances under which a loan may be called due and payable upon the passage of time or a specified event external to the loan;

(5) The aggregate amount of funds that may be loaned upon the security of real estate;

(6) Escrow accounts, impound accounts, and similar accounts;

(7) Security property, including leaseholds;

(8) Access to, and use of, credit reports;

(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;

(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, mortgages;

(11) Disbursements and repayments;

(12) Rates of interest on loans;[1]

(13) Due-on-sale clauses except to the extent provided in 12 U.S.C. 1701j–3 and 12 CFR part 591; and

(14) Covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

(b) State laws on the following subjects are not inconsistent with the real estate lending powers of national banks and apply to national banks to the extent that they only incidentally affect the exercise of national banks' real estate lending powers:

(1) Contracts;

(2) Torts;

(3) Criminal law; [2]

(4) Homestead laws specified in 12 U.S.C. 1462a(f);

(5) Rights to collect debts;

(6) Acquisition and transfer of real property;

(7) Taxation;

(8) Zoning; and

(9) Any other law the effect of which the OCC determines to be incidental to the real estate lending operations of national banks or otherwise consistent with the powers and purposes set out in § 34.3(a).

Dated: January 6, 2004.

John D. Hawke, Jr.,

Comptroller of the Currency.

[FR Doc. 04–586 Filed 1–12–04; 8:45 am]

BILLING CODE 4810–33–P

[8] 8 *Id.*

[1] The limitations on charges that comprise rates of interest on loans by national banks are determined under Federal law. *See* 12 U.S.C. 85 and 1735f–7a; 12 CFR 7.4001. State laws purporting to regulate national bank fees and charges that do not constitute interest are addressed in 12 CFR 7.4002.

[2] *But see* the distinction drawn by the Supreme Court in *Easton* v. *Iowa*, 188 U.S. 220, 238 (1903) between "crimes defined and punishable at common law or by the general statutes of a state and crimes and offences cognizable under the authority of the United States." The Court stated that "[u]ndoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction * * *. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States." *Id.* at 239 (holding that Federal law governing the operations of national banks preempted a state criminal law prohibiting insolvent banks from accepting deposits).

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9048]

RIN 1545–BB95

Guidance Under Section 1502; Suspension of Losses on Certain Stock Dispositions; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Corrections to final and temporary regulations.

SUMMARY: This document corrects final and temporary regulations (TD 9048) published in the **Federal Register** on March 14, 2003 (68 FR 12287). The final and temporary regulations redetermine the basis of stock of a subsidiary member of a consolidated group immediately prior to certain transfers of such stock and certain deconsolidations of a subsidiary member and also suspend certain losses recognized on the disposition of stock of a subsidiary member.

DATES: This document is effective on March 14, 2003.

FOR FURTHER INFORMATION CONTACT: Aimee K. Meacham, (202) 622–7530 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final and temporary regulations (TD 9048) that are the subject of these corrections are under section 1502 of the Internal Revenue Code.

Need for Correction

As published, the final and temporary regulations (TD 9048) contain errors that may prove to be misleading and are in need of clarification. In particular, this document supplies text clarifying § 1.1502–35T(c)(5)(i).

Correction of Publication

■ Accordingly, the publication of the final and temporary regulations (TD 9048) that were the subject of FR Doc. 03–6119, is corrected as follows:

§ 1.1502–35T [Corrected]

■ 1. On page 12294, column 1, § 1.1502–35T(c)(5)(i), line 8 from the bottom of the paragraph, the language "subsidiary (or any successor) is not a" is corrected to read "subsidiary (and any successor) is not a".

La Nita Van Dyke,

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

[FR Doc. 04–710 Filed 1–12–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD07–03–094]

RIN 1625–AA09

Drawbridge Operation Regulations; Rice Creek, Putnam County, FL

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is changing the regulation governing the operation of the CSX Railroad Swingbridge, across Rice Creek, mile 0.8, Putnam County, Florida. This rule requires the bridge to open on signal during the day and to open with a 24-hour advance notice at all other times. This rule will meet the reasonable needs of navigation on Rice Creek.

DATES: This rule is effective February 12, 2004.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket [CGD07–03–094] and are available for inspection or copying at Commander (obr), Seventh Coast Guard District, 909 SE 1st Avenue, Miami, Florida 33131 between 7:30 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Barry Dragon, Project Manager, Seventh Coast Guard District, Bridge Branch, (305) 415–6743.

SUPPLEMENTARY INFORMATION:

Regulatory History

On August 11, 2003, the Coast Guard published a notice of proposed rulemaking (NPRM) entitled Drawbridge Operation Regulations; Rice Creek, Putnam County, Florida in the **Federal Register** (68 FR 47522). We received no comments on this notice of proposed rulemaking (NPRM). No public hearing was requested, and none was held.

Background and Purpose

The CSX Railroad Swingbridge across Rice Creek, mile 0.8, is a railroad swingbridge with a vertical clearance of 2 feet at mean high water and a horizontal clearance of 30 feet. The current operating regulations published in 33 CFR 117.5 require the bridge to open on signal at all times. This regulatory action will ease the burden of having a full time bridge tender on site. For the last three years, requests to open the bridge have been for intermittent tug and barge traffic between 4 p.m. and 8 a.m. The CSX Railroad and the tug and barge companies that pass through the bridge service the same customer upstream from the bridge and are able to coordinate their operating schedules for timely bridge openings. This rule will continue to meet the reasonable needs of navigation for this bridge.

Discussion of Comments and Changes

We received no comments on the notice of proposed rulemaking (NPRM).

This rule requires the bridge to open on signal from 8 a.m. to 4 p.m. From 4:01 p.m. to 7:59 a.m., the bridge need open only with a 24-hour advance notice by calling (800) 232–0142. This schedule will meet the reasonable needs of navigation.

Regulatory Evaluation

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

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation is unnecessary, because the rule will only affect a small percentage of vessels that travel through this bridge and after "on signal" hours openings are available with 24-hour advance notice.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), we offered to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process. We offered small businesses, organizations, or governmental jurisdictions affected by this rule or with questions concerning its provisions or options for compliance, to contact the person listed in **FOR FURTHER INFORMATION CONTACT.**

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Environment

We have analyzed this rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction, from further environmental documentation. Under figure 2–1, paragraph (32)(e), of the Instruction, an "Environmental Analysis Check List" and a "Categorical Exclusion Determination" are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

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

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

■ 2. Section 117.324 is added to read as follows:

§ 117.324 Rice Creek.

The CSX Railroad Swingbridge, mile 0.8, in Putnam County, shall open on signal from 8 a.m. to 4 p.m., daily. From 4:01 p.m. to 7:59 a.m., daily, the bridge shall open with a 24-hour advance notice to CSX at 1–800–232–0142.

Dated: December 31, 2003.

Fred M. Rosa

Captain, U.S. Coast Guard, Acting Commander, Seventh Coast Guard District.

[FR Doc. 04–589 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–15–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[KS 202–1202; FRL–7608–9]

Approval and Promulgation of Implementation Plans; State of Kansas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is announcing the approval of a revision to the maintenance plan prepared by Kansas to maintain the 1-hour national ambient air quality standard (NAAQS) for ozone in the Kansas portion of the Kansas City maintenance area through the year 2012. This plan is applicable to Johnson and Wyandotte Counties. This revision is required by the Clean Air Act. A similar final rulemaking pertaining to the Missouri portion of the Kansas City maintenance area is being done in

conjunction with this rulemaking. The effect of this approval is to ensure Federal enforceability of the state air program plan and to maintain consistency between the state-adopted plan and the approved SIP.

DATES: This rule is effective on February 12, 2004.

FOR FURTHER INFORMATION CONTACT: Leland Daniels, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101, or by e-mail at *daniels.leland@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 does Federal approval of a state regulation mean to me?
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) 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 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 Being Addressed in This Document?

For the past ten years, Kansas has had a plan in place to maintain the 1-hour ozone standard in the Kansas portion of the Kansas City maintenance area through 2002. The CAA requires that the maintenance plan be revised. Kansas' submittal of January 9, 2003, contained a revised plan that describes what will be done during the next ten-year period to maintain the ozone standard in the Kansas portion of the Kansas City maintenance area through 2012.

Our proposed approval of Kansas' revised maintenance plan for the Kansas portion of the Kansas City 1-hour ozone maintenance area was published September 16, 2003 (68 FR 54190). No comments regarding the proposed approval were received.

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 in this final rule and in more detail in the technical support document which is part of this document, the revision meets the substantive SIP requirements of the CAA, including section 110 and implementing regulations.

What Action Is EPA Taking?

Our review of the material submitted indicates that the state has revised the maintenance plan in accordance with the requirements of the CAA. A detailed discussion of our rationale for this determination is contained in the September 16, 2003, proposal. For the reasons stated in the proposal, we are fully approving Kansas' revised maintenance plan for maintaining the 1-hour ozone standard for the second ten-year period in the Kansas portion of the Kansas City maintenance area.

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 is not economically significant.

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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 15, 2004. 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, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 31, 2003.

James B. Gulliford,

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 R—Kansas

■ 2. In § 52.870(e) the table is amended by adding an entry at the end of the table to read as follows:

§ 52.870 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED KANSAS NONREGULATORY PROVISIONS

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date	EPA approval date	Explanation
* *	*	*	*	*
(28) Maintenance Plan for the 1-hour ozone standard in the Kansas portion of the Kansas City maintenance area for the second ten- year period.	Kansas City	01/09/03	01/13/04.	

[FR Doc. 04–560 Filed 1–12–04; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MO 201–1201; FRL–7608–8]

Approval and Promulgation of Implementation Plans; State of Missouri

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is announcing the approval of a revision to the maintenance plan prepared by Missouri to maintain the 1-hour national ambient air quality standard (NAAQS) for ozone in the Missouri portion of the Kansas City maintenance area through the year 2012. This maintenance plan is applicable to Clay, Jackson and Platte Counties. This revision is required by the Clean Air Act. A similar final action pertaining to the Kansas portion of the Kansas City maintenance area is being done in conjunction with this rulemaking. The effect of this approval is to ensure Federal enforceability of the State air program plan and to maintain consistency between the State-adopted plan and the approved SIP.

DATES: This rule is effective on February 12, 2004.

FOR FURTHER INFORMATION CONTACT: Leland Daniels, Environmental Protection Agency, Air Planning and Development Branch, 901 North 5th Street, Kansas City, Kansas 66101, or by e-mail at *daniels.leland@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 does Federal approval of a State regulation mean to me?

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) 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 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 Being Addressed in This Document?

For the past ten years, Missouri has had a maintenance plan in place to maintain the 1-hour ozone standard in the Missouri portion of the Kansas City maintenance area through 2002. The CAA requires that the maintenance plan be revised. Missouri's submittal of December 17, 2002, contained a revised plan that describes what will be done during the next ten-year period to maintain the 1-hour ozone standard in the Missouri portion of the Kansas City maintenance area through 2012.

Our proposed approval of Missouri's revised maintenance plan for the Missouri portion of the Kansas City 1-hour ozone maintenance area was published September 16, 2003 (68 FR 54186). No comments regarding the proposed approval were received.

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 in this final rule and in more detail in the technical support document which is part of this document, the revision meets the substantive SIP requirements of the CAA, including section 110 and implementing regulations.

What Action Is EPA Taking?

Our review of the material submitted indicates that the State has revised the maintenance plan in accordance with the requirements of the CAA. A detailed discussion of our rationale for this determination is contained in the September 16, 2003, proposal. For the reasons stated in the proposal, we are fully approving Missouri's revised maintenance plan for maintaining the 1-hour ozone standard for the second ten-year period in the Missouri portion of the Kansas City maintenance area.

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 is not economically significant.

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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 15, 2004. 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, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: December 31, 2003.

James B. Gulliford,

Regional Administrtor, 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 AA—Missouri

■ 2. In § 52.1320(e) the table is amended by adding an entry at the end of the table to read as follows:

§ 52.1320 Identification of Plan.

* * * * *

(e) * * *

EPA-Approved Missouri Nonregulatory SIP Provisions

Name of nonregulatory SIP provision	Applicable geographic or non-attainment area	State submittal date	EPA approval date	Explanation
* * *	*	*	*	*
Maintenance Plan for the 1-hour ozone standard in the Missouri portion of the Kansas City maintenance area for the second ten-year period.	Kansas City	12/17/02	1/13/04	.....

[FR Doc. 04–559 Filed 1–12–04; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL–7608–6]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List

AGENCY: Environmental Protection Agency.

ACTION: Notice of partial deletion of the Del Monte Corporation (Oahu Plantation) Superfund Site from the National Priorities List.

SUMMARY: The Environmental Protection Agency (EPA) Region 9 announces the deletion of the Poamoho section of the Del Monte Corporation (Oahu Plantation) Superfund Site (the Site) from the National Priorities List (NPL). The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, 42 U.S.C. 9605, is codified at Appendix B of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 CFR part 300. This partial deletion is consistent with the EPA's Notice of Policy Change: Policy Regarding Partial Deletion of Sites Listed on the National Priorities List. 60 FR 55466 (November 1, 1995). This partial deletion pertains to the Poamoho section of the Site. This partial deletion does not pertain to the Kunia section of the site. The Kunia section of the site will remain on the NPL, and response activities will continue at that section. With the concurrence of the State of Hawaii through the Hawaii Department of Health (DOH), the EPA has determined that Site investigations show that the Poamoho section of the Site poses no significant threat to public health or the environment; consequently, pursuant to CERCLA section 105, and 40 CFR 300.425(e), the Poamoho section of the Site is hereby deleted from the NPL.

EFFECTIVE DATE: January 13, 2004.

FOR FURTHER INFORMATION CONTACT: Janet Rosati, Remedial Project Manager, (415) 972–3165, or toll-free (800) 231–3075, U. S. Environmental Protection Agency, Region 9, 75 Hawthorne Street, Mail Code SFD–8–2, San Francisco, CA 94105. Information on the Site is available at the local information repository located at: Wahiawa Public Library, 820 California Avenue, Wahiawa, HI 96786, (808) 622–6345. Site information is also available at the U.S. EPA Records Center, 95 Hawthorne Street, San Francisco, CA 94105, (415) 536–2000.

SUPPLEMENTARY INFORMATION: The site to be partially deleted from the NPL is the Del Monte Corporation (Oahu Plantation) Superfund Site, Kunia, Honolulu County, Oahu, Hawaii. This partial deletion pertains to the Poamoho section of the Site. This partial deletion does not pertain to the Kunia section of the Site. This partial deletion is 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 (Nov. 1, 1995). A Notice of Intent to Partially Delete this Site was published in the **Federal Register** on October 30, 2003 (62 FR 60058). The closing date for comments on the Notice of Intent for Partial Site Deletion was December 1, 2003. The EPA received two comment letters which supported the partial deletion.

EPA identifies sites that appear to present a significant risk to public health, welfare, or the environment and

it maintains the NPL as the list of those sites. Sites on the NPL may be the subject of Fund-financed remedial actions. Section 300.425(e)(3) of the NCP, 40 CFR 300.425(e)(3), states that Fund-financed actions may be taken at sites deleted from the NPL in the unlikely event that conditions at the site warrant such action. Deletion of a site from the NPL does not affect responsible party liability or impede EPA efforts to recover costs associated with response efforts.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: January 2, 2004.

Laura Yoshii,

Acting Regional Administrator, Region 9.

■ For the reasons set out in the preamble, 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

■ 1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR 1987 Comp., p. 193.

■ 2. Table 1 of Appendix B to part 300 is amended by revising the entry for "Del Monte Corp.(Oahu Plantation)" to read as follows:

Appendix B—[Amended]

TABLE 1.—GENERAL SUPERFUND SECTION

State	Site name	City/county	Notes [1]
*	*	*	*
HI	Del Monte Corp. (Oahu Plantation)	Honolulu County	P
*	*	*	*

[1] A = Based on issuance of health advisory by Agency for Toxic Substances and Disease Registry (if scored, HRS score need not be ≤28.50). P=Sites with partial deletion(s).

* * * * *

[FR Doc. 04–558 Filed 1–12–04; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 721

[OPPT–2003–0031; FRL–7320–1]

RIN 2070–AB27

Revocation of Significant New Uses of Certain Chemical Substances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is revoking significant new use rules (SNURs) for four substances promulgated under section 5(a)(2) of the Toxic Substances Control Act (TSCA) based on new data. Based on the new data the Agency no longer finds that activities not described in the corresponding TSCA section 5(e) consent orders or premanufacture notices (PMN) for these chemical substances may result in significant changes in human or environmental exposure.

DATES: This final rule is effective on February 12, 2004.

FOR FURTHER INFORMATION CONTACT: *For general information contact*: Barbara Cunningham, Director, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov.*

For technical information contact: James Alwood, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: 202 564–8974; e-mail address: *alwood.jim@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you manufacture, import, process, or use the chemical substances contained in this revocation. Potentially affected entities may include, but are not limited to:

- Chemical manufacturers (NAICS 325), e.g., persons manufacturing, importing, processing, or using chemicals for commercial purposes.
- Petroleum and coal product industries (NAICS 324), e.g., persons manufacturing, importing, processing, or using chemicals for commercial purposes.

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. To determine whether you or your business may be affected by this action, you should carefully examine the applicability provisions in title 40 of the Code of Federal Regulations (CFR) at 40 CFR 721.5. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Copies of this Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under docket identification (ID) number OPPT–2003–0031. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the EPA Docket Center, Rm. B102-Reading Room, EPA West, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The EPA Docket Center Reading Room telephone number is (202) 566–1744 and the telephone number for the OPPT Docket, which is located in EPA Docket Center, is (202) 566–0280.

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/.A frequently updated electronic version of 40 CFR part 721 is available at *http://www.access.gpo.gov/nara/cfr/cfrhtml_00/Title_40/40cfr721 00.html*, a beta site currently under development.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in Unit I.B.1. Once in the system, select "search," then key in the appropriate docket identification number.

II. Background

A. What Action is the Agency Taking?

The Agency proposed the revocation of these SNURs in the **Federal Register** of September 20, 2002 (67 FR 59233) (FRL–7181–1). The background and reasons for the revocation of each individual SNUR are set forth in the preamble to the proposed revocation. The comment period closed on October 21, 2002. EPA received no comments regarding the proposed revocation of the SNURs. Therefore, EPA is revoking these rules.

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

Section 5(a)(2) of TSCA (15 U.S.C. 2604(a)(2)) authorizes EPA to determine that a use of a chemical substance is a "significant new use." EPA must make this determination by rule after considering all relevant factors, including those listed in section 5(a)(2) of TSCA. Once EPA determines that a use of a chemical substance is a significant new use, section 5(a)(1)(B) of TSCA requires persons to submit a notice to EPA at least 90 days before they manufacture, import, or process the substance for that use. The mechanism for reporting under this requirement is established under 40 CFR 721.5.

During review of the PMNs submitted for the chemical substances that are the subject of this revocation, EPA concluded that regulation was warranted based on available information that indicated activities not described in the TSCA section 5(e) consent order or PMN might result in significant changes in human or environmental exposure as described in section 5(a)(2) of TSCA. Based on these findings, SNURs were promulgated.

EPA has revoked the TSCA section 5(e) consent orders that are the basis for these SNURs and no longer finds that activities other than those described in the TSCA section 5(e) consent orders or PMN may result in significant changes in human or environmental exposure. The revocation of SNUR provisions for these substances is consistent with the findings set forth in the preamble to the proposed revocation of each individual SNUR.

Therefore, EPA is revoking the SNUR provisions for these chemical substances. When this revocation becomes final, EPA will no longer require notice of intent to manufacture, import, or process these substances. In addition, export notification under section 12(b) of TSCA will no longer be required.

III. Statutory and Executive Order Reviews

This rule revokes or eliminates an existing regulatory requirement and does not contain any new or amended requirements. As such, the Agency has determined that this SNUR revocation will not have any adverse impacts, economic or otherwise.

The Office of Management and Budget (OMB) has exempted these types of regulatory actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). This rule does not contain any information collections subject to approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* Since this rule eliminates a reporting requirement, the Agency certifies pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), that this SNUR revocation will not have a significant economic impact on a substantial number of small entities.

For the same reasons, this action does not require any action under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4). This rule has neither Federalism implications, because it will not have substantial direct effects 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), nor tribal implications, because it will not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (59 FR 22951, November 6, 2000).

This action is not subject to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), because this is not an economically significant regulatory action as defined under Executive Order 12866, and it does not address environmental health or safety risks disproportionately affecting children. It is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because this action is not expected to affect energy supply, distribution, or use. Because this action does not involve any technical standards, 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), does not apply to this action. This action does not involve special considerations of environmental justice related issues 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).

IV. Congressional Review Act

The Congressional Review Act (CRA), 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, which includes a copy of the rule, to each House of the Congress and 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).

List of Subjects in 40 CFR Part 721

Environmental protection, Chemicals, Hazardous substances, Reporting and recordkeeping requirements.

Dated: December 19, 2003.

Charles M. Auer,

Director, Office of Pollution Prevention and Toxics.

■ Therefore, 40 CFR part 721 is amended as follows:

PART 721—[AMENDED]

■ 1. The authority citation for part 721 continues to read as follows:

Authority: 15 U.S.C. 2604, 2607, and 2625(c).

§§ 721.1710, 721.4200, 721.4240, and 721.4466 [Removed]

■ 2. By removing §§ 721.1710, 721.4200, 721.4240, and 721.4466.

[FR Doc. 04–709 Filed 1–12–04; 8:45 am]

BILLING CODE 6560–50–S

DEPARTMENT OF DEFENSE

48 CFR Parts 202, 232, and 252

Defense Federal Acquisition Regulation Supplement; Technical Amendments

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is making technical amendments to the Defense Federal Acquisition Regulation Supplement to update activity names and Internet addresses.

EFFECTIVE DATE: January 13, 2004.

FOR FURTHER INFORMATION CONTACT: Ms. Michele Peterson, Defense Acquisition Regulations Council, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0311; facsimile (703) 602–0350.

List of Subjects in 48 CFR Parts 202, 232, and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

■ Therefore, 48 CFR Parts 202, 232, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR Parts 202, 232, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 202—DEFINITIONS OF WORDS AND TERMS

§ 202.101 [Amended]

■ 2. Section 202.101 is amended in the definition of "Contracting activity", under the heading "DEFENSE LOGISTICS AGENCY", by removing "Office of the Executive Director, Logistics Policy and Acquisition Management" and adding in its place "Office of the Deputy Director, Logistics Operations".

PART 232—CONTRACT FINANCING

232.7003 [Amended]

■ 3. Section 232.7003 is amended in paragraph (a)(1), in the parenthetical, by removing "*https://rmb.ogden.disa.mil*" and adding in its place "*https://wawf.eb.mil*".

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.232–7003 [Amended]

■ 4. Section 252.232–7003 is amended as follows:

■ a. By revising the clause date to read "(JAN 2004)"; and

■ b. In paragraph (b)(1) by removing "*https://rmb.ogden.disa.mil*" and adding in its place "*https://wawf.eb.mil*".

[FR Doc. 04–567 Filed 1–12–04; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

48 CFR Parts 212, 213, 225, and 252

[DFARS Case 2003–D088]

Defense Federal Acquisition Regulation Supplement; Free Trade Agreements—Chile and Singapore

AGENCY: Department of Defense (DoD).

ACTION: Interim rule with request for comments.

SUMMARY: DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement to implement new Free Trade Agreements with Chile and Singapore, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act and the United States-Singapore Free Trade Agreement Implementation Act. The new Free Trade Agreements waive the applicability of the Buy American Act for some foreign supplies and construction materials from Chile and Singapore, and specify procurement procedures designed to ensure fairness.

DATES: *Effective date:* January 13, 2004.

Comment date: Comments on the interim rule should be submitted to the address shown below on or before March 15, 2004, to be considered in the formation of the final rule.

ADDRESSES: Respondents may submit comments via the Internet at *http://emissary.acq.osd.mil/dar/dfars.nsf/pubcom*. As an alternative, respondents may e-mail comments to: *dfars@osd.mil*. Please cite DFARS Case 2003–D088 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Ms. Amy Williams, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062; facsimile (703) 602–0350. Please cite DFARS Case 2003–D088.

At the end of the comment period, interested parties may view public comments on the Internet at *http://emissary.acq.osd.mil/dar/dfars.nsf*.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (703) 602–0328.

SUPPLEMENTARY INFORMATION:

A. Background

This rule amends DFARS 212.301, 213.302–5, part 225, and associated clauses to implement new Free Trade Agreements with Chile and Singapore, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act (Pub. L. 108–77) and the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. 108–78). Applicable changes to the Federal Acquisition Regulation (FAR) were published in Federal Acquisition Circular 2001–19 on January 7, 2004 (69 FR 1051).

The threshold for applicability of the new Free Trade Agreements with Chile and Singapore is $58,550 for supplies and services, and $6,725,000 for construction. Singapore was already a signatory to the Agreement on Government Procurement, and therefore was already included as a designated country under the Trade Agreements Act (FAR 25.003), with thresholds of $175,000 for supplies or services and $6,725,000 for construction.

The trade agreements clauses at DFARS 252.225–7021, 252.225–7036, and 252.225–7045 are amended to include definitions of "Free Trade Agreement country" and "Free Trade Agreement country end product" or "Free Trade Agreement country construction material" instead of "NAFTA country" and "NAFTA country end product" or "NAFTA country construction material." The Free Trade Agreement countries are Canada, Chile, Mexico, and Singapore.

Section 106 of Pub. L. 108–77 and section 106 of Pub. L. 108–78 provide for arbitration of certain claims. The United States is authorized to resolve any claim against the United States covered by the section of the applicable Free Trade Agreement relating to Investor-State Disputes Settlement, pursuant to the investor-state dispute settlement procedures set forth in the applicable section (section B of chapter 10 for Chile; section C of chapter 15 for Singapore). DoD invites comment on

appropriate implementation of this authorization. Sections 106 of the same public laws also require that, after the new trade agreements become effective, contracts must specify the law that will apply to resolve any breach of contract claim. The statement that "United States law will apply to resolve any claim of breach of this contract" has been included in each of the trade agreements clauses, rather than creating a separate clause.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* Although the rule opens up Government procurement to the products of Chile, and lowers the trade agreements threshold for the products of Singapore, DoD does not believe there will be a significant economic impact on U.S. small businesses. DoD applies the trade agreements to only those non-defense items listed at DFARS 225.401–70, and acquisitions below $100,000 that are set aside for small businesses are exempt. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2003–D088.

C. Paperwork Reduction Act

This interim rule affects the certification and information collection requirements in the provisions at DFARS 252.225–7020 and 252.225–7035, currently approved under OMB Clearance 0704–0229. The impact, however, is negligible. In the provision at DFARS 252.225–7020, Trade Agreements Certificate, the offeror no longer has to list offers of end products from Chile as nondesignated country end products. However, offers of Chilean end products would have been unlikely, because purchase of foreign products other than eligible products is prohibited by the Trade Agreements Act. In the provision at DFARS 252.225–7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate, the offeror must list all end products that are not domestic end products. The offeror will list products of Chile and Singapore on the list of Free Trade Agreement country end products, rather than the list of "other foreign end products."

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements new Free Trade Agreements with Chile and Singapore, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act (Pub. L. 108–77) and the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. 108–78). These agreements waive the applicability of the Buy American Act for some foreign supplies and construction materials from Chile and Singapore, and specify procurement procedures designed to ensure fairness. The new Free Trade Agreements became effective on January 1, 2004. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Parts 212, 213, 225, and 252

Government procurement.

Michele P. Peterson,
Executive Editor, Defense Acquisition Regulations Council.

■ Therefore, 48 CFR parts 212, 213, 225, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 212, 213, 225, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 212—ACQUISITION OF COMMERCIAL ITEMS

■ 2. Section 212.301 is amended by revising paragraph (f)(i)(C) to read as follows:

212.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(f)(i) * * *

(C) 252.225–7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

* * * * *

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

■ 3. Section 213.302–5 is amended by revising paragraph (d)(ii) to read as follows:

213.302–5 Clauses.

* * * * *

(d) * * *

(ii) 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program, as prescribed at 225.1101(10).

PART 225—FOREIGN ACQUISITION

■ 4. Section 225.003 is amended by revising paragraphs (4), (5), and (10) to read as follows:

225.003 Definitions.

* * * * *

(4) *Domestic end product* has the meaning given in the clauses at 252.225–7001, Buy American Act and Balance of Payments Program; and 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program, instead of the meaning in FAR 25.003.

(5) *Eligible product* means, instead of the definition in FAR 25.003—

(i) A foreign end product that—

(A) Is in a category listed in 225.401–70; and

(B) Is not subject to discriminatory treatment, due to the applicability of a trade agreement to a particular acquisition; or

(ii) A foreign service that is not subject to discriminatory treatment, due to the applicability of a trade agreement to a particular acquisition.

* * * * *

(10) *Qualifying country component* and *qualifying country end product* are defined in the clauses at 252.225–7001, Buy American Act and Balance of Payments Program; and 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program. *Qualifying country end product* is also defined in the clause at 252.225–7021, Trade Agreements.

* * * * *

■ 5. Section 225.401–70 is amended by revising the section heading and introductory text to read as follows:

225.401–70 Products subject to trade agreements.

Acquisitions of end products in the following Federal supply groups (FSG) are subject to trade agreements, if the value of the acquisition is at or above the applicable trade agreement threshold and no exception applies. If an end product is not in one of the listed groups, the trade agreements do not apply. The definition of Caribbean Basin country end products in FAR 25.003 excludes those end products that are not eligible for duty-free treatment under 19 U.S.C. 2703(b). Therefore certain watches, watch parts, and luggage from

certain Caribbean Basin countries are not eligible products. However, 225.003 expands the definition of Caribbean Basin country end products to include petroleum and any product derived from petroleum.

* * * * *

■ 6. Section 225.502 is amended by revising paragraph (c)(i)(B) to read as follows:

225.502 Application.

* * * * *

(c) * * *

(i) * * *

(B) If the acquisition is also subject to a Free Trade Agreement, then end products of the applicable Free Trade Agreement country are also exempt from application of the Buy American Act or Balance of Payments Program evaluation factor.

* * * * *

225.901 [Amended]

■ 7. Section 225.901 is amended in the introductory text and paragraph (2) by removing "NAFTA" and adding in its place "a Free Trade Agreement".

■ 8. Section 225.1101 is amended by revising paragraphs (2)(iv)(B), (3)(iii), (9), and (10) to read as follows:

225.1101 Acquisition of supplies.

* * * * *

(2) * * *

(iv) * * *

(B) 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program.

(3) * * *

(iii) 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program.

* * * * *

(9) Use the provision at 252.225–7035, Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate, instead of the provision at FAR 52.225–4, Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate, in solicitations that include the clause at 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program. Use the provision with its Alternate I when the clause at 252.225–7036 is used with its Alternate I.

(10)(i) Use the clause at 252.225–7036, Buy American Act—Free Trade Agreements—Balance of Payments Program, instead of the clause at FAR 52.225–3, Buy American Act—Free Trade Agreements—Israeli Trade Act, in solicitations and contracts for the items listed at 225.401–70, when the estimated value equals or exceeds $25,000, but is less than $175,000, and a Free Trade Agreement applies to the acquisition.

(A) Use the basic clause when the estimated value equals or exceeds $58,550.

(B) Use the clause with its Alternate I when the estimated value equals or exceeds $25,000 but is less than $58,550.

(ii) Do not use the clause if purchase from foreign sources is restricted (see 225.401(a)(2)), unless the contracting officer anticipates a waiver of the restriction.

(iii) The acquisition of eligible and noneligible products under the same contract may result in the application of a Free Trade Agreement to only some of the items acquired. In such case, indicate in the Schedule those items covered by the Buy American Act—Free Trade Agreements—Balance of Payments Program clause.

■ 9. Section 225.7501 is amended by revising paragraphs (b)(1)(ii) and (b)(2) to read as follows:

225.7501 Policy.

* * * * *

(b) * * *

(1) * * *

(ii) Is an eligible product;

* * * * *

(2) The construction material is designated country construction material or Free Trade Agreement country construction material, and the acquisition is subject to the Trade Agreements Act or a Free Trade Agreement respectively; or

* * * * *

225.7503 [Amended]

■ 10. Section 225.7503 is amended as follows:

a. In paragraph (a), and in paragraph (b) in the first and second sentences, by removing "$6,481,000" and adding in its place "$6,725,000"; and

b. In paragraph (b), in the second sentence, by removing "$7,304,733" and adding in its place "$7,611,532".

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 11. Section 252.212–7001 is amended as follows:

■ a. By revising the clause date to read "(JAN 2004)";

■ b. In paragraph (b), in entry "252.225–7021", by removing "(AUG 2003)" and adding in its place "(JAN 2004)"; and

■ c. In paragraph (b), by revising entry "252.225–7036" to read as follows:

252.212–7001 Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items.

* * * * *

(b) * * *

_____ 252.225–7036 Buy American Act—Free Trade Agreements—Balance of Payments Program (JAN 2004) (___Alternate I) (JAN 2004) (41 U.S.C. 10a–10d and 19 U.S.C. 3301 note).

* * * * *

■ 12. Section 252.225–7013 is amended as follows:

■ a. By revising the clause date to read "(JAN 2004)"

■ b. By revising paragraphs (a)(2) and (3); and

■ c. In paragraph (e)(2)(iv)(B) by revising the parenthetical to read as follows:

252.225–7013 Duty-Free Entry.

* * * * *

(a) * * *

(2) *Eligible product* means—

(i) *Designated country end product* or *Caribbean Basin country end product* as defined in the Trade Agreements clause of this contract;

(ii) *Free Trade Agreement country end product* as defined in the Trade Agreements clause or the Buy American Act—Free Trade Agreements—Balance of Payments Program clause of this contract; or

(iii) *Canadian end product* as defined in Alternate I of the Buy American Act—Free Trade Agreements—Balance of Payments Program clause of this contract.

(3) *Qualifying country* and *qualifying country end product* have the meanings given in the Trade Agreements clause, the Buy American Act and Balance of Payments Program clause, or the Buy American Act—Free Trade Agreements—Balance of Payments Program clause of this contract.

* * * * *

(e) * * *

(2) * * *

(iv) * * *

(B) * * * (If the shipment will be consigned to a contractor's plant and no duty-free entry certificate is required due to a trade agreement, the Contractor shall claim duty-free entry under the applicable trade agreement and shall comply with the U.S. Customs Service requirements. No notification to Commander, DCMA New York, is required.)

* * * * *

252.225–7020 [Amended]

■ 13. Section 252.225–7020 is amended as follows:

■ a. By revising the clause date to read "(JAN 2004)"; and

■ b. In paragraph (a), paragraph (b)(2) introductory text, and paragraph (c)(1) by removing "NAFTA" and adding in its place "Free Trade Agreement".

■ 14. Section 252.225–7021 is amended as follows:

■ a. By revising the clause date to read "(JAN 2004)";

■ b. By revising paragraphs (a)(7), (a)(8), (a)(9) and (b);

■ c. In paragraph (c) introductory text and paragraph (c)(2)(i) by removing "NAFTA" and adding in its place "Free Trade Agreement";

■ d. By redesignating paragraph (e) as paragraph (f); and

■ e. By adding a new paragraph (e) to read as follows:

252.225–7021 Trade Agreements.

* * * * *

(a) * * *

(7) *Free Trade Agreement country* means Canada, Chile, Mexico, or Singapore.

(8) *Free Trade Agreement country end product* means an article that—

(i) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(ii) In the case of an article that consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in a Free Trade Agreement country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply, provided that the value of those incidental services does not exceed the value of the product itself.

(9) *Nondesignated country end product* means any end product that is not a U.S.-made end product or a designated country end product.

* * * * *

(b) Unless otherwise specified, this clause applies to all items in the Schedule.

* * * * *

(e) United States law will apply to resolve any claim of breach of this contract.

* * * * *

■ 15. Section 252.225–7035 is amended by revising the section heading, clause title, clause date, paragraphs (a) and (b)(2), paragraph (c)(1) introductory text, paragraph (c)(2)(ii), and Alternate I to read as follows:

252.225–7035 Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

* * * * *

Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate (Jan 2004)

(a) *Definitions. Domestic end product, foreign end product, Free Trade Agreement country end product, qualifying country end product,* and *United States* have the meanings given in the Buy American Act—Free Trade Agreements—Balance of Payments Program clause of this solicitation.

(b) * * *

(2) For line items subject to Free Trade Agreements, will evaluate offers of qualifying country end products or Free Trade Agreement country end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program.

(c) * * *

(1) For all line items subject to the Buy American Act—Free Trade Agreements—Balance of Payments Program clause of this solicitation, the offeror certifies that—

* * * * *

(2) * * *

(ii) The offeror certifies that the following supplies are Free Trade Agreement country end products:

_____

(Line Item Number)

_____

(Country of Origin)

* * * * *

Alternate I (Jan 2004)

As prescribed in 225.1101(9), substitute the phrase "Canadian end product" for the phrase "Free Trade Agreement country end product" in paragraph (a) of the basic provision; and substitute the phrase "Canadian end products" for the phrase "Free Trade Agreement country end products" in paragraphs (b) and (c)(2)(ii) of the basic provision.

■ 16. Section 252.225–7036 is amended as follows:

■ a. By revising the section heading, clause title, clause date, and paragraph (a)(5);

■ b. In paragraph (a)(6) introductory text, paragraph (a)(6)(i), and the first sentence of paragraph (a)(6)(ii) by removing "NAFTA" and adding in its place "Free Trade Agreement";

■ c. By revising paragraphs (b) and (c);

■ d. By adding paragraph (e); and

■ e. In Alternate I by revising the date and the first sentence of paragraph (c) to read as follows:

252.225–7036 Buy American Act—Free Trade Agreements—Balance of Payments Program.

* * * * *

Buy American Act—Free Trade Agreements—Balance of Payments Program (Jan 2004)

(a) * * *

(5) *Free Trade Agreement country* means Canada, Chile, Mexico, or Singapore.

* * * * *

(b) Unless otherwise specified, this clause applies to all items in the Schedule.

(c) The Contractor shall deliver under this contract only domestic end products unless, in its offer, it specified delivery of qualifying country, Free Trade Agreement country, or other foreign end products in the Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product or a Free Trade Agreement country end product, the Contractor shall deliver a qualifying country end product, a Free Trade Agreement country end product, or, at the Contractor's option, a domestic end product.

* * * * *

(e) United States law will apply to resolve any claim of breach of this contract.

(End of clause)

Alternate I (Jan 2004)

* * * * *

(c) The Contractor shall deliver under this contract only domestic end products unless, in its offer, it specified delivery of qualifying country, Canadian, or other foreign end products in the Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate provision of the solicitation. * * *

■ 17. Section 252.225–7045 is amended as follows:

■ a. By revising the clause date to read "(Jan 2004)";

■ b. In paragraph (a) by removing the definitions of "North American Free Trade Agreement (NAFTA) country" and "North American Free Trade Agreement (NAFTA) country construction material";

■ c. In paragraph (a) by adding, in alphabetical order, definitions of "Free Trade Agreement country" and "Free Trade Agreement country construction material";

■ d. By revising paragraph (b);

■ e. In paragraph (c) introductory text by removing "NAFTA" and adding in its place "Free Trade Agreement";

■ f. By adding paragraph (d); and

■ g. By revising Alternate I to read as follows:

252.225–7045 Balance of Payments Program—Construction Material Under Trade Agreements.

* * * * *

(a) * * *

"Free Trade Agreement country" means Canada, Chile, Mexico, or Singapore.

"Free Trade Agreement country construction material" means a construction material that—

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Free Trade Agreement country into a new and different construction

material distinct from the material from which it was transformed.

* * * * *

(b) This clause implements the Balance of Payments Program by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the Trade Agreements Act and Free Trade Agreements apply to this acquisition. Therefore, the Balance of Payments Program restrictions are waived for designated country and Free Trade Agreement country construction materials.

* * * * *

(d) United States law will apply to resolve any claim of breach of this contract.

(End of clause)

Alternate I (Jan 2004)

As prescribed in 225.7503(b), delete the definitions of "Free Trade Agreement country" and "Free Trade Agreement country construction material" from the definitions in paragraph (a) of the basic clause, add the following definition of "Chilean construction material" to paragraph (a) of the basic clause, and substitute the following paragraphs (b) and (c) for paragraphs (b) and (c) of the basic clause:

"Chilean construction material" means a construction material that—

(1) Is wholly the growth, product, or manufacture of Chile; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in Chile into a new and different construction material distinct from the materials from which it was transformed.

(b) This clause implements the Balance of Payments Program by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the Trade Agreements Act, the Chile Free Trade Agreement, and the Singapore Free Trade Agreement apply to this acquisition. Therefore, the Balance of Payments Program restrictions are waived for designated country and Chilean construction material.

(c) The Contractor shall use only domestic, designated country, or Chilean construction material in performing this contract, except for—

(1) Construction material valued at or below the simplified acquisition threshold in Part 2 of the Federal Acquisition Regulation; or

(2) The construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate "none".]

[FR Doc. 04–568 Filed 1–12–04; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 222 and 229

[Docket No. FRA–1999–6439, Notice No. 9]

[RIN 2130–AA71]

Use of Locomotive Horns at Highway-Rail Grade Crossings

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Interim final rule; correction and announcement of public hearing.

SUMMARY: On December 18, 2003, FRA published an Interim Final Rule (IFR) in the **Federal Register** (68 FR 70585) addressing the use of locomotive horns at highway-rail grade crossings. FRA is interested in receiving public comments on all aspects of the IFR. In the IFR, FRA announced that it would schedule a public hearing to allow interested parties the opportunity to comment on these issues. This notice announces the scheduling of the public hearing and makes one technical correction to the IFR.

DATES: Correction: The correction to part 222 is effective December 18, 2004.

Public Hearing: The date of the public hearing is February 4, 2004, at 9:30 a.m. in Washington, DC. Any person wishing to participate in the public hearing should notify FRA's Docket Clerk by telephone (202–493–6030), by fax (202–493–6068), or by mail at the address provided below at least five working days prior to the date of the hearing. The notification should identify the party the person represents, and the particular subject(s) the person plans to address. The notification should also provide the Docket Clerk with the participant's mailing address.

ADDRESSES: (1) Docket Clerk: Written notification should identify the docket number of this proceeding (Docket No. FRA–1999–6439) and must be submitted to Ms. Ivornette Lynch, Docket Clerk, Office of Chief Counsel, Federal Railroad Administration, RCC–10, 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590.

(2) Public Hearing: The public hearing will be held at the Washington Plaza Hotel, 10 Thomas Circle, NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Ron Ries, Office of Safety, FRA, 1120 Vermont Avenue, NW., Stop 25, Washington, DC 20590 (telephone 202–493–6299); or Kathryn Shelton, Office of Chief Counsel, FRA, 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590 (telephone 202–493–6038).

SUPPLEMENTARY INFORMATION:

Technical Correction

■ In interim final rule document 03–30606 beginning on page 70586 in the issue of Thursday, December 18, 2003, make the following correction:

Appendix C to Part 222 [Corrected]

■ 1. On page 70677, in the first column, in the first paragraph, in the first line, the parenthetical sentence "(New Quiet Zones within the Chicago Region will reflect an increased risk index of 17.3 percent.)" is removed.

Issued in Washington, DC, on January 8, 2004.

Allan Rutter,

Administrator.

[FR Doc. 04–705 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 030130026–3323–02; I.D. 121202B]

RIN 0648–AM30

Fisheries of the Exclusive Economic Zone off Alaska; Halibut Fisheries in U.S. Convention Waters Off Alaska; Management Measures to Reduce Seabird Incidental Take in the Hook-and-Line Halibut and Groundfish Fisheries

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to revise regulations requiring seabird avoidance measures in the hook-and-line groundfish fisheries of the Bering Sea and Aleutian Islands management area (BSAI) and Gulf of Alaska (GOA) and in the Pacific halibut fishery in U.S. Convention waters off Alaska. This action is intended to improve the current requirements and further mitigate interactions with the short-tailed albatross (Phoebastria albatrus), an endangered species protected under the Endangered Species Act (ESA), and with other seabird species in hook-and-line fisheries in and off Alaska, and thus further the goals and objectives of the Magnuson-Stevens Fishery

Conservation and Management Act (Magnuson-Stevens Act), the Northern Pacific Halibut Act of 1982 (Halibut Act), the Migratory Bird Treaty Act (MBTA), and the ESA.

DATES: Effective February 12, 2004.

ADDRESSES: Copies of the Environmental Assessment/Regulatory Impact Review/Final Regulatory Flexibility Analysis (EA/RIR/FRFA) prepared for this action maybe be obtained from the Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Lori Durall, or by calling (907) 586–7228. Written comments regarding the burden-hour estimate or other aspects of the collection-of-information requirement contained in this rule may be submitted to NMFS, Alaska Region, and by email to *David_Rostker@omb.eop.gov*, or fax to (202)395–7285.

FOR FURTHER INFORMATION CONTACT: Kim S. Rivera, (907) 586–7424, or *Kim.Rivera@noaa.gov*.

SUPPLEMENTARY INFORMATION: The U.S. groundfish fisheries of the GOA and the BSAI in the exclusive economic zone (EEZ) are managed by NMFS under the Fishery Management Plan for Groundfish of the Gulf of Alaska and the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area (FMPs). The FMPs were prepared by the North Pacific Fishery Management Council (Council) under the authority of the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*) and are implemented by regulations at 50 CFR part 679. General regulations that also pertain to U.S. fisheries appear at subpart H of 50 CFR part 600. The Halibut Act, 16 U.S.C. 773 *et seq.*, authorizes the Council to develop, and NMFS to implement, halibut fishery regulations that are in addition to, and not in conflict with, regulations adopted by the International Pacific Halibut Commission (IPHC).

This action is intended to reduce the incidental take of seabirds in hook-and-line fisheries. The Magnuson-Stevens Act emphasizes the importance of reducing bycatch to maintain sustainable fisheries. Although seabirds are not included within the Magnuson-Stevens Act's "bycatch" definition, efforts to reduce the incidental take of seabirds in fisheries are consistent with the Magnuson-Stevens Act's objective to conserve and manage the marine environment. In addition, the NMFS' guidelines for implementing the Magnuson-Stevens Act's national standards for fishery conservation and management note that other applicable laws, such as the Marine Mammal Protection Act, the ESA, and the MBTA, require that Councils consider the impact of conservation and management measures on living marine resources other than fish; i.e. marine mammals and birds. Additionally, reducing the take of migratory birds is addressed in NMFS' National Bycatch Strategy (available at *http://www.nmfs.noaa.gov/bycatch_images/FINALstrategy.pdf*). The 1998 NMFS' report "Managing the Nation's Bycatch" and the NMFS' National Bycatch Strategy use a working definition of "bycatch" that is more expansive than the definition in the Magnuson-Stevens Act and includes the incidental take of seabirds as "bycatch." That more expansive definition is used in this preamble.

Background

Awareness of seabird incidental take and incidental mortality in commercial fishing operations off Alaska has been heightened in recent years. Further information on this issue was provided in the preambles to the proposed and final rules implementing seabird avoidance measures in the GOA and BSAI hook-and-line groundfish fisheries (62 FR 10016, March 5, 1997, and 62 FR 23176, April 29, 1997) and in the Pacific halibut fishery off Alaska (62 FR 65635, December 15, 1997, and 63 FR 11161, March 6, 1998) and the EA/RIR/FRFAs prepared for those actions. Additional background information is available in the final report prepared and submitted to the Council and NMFS by the Washington Sea Grant Program (WSGP), Solutions to Seabird Bycatch in Alaska's Demersal Longline Fisheries (available at *http://www.wsg.washington.edu/pubs/seabirds/seabirdpaper.html*). NMFS published the proposed rule for this action in the **Federal Register** on February 7, 2003 (68 FR 6386), which described the proposed regulatory amendment and invited comments from the public. NMFS received 11 letters containing 50 different comments on the proposed rule, which are summarized and responded to in the section Response to Public Comments of this document.

Incidental Seabird Mortality off Alaska

The NMFS North Pacific Groundfish Observer Program office has documented incidental take of seabird species in the GOA and BSAI groundfish fisheries since 1989. Since 2000, the seabird bycatch estimates have been incorporated into the seabird section of the Ecosystem Considerations chapter of the Council's annual Stock Assessment and Fishery Evaluation reports for the GOA and BSAI groundfish fisheries (SAFE). Estimates of the annual seabird incidental take for the Alaska groundfish fisheries, based on 1993 to 1999 observer data, were provided in the EA/RIR/IRFA prepared for the proposed rule. Approximately 15,700 seabirds were killed (taken) annually in the combined BSAI and GOA groundfish hook-and-line fisheries (14,500 in the BSAI and 1,200 in the GOA) at the average rates of 0.10 and 0.03 birds per 1,000 hooks in the BSAI and in the GOA, respectively. Approximately 60 percent of the 15,700 seabirds taken are northern fulmars (*Fulmaris glacialis*), the most abundant seabird species off Alaska. Based on 2000 to 2002 observer data, the average annual estimate of seabirds taken in the combined BSAI and GOA groundfish hook-and-line fisheries was 11,180 (10,672 in the BSAI and 507 in the GOA) at the average rates of 0.05 and 0.014 birds per 1,000 hooks in the BSAI and in the GOA, respectively. Since 2000 in the BSAI, the average annual estimate of the total number of seabirds caught has declined from about 18,000 birds to less than 4,000 in 2002 (corresponding bycatch rates declining from 0.09 birds/1,000 hooks to 0.018). Since 2000 in the GOA, the average annual estimate of the total number of seabirds caught has declined from about 750 birds to less than 300 in 2002 (corresponding bycatch rates declining from 0.02 birds/1,000 hooks to 0.007). With one exception, northern fulmars continue to comprise the vast majority of birds taken. The exception is that in 2002 in the BSAI, gull species comprised over 60 percent of the estimated seabird bycatch. Northern fulmars accounted for the 2nd largest species category that year, 18 percent of the total seabird bycatch.

The annual seabird bycatch estimates based on observer data from 1993 through 2002 exhibit extreme inter-annual variation, as did the take numbers and bird attack rates on baits in the WSGP study. The bycatch rate in 2002 may have decreased because fishermen are becoming more diligent and skilled using seabird avoidance measures, outreach efforts are successful, or the 1999–2000 WSGP research program's collaborative industry approach may have acted to change fishermen's behavior and improve the effective deployment of seabird avoidance measures. Many other factors, both anthropogenic and non-anthropogenic, may affect seabird hooking and entanglement in longline gear. These factors may include geographic location of fishing activity; time of day; season; type of fishing operation and gear used; bait type; condition of the bait; length of time

baited hooks remain at or near the surface of the water; water and weather conditions; availability of food (including bait and offal); bird size; bird behavior (feeding and foraging strategies); bird abundance and distribution; physical condition of the bird, and the quality and correct deployment of seabird avoidance gear.

Council's Final Action

For a more detailed description of the Council's final action, based in part on WSGP research results and recommendations, see the preamble to the proposed rule (68 FR 6386, February 7, 2003).

Summary of the Revised Final Seabird Avoidance Measures

For more detailed descriptions of the seabird avoidance requirements, see the preamble to the proposed rule (68 FR 6386, February 7, 2003). Seabird avoidance measures apply to the operators of vessels using hook-and-line gear for (1) Pacific halibut in the Individual Fishing Quota (IFQ) and Community Development Quota (CDQ) management programs (0 to 200 nautical miles (nm)), (2) IFQ sablefish in EEZ waters (3 to 200 nm) and waters of the State of Alaska (0 to 3 nm), except waters of Prince William Sound and areas in which sablefish fishing is managed under a State of Alaska limited entry program (Clarence Strait, Chatham Strait), and (3) groundfish (except IFQ sablefish) with hook-and-line gear in the U.S. EEZ waters off Alaska (3 to 200 nm).

Operators of all applicable vessels using hook-and-line gear are required to comply with the following bird line requirements (see Table 20):

For Applicable Vessels, Using Hook-and-Line Gear Including Snap Gear, Operating in Inside Waters (NMFS Area 649, NMFS Area 659, and State Waters of Cook Inlet): (1) a minimum of 1 buoy bag line of a specified performance standard is required of vessels greater than 26 ft (7.9 m) length overall (LOA) and less than or equal to 55 ft (16.8 m) LOA that are without masts, poles, or rigging, (2) a minimum of one buoy bag line of a specified performance standard is required of vessels greater than 26 ft (7.9 m) LOA and less than or equal to 32 ft (9.8 m) LOA and with masts, poles, or rigging, (3) a minimum of one streamer line of a specified performance standard is required of vessels greater than 32 ft (9.8 m) LOA and less than or equal to 55 ft (16.8 m) LOA and with masts, poles, or rigging, and (4) a minimum of one streamer line of a specified performance standard is required of vessels greater than 55 ft (16.8 m) LOA.

For Applicable Vessels, Using Other than Snap Gear, and Operating in the EEZ (not including NMFS Area 659): (1) a minimum of one buoy bag line of a specified performance standard and one other specified device is required of vessels greater than 26 ft (7.9 m) LOA and less than or equal to 55 ft (16.8 m) LOA that are without masts, poles, or rigging, (2) a minimum of one streamer line of a specified performance standard and one other specified device is required of vessels greater than 26 ft (7.9 m) LOA and less than or equal to 55 ft (16.8 m) LOA and with masts, poles, or rigging, and (3) except for vessels using snap gear, a minimum of paired streamer lines of a specified performance standard is required of vessels greater than 55 ft (16.8 m) LOA.

For Operators of Vessels, Using Hook-and-line Gear Other than Snap Gear, Fishing for IFQ Halibut, CDQ Halibut, or IFQ Halibut in Waters Shoreward of the EEZ (except for IPHC Area 4E, see below): the same requirements included in the preceding paragraph apply.

For Applicable Vessels Using Snap Gear and Operating in the EEZ (not including NMFS Area 659): (1) a minimum of one buoy bag line of a specified performance standard and one other specified device is required of vessels greater than 26 ft (7.9 m) LOA and less than or equal to 55 ft (16.8 m) LOA and that are without masts, poles, or rigging, (2) a minimum of one streamer line of a specified performance standard and one other specified device is required of vessels greater than 26 ft (7.9 m) LOA and less than or equal to 55 ft (16.8 m) LOA and with masts, poles, or rigging, and (3) a minimum of one streamer line of a specified performance standard is required of vessels greater than or equal to 55 ft (16.8 m) LOA and with masts, poles, or rigging.

Other seabird avoidance devices and methods include weights added to groundline, a buoy bag line or streamer line of specified performance standards, and strategic offal discharge to distract birds away from the setting of baited hooks, that is, discharge fish, fish parts (i.e. offal) or spent bait to distract seabirds away from the main groundline while setting gear.

Gear Performance and Material Standards

To enhance the effectiveness and improve the enforcement of seabird avoidance measures, this rule specifies the gear performance and material standards for larger vessels (vessels greater than or equal to 55 ft (16.8 m) LOA). Voluntary guidelines for gear performance and material standards for smaller vessels (vessels greater than or equal to 26 ft (7.9m) and less than 55 ft (16.8 m) LOA) were provided in the preamble to the proposed rule (68 FR 6386, February 7, 2003). The only standard applied to seabird avoidance gear for smaller vessels in this rule is discussed in Weather Safety Factor.

Standards for Larger (Greater than 55 ft (16.8 m) LOA) Vessels

Paired Streamer Standard Larger vessels must deploy a minimum of two streamer lines while setting hook-and-line gear. Preferably, both streamer lines are deployed prior to the first hook being set. At least one streamer line must be deployed before the first hook is set and both streamers must be fully deployed within 90 seconds. Further, streamer lines must be deployed in such a way that streamers are in the air for a minimum of 131.2 ft (40 m) aft of the stern for vessels under 100 ft (30.5 m) and 196.9 ft (60 m) aft of the stern for vessels 100 ft (30.5 m) or over. For vessels deploying gear from the stern, the streamer lines must be deployed from the stern, one on each side of the main groundline. For vessels deploying gear from the side, the streamer lines must be deployed from the stern, one over the main groundline and the other on one side of the main groundline.

Materials Standard The following minimum streamer line specifications must be met: (1) length of 300 feet (91.4 m), (2) spacing of streamers every 16.4 ft (5 m), and (3) streamer material that is brightly colored, UV-protected plastic tubing or 3/8 inch polyester line or material of an equivalent density. An individual streamer must hang attached to the mainline to 0.25 m above the waterline in the absence of wind.

Snap Gear Streamer Standard For vessels using snap gear, a single streamer line [147.6 ft (45 m) length] must be deployed in such a way that streamers are in the air for 65.6 ft (20 m) aft of the stern and within 6.6 ft (2 m) horizontally of the point where the main groundline enters the water.

Single Streamer Standard A single streamer line must be deployed in such a way that streamers are in the air for a minimum of 131.2 ft (40 m) aft of the stern and within 6.6 ft (2 m) horizontally of the point where the main groundline enters the water.

Materials Standard The single streamer line materials standard is the same as the materials standard for paired streamer lines.

Offal Requirements The offal discharge regulation is amended to require that prior to offal discharge,

embedded hooks are removed from offal.

Weather Safety Factor In winds exceeding 45 knots (storm or Beaufort 9 conditions), the deployment of streamer lines (either single or paired) or buoy bag lines is discretionary. For vessel operators required to use paired streamer lines, in winds exceeding 30 knots, but less then or equal to 45 knots (near gale or Beaufort 7 conditions), a single streamer must instead be deployed from the windward side of the vessel.

Exemption for Vessels 32 ft (9.8m) LOA or Less in State Waters of IPHC Area 4E

Operators of vessels less than 32 ft (9.8m) LOA using hook-and-line gear and fishing in state waters of IPHC Area 4E are exempt from using seabird avoidance measures.

Seabird Reporting Requirements

Regulations at § 679.5(a)(7)(ix)(C)(3) currently require operators of catcher vessels or catcher/processor vessels using longline gear to report the bird avoidance gear deployed using gear codes at Table 19 to part 679. Because this rule revises the required seabird avoidance measures, the seabird avoidance codes at Table 19 to part 679 are revised to reflect these changes.

Seabird Avoidance Plan

A Seabird Avoidance Plan that is written and onboard the vessel must contain the following information: (1) Vessel name, (2) master's name, (3) type of bird avoidance measures utilized, (4) positions and responsibilities of crew for deploying, adjusting, and monitoring performance of deployed gear, (5) instructions and/or diagrams outlining the sequence of actions required to deploy and retrieve the gear to meet specified performance standards, and (5) procedures for strategic discharge of offal, if any. The Seabird Avoidance Plan is prepared and signed by the vessel operator. The vessel operator's signature indicates the operator has read the plan, reviewed it with the vessel crew, made it available to the crew, and instructed vessel crew to read it. The Seabird Avoidance Plan must be made available for inspection upon request by an authorized officer (USCG boarding officer, NMFS Enforcement Officer or other designated official) or an observer.

Seabird Data Collection by Observers

Operators of observed vessels are required to collect seabirds from the observer-sampled portions of hauls using hook-and-line gear or as requested by an observer during non-sampled portions of hauls.

Applicability of Seabird Avoidance Regulations While Fishing for CDQ Halibut

Paragraphs § 679.32(f)(2)(v) and § 679.42(b)(2) require the use of seabird avoidance measures on all vessels of a specified length that are fishing in U.S. Convention waters off Alaska for Pacific halibut, whether the vessels are engaged in IFQ fisheries or CDQ fisheries.

Definitions at § 679.2

Definitions are added at § 679.2 for two previously undefined terms: "snap gear" (as a type of "authorized fishing gear") and "seabird.≥

Redesignation of Paragraphs at § 679.24(e)

Seabird avoidance requirements currently in § 679.24 (e)(2)(i), (ii), and (iii) are redesignated as paragraphs (e)(2)(iv), (e)(2)(v)(A), and (e)(2)(vi), respectively.

Changes to the Seabird Avoidance Measures from the Proposed Rule

The notice of proposed rulemaking specified seabird avoidance requirements for operators of vessels fishing with hook-and-line gear in NMFS Reporting Areas 649, 659, or state waters of Cook Inlet and while fishing in the EEZ [see 68 FR 6394, columns 1 and 2 and Table 20 at 6398 (February 7, 2003)]. A comment received during the public comment period (see Comment 1) noted that it was not clear if the proposed regulations applied to vessels fishing in State waters. The commenter recalled that the Council's action specified that these vessels fishing in State waters for species other than halibut would be subject to regulations adopted by the Alaska Board of Fisheries (Board). The commenter is correct and the final rule is clarified to indicate that the requirements for operators of vessels fishing in the EEZ also apply to vessel operators fishing for IFQ halibut, CDQ halibut, and IFQ sablefish in waters shoreward of the EEZ. NMFS regulates IFQ and CDQ fishermen participating in each of these three fisheries in State waters (0–3 nm), including implementation of seabird avoidance requirements. These clarifications are made with a new paragraph at § 679.24(e)(4)(iv), minor revisions at § 679.24(e)(4)(ii) and (iii), revision of the title legend of Table 20, and the corresponding text changes to Table 20. Companion clarifications are also made for the requirements in IPHC Area 4E.

The notice of proposed rulemaking specified seabird avoidance requirements for operators of vessels fishing with hook-and-line gear, other than snap gear, in NMFS Reporting Areas 649 and 659, or state waters of Cook Inlet and for operators of vessels that use snap gear [see 68 FR 6394, columns 1 and 2 and Table 20 at 6398 (February 7, 2003)]. A comment received during the public comment period (see Comment 2) noted that it was not clear whether the proposed regulation for vessels with snap gear and the corresponding language in Table 20 apply to vessels when fishing only in the EEZ or when fishing in any area, including inside state waters (NMFS Areas 649 and 659). The commenter noted that the Council's final action was that the requirements for inside waters apply to all hook-and-line gear types (i.e. including snap gear) and that the specific requirements for vessels using snap gear apply only when fishing in the EEZ. The commenter is correct. The Council's final action on seabird avoidance measures was that the requirements for inside waters would apply also to vessels using snap gear. The specific snap gear requirements were not intended to apply to vessels fishing in the inside waters. Changes from the proposed regulation at § 679.24(e)(4)(i) and (iii) and in Table 20 are made in the final rule. Companion clarifications are also made for the requirements in IPHC Area 4E.

The notice of proposed rulemaking revised the bird avoidance codes in Table 19 to correspond to the proposed changes in seabird avoidance measures. See 68 FR 6396 and 6397, February 7, 2003. A comment addressed under Comment 13 noted that the regulations should more clearly specify that more than one device, and therefore more than one code, can be used at the same time. The commenter is correct that more than one device can be used at a time; therefore NMFS makes this clarification in the recordkeeping and reporting requirements at § 679.5(c)(1)(xvii).

The notice of proposed rulemaking specified that operators of vessels required to carry one or more observers must provide assistance that would include collecting all seabirds that are incidentally taken on the observer-sampled portions of hauls using hook-and-line gear or as requested by an observer during non-sampled portions of hauls. See 68 FR 6395, February 7, 2003. When the notice of proposed rulemaking was drafted in 2002, the regulatory responsibilities for vessels carrying observers were codified at § 679.50(f)(1). A final rule was published on December 6, 2002, 67 FR 75295, that extended the effective date of the existing regulations for the interim North Pacific Groundfish

Observer Program (Observer Program) and also amended regulations governing the Observer Program. The amended regulations included a redesignation of paragraph § 679.50 (f) to paragraph § 679.50(g). This final rule reflects the correct designation for the paragraph in § 679.50 on vessel responsibilities. The new paragraph (1)(viii)(F) of this section, which will require operators of vessels to provide assistance to observers in the form of collecting all seabirds that are incidentally taken on the observer-sampled portions of hauls using hook-and-line gear or as requested by an observer during non-sampled portions of hauls, will now be codified in paragraph (g) of this section.

The notice of proposed rulemaking specified that seabird avoidance measures would be required on all vessels of a specified length that are fishing in U.S. Convention waters off Alaska for Pacific halibut, whether the vessels are engaged in IFQ fisheries or CDQ fisheries. The proposed regulation for the halibut CDQ fisheries was designated at § 679.32 (f)(2)(vi). See 68 FR 6395, February 7, 2003. When the notice of proposed rulemaking was drafted in 2002, the regulatory responsibilities for halibut CDQ vessel operations were codified at § 679.32(f). A final rule was published on July 29, 2003, 68 FR 44473, that revised extensively certain requirements for the IFQ and CDQ programs for the Pacific halibut fishery and also amended regulations governing these programs. The amended regulations included redesignations of some of the sub-paragraphs of paragraph § 679.32 (f)(2) to § 679.4(e). This seabird final rule reflects the correct designation for the paragraph in § 679.32(f) on halibut CDQ. A new paragraph (5) will be added to this section, and will require the CDQ group, and vessel owner or operator to comply with all of the seabird avoidance requirements at § 679.42(b)(2).

Response to Public Comments

NMFS received 11 letters containing 50 different comments on the proposed seabird avoidance measures. The summarized comments and responses to them follow:

Comment 1: In general, the proposed rule reflects the intent of the Council's final action. However, clarification is needed to the proposed regulation specifying use of seabird avoidance measures in State waters. The proposed regulatory language at Part 679.24(e)(4)(i) and text in Table 20 implies that vessels fishing in State waters for species other than halibut are subject to the federal regulations, in essence pre-empting State regulations. The Council's action specified that these vessels would be subject to regulations adopted by the Alaska Board of Fisheries (Board). For example, if an operator were fishing hook-and-line gear for Pacific cod in NMFS Area 649 (Prince William Sound), an exact reading of the proposed rule would lead him/her to believe that compliance with the federal regulations is required even if federal regulations conflicted with regulations adopted by the Board.

Response: The final rule will clarify the applicability of these seabird avoidance regulations to vessels fishing in State of Alaska waters. In particular, the title legend of Table 20 has been revised to indicate that the reader must refer to § 679.24(e)(1) for applicable fisheries. Section 679.24(e)(1) indicates that the operator of a vessel that is longer than 26 ft (7.9 m) LOA fishing with hook-and-line gear must comply with the seabird avoidance requirements as specified in paragraphs (e)(2) through (e)(4) of this section while fishing for IFQ halibut or CDQ halibut, IFQ sablefish, and groundfish in the EEZ off Alaska. Further a new paragraph § 679.24(e)(4)(iv) is added that clearly indicates what seabird avoidance measures must be used while fishing for IFQ halibut, CDQ halibut, or IFQ sablefish in waters shoreward of the EEZ. NMFS promulgates fishery regulations, including seabird avoidance requirements, for these three fisheries in State waters (0–3 nm). The State of Alaska will promulgate seabird avoidance regulations applicable to its groundfish fisheries in State waters. At its March 2002 meeting, the Board approved a proposal that will change state groundfish regulations to parallel these new Federal regulations governing seabird avoidance measure requirements for operators in hook-and-line fisheries.

Comment 2: It is unclear if the proposed regulation at § 679.24(e)(4)(iii) for vessels with snap gear, and the corresponding language in Table 20, apply to vessels only when fishing in the EEZ, or when fishing in any area, including the inside state waters (NMFS Areas 649 and 659). The commenter's recollection of the final Council action was that the requirements for inside waters apply to all hook-and-line gear types (i.e. including snap gear), and the specific requirements for vessels using snap gear applies only when fishing in the EEZ. Clarification of how these two components interact would be helpful.

Response: The Council's final action intended that seabird avoidance measures would apply to vessels using snap gear in inside state waters as well. Consequently, the regulations at § 679.24(e)(4) were revised from the proposed rule to clarify this point. The text in Table 20 has also been changed as a result.

Comment 3: The commenter believes that insufficient data have been collected to justify the extensive regulatory revisions based on individual vessel classes and fishing areas. Without adequate research to justify these revisions, the rules should impose a conservative management plan consistent for all vessels in all the fishing areas.

Response: The factors potentially affecting seabird hooking and entanglement on hook-and-line gear are numerous and complex. The solutions to reduce seabird/vessel interactions will reflect this complexity as well. Factors may include geographic location of fishing activity; time of day; season; type of fishing operation and gear used; bait type; condition of the bait; length of time baited hooks remain at or near the surface of the water; water and weather conditions; availability of food (including bait and offal); bird size; bird behavior (feeding and foraging strategies); bird abundance and distribution; and physical condition of the bird. When establishing effective requirements that reduce the potential for seabird interactions with gear and the associated mortality of seabirds, considering or accounting for any of these factors, to the extent possible and practicable is desirable. Based on information from the WSGP study, the Council's Science and Statistical Committee (SSC), several U.S. Fish &Wildlife Service (USFWS) marine bird surveys, and anecdotal information from the commercial longline fleet off Alaska, the seabird avoidance measures required of vessel operators reflect the area fished, vessel length, vessel type, and gear type. This base of knowledge is sufficient to modify the existing regulations. NMFS agrees that additional research may help elucidate the bird/vessel interaction, particularly for smaller vessels because most of the work thus far has been conducted on larger vessels. In general, research to date have focused work on locations of higher bird bycatch rates (BSAI) and on vessel types that appear to catch more birds (larger processing vessels). In response to the SSC's recommendation for additional studies on smaller vessels, WSGP researchers began work in the summer of 2002 with vessel owners to evaluate the need for mitigation devices as well as performance standards that could be achieved on these vessels that operate quite differently from larger vessels.

Studies were conducted on vessels from 26 ft (7.9 m) to 55 ft (16.8 m) LOA, with and without superstructure (i.e. poles, masts, rigging). Results may lead to further revisions to seabird avoidance measures if warranted. NMFS believes the final rule implements a conservative management plan that accounts for the fleet diversity and differences between vessels types and geographic areas in likelihood of hooking and entangling seabirds.

Comment 4: Three commenters suggested that paired streamer lines should be used on more vessels than is proposed. One commenter believed they should be required on all vessels capable of conducting fishing operations with paired streamer lines deployed. This would mean that any vessel over 26 ft (7.9 m) LOA with masts or other rigging must deploy paired streamer lines. Another commenter suggested that all longline vessels over 35 ft (10.7 m) LOA should be required to use paired streamer lines while setting gear. If owners of vessels 35 (10.7 m) to 55 ft (16.8 m) LOA can document to a NMFS official that deployment of 2 streamer lines from their vessel is not practical, then other means, such as a single streamer line, other towed deterrent, and weighting the groundline to achieve a sink rate of 0.3 m per second, would be acceptable alternatives.

Response: Based on best available information, NMFS has determined that the new requirements will place paired streamer lines on those vessels that can safely and practicably use them in an effective manner to reduce bycatch of seabirds. Paired streamer lines will be required on vessels over 55 ft (16.8 m) LOA. In 2000 these vessels accounted for 98 percent, 67 percent, and 59 percent of the harvest by hook-and-line vessels in the BSAI groundfish, GOA groundfish, and halibut fisheries, respectively. Of the 1,006 vessels that harvested groundfish in either the BSAI or GOA in year 2000, 687 were smaller catcher vessels (26 (7.9 m) to 55 ft (16.8 m) LOA), 275 were vessels over 55 ft LOA and will be required to use paired streamer lines, and 44 vessels that also process their catch were all over 55 ft (16.8 m) LOA and will be required to use paired streamer lines. In the IFQ halibut fishery, 308 vessels were over 55 ft (16.8 m) LOA and will be required to use paired streamer lines. Smaller catcher vessels numbered 1,145 and these vessels will be required to use single streamer lines or similar devices. The higher bird bycatch rates in the BSAI compared to the GOA (0.05 birds/1,000 hooks vs 0.014 birds/1,000 hooks; 2000–2002 average annual rate) may reflect higher bycatch rates of larger processing vessels as compared to smaller vessels that do not process catch. One factor that contributes to birds getting hooked on hook-and-line gear is whether the vessel processes fish and discharges offal, an attractant to birds. Smaller vessels (i.e. the majority of vessels in the GOA and in the halibut fishery) often retain whole fish on ice for delivery to shoreside plants. In the absence of fish offal discharged around these vessels, fewer birds are attracted and thus fewer are vulnerable to getting hooked. Additionally, deploying paired streamer lines on smaller vessels with narrower beam widths is not practicable. Paired lines can become easily tangled and may pose safety hazards to the vessel and crew during the deployment of gear. These smaller vessels will be required to use single streamer lines in most instances. The WSGP study found that single streamer lines effectively reduced seabird bycatch by 71 to 96 percent compared to a control of no deterrent. Single streamer lines will be an adequate deterrent for use on these smaller vessels.

A system does not currently exist within NMFS to provide for individual vessel accountability whereby vessels could demonstrate if the deployment of paired streamer lines was practicable. Thus, such a system, as suggested by the commenter, is not feasible at this time. More importantly, NMFS does not believe such a system is necessary given that the final regulations are designed to effectively reduce seabird bycatch in the fleet component most responsible for seabird bycatch.

Comment 5: Vessels not required to use paired streamer lines should be required to use at least two bird deterrent methods and should operate at speeds slow enough to permit longlines to sink at a rapid rate and not extend far behind the vessel at or near the surface of the water.

Response: The use of multiple deterrent devices is one effective way to reduce gear interactions with seabirds. In those geographic areas where seabirds are more likely to be encountered (i.e. in the EEZ), NMFS will require vessels not required to use paired streamer lines to use a minimum of two methods or devices (single streamer line, buoy bag line, adding weights to groundline, or strategic offal discharge). NMFS agrees that deploying gear at slower speeds is an effective way to allow baited hooks to sink more quickly, thus becoming inaccessible to seabirds. Because the vessel speed used by a vessel operator will depend upon many other factors, including water and wind conditions, NMFS will not include this method as a required option. WSGP has produced an educational outreach video that has been widely distributed to Alaska fishermen. This video demonstrates that slowing the speed of the vessel during gear deployment can successfully sink gear more quickly, away from the reach of birds.

Comment 6: Three commenters suggested mandatory training for vessel crews or operators on the proper use and deployment of streamer lines. One of the commenters further suggested that the workshops could also cover seabird identification, use of other seabird deterrents, and to discuss any innovations in seabird avoidance in the industry. These workshops would be conducted annually by NMFS and USFWS and could be similar to the protected species workshops that have been conducted in Hawaii for the longline fleet since 1996.

Response: Over the past several years, NMFS has conducted or collaborated with groups conducting seminars, workshops, and industry meetings to provide outreach and training about the effective use and deployment of seabird deterrent devices, discuss new innovations in seabird avoidance, and cover seabird identification. These sessions have been well attended and beneficial to participants. Additionally, the WSGP, in collaboration with the USFWS, NMFS, and longline industry associations, has produced an informational outreach video that has been widely distributed to longline fishermen. Given the very large fleet of vessels deploying hook-and-line gear off Alaska (up to 2,000 vessels), NMFS is not able at this time to provide mandatory training workshops for vessel owners and their crew. Such mandatory workshops have worked in other areas, such as Hawaii, due to the much smaller fleet (several hundred vessels). NMFS is satisfied that the outreach and training program in the Alaska fleet is effective and NMFS will continue to provide for and be involved in future opportunities for outreach and training.

Comment 7: The manufacture of streamer lines should be strictly monitored to assure that only properly designed and constructed streamer lines are used by the fishing vessels.

Response: The vast majority of the streamer lines currently in use have been provided by a USFWS "streamer line give-away program." The Pacific States Marine Fisheries Commission (PSMFC) is responsible for constructing and distributing the streamer lines and it consulted with WSGP for construction standards. These lines, when properly

deployed, meet the performance and material standards specified in the revised regulations. PSMFC has an ample supply of streamer lines in stock at port distribution sites throughout Alaska and in Seattle. This stock should be adequate to meet the immediate demand for streamer lines when the new requirements become effective. NMFS regulations specify the performance and material standards for the streamer lines. Streamer lines can be constructed from relatively inexpensive and readily available materials, thus increasing the practicability of streamer line construction and use by fishermen. NMFS does not regulate or control the manufacture of streamer lines, nor is this a necessary element for the effective use and deployment of streamer lines by fishermen. NMFS can more efficiently convey this type of information through its support of outreach materials such as the WSGP video on deterrent devices.

Comment 8: Three commenters have recommended that NMFS should require observer coverage on vessels fishing for halibut in order to monitor gear interactions with seabirds. One commenter suggested that due to concerns that additional gear mitigation studies may not be conducted rapidly enough for incorporation into management requirements and that the studies will not be adequate to address the entire problem, the regulations should also be expanded to cover the observer-monitoring programs on the smaller vessels and the halibut fishery. The other commenter suggested that the coverage in the halibut fishery should be at least 80 percent of all vessels over 60 ft (18.3 m) LOA and perhaps 15 percent of vessels from over 26 ft (7.9 m) LOA to 60 ft (18.3 m) LOA. Currently there is no assessment of seabird bycatch in this fishery despite the U.S.'s National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries (NPOA) which requires an assessment of all such fisheries for seabird bycatch to be completed by February 2003. Additionally, the Biological Opinion issued by USFWS in 1999 included a conservation recommendation that all vessels over 60 ft (18.3 m) LOA carry observers for the purposes of monitoring seabird bycatch.

Response: NMFS is exploring additional options to monitor seabird mortality in the halibut and small boat fleets. Observer programs are subject to serious safety, logistical, funding, service delivery, and resource constraints. For example, observer costs range from $355 to over $2,000 per day, depending on program structure, size, area of operation, and other factors. Issues like these are not easy problems to solve, but NMFS has been making progress in two areas. NMFS has funded and supported research by the IPHC to evaluate alternative monitoring systems that rely on video technology rather than observers. NMFS and the IPHC are coordinating to have that report published and available in 2004. NMFS will coordinate with the IPHC and the USFWS in 2004 to discuss report recommendations and other options with regard to the Biological Opinion for the halibut fishery. The Council and NMFS are interested in expanding monitoring to groundfish vessels less than 60 ft (18.3 m) LOA for a variety of fishery management goals in addition to that of assessing seabird incidental take. Staff are coordinating with the Council to address potential options for Observer Program redesign that might provide coverage to these smaller vessels. These efforts continue as NMFS evaluates the costs and benefits of monitoring options and coverage levels, and addresses the constraints noted above. This work has not advanced far enough to evaluate the coverage levels recommended by the commenter, although the IPHC report does evaluate costs of alternate monitoring methods for two coverage levels. Any expansion of observer coverage requirements will require subsequent regulatory amendments.

The 1999 USFWS Biological Opinion conservation recommendations are discretionary agency activities. While observer coverage has not yet been implemented in these fisheries, NMFS did address this conservation recommendation as evident from the series of steps described above.

Comment 9: Three commenters recommended that NMFS report annually on seabird bycatch. The catch per unit effort (CPUE) should be listed by bird species for each boat with reference to boat size, numbers of hooks set, avoidance gear used, and by fishing area. Data when observers are aboard should be segregated to determine any variation in CPUE when observers are not aboard. One commenter suggested that NMFS should be required to report by March of every year on seabird bycatch and estimates derived from the bycatch data. The annual report should include: observed and estimated number of seabird interactions and seabird takes by species, the estimated take by fishing set type and rate of take per 1,000 hooks, an analysis of what deterrents are being used and their effectiveness in reducing seabird interactions, and details of observer coverage and the total number of observed hooks. The Biological Opinion issued by USFWS for the Hawaii pelagic longline fishery requires such an annual report; this should also be required for the Alaska fishery.

Response: NMFS notes that estimates of seabird bycatch have been reported annually for several years, although not at the level of detail described by the commenter. Annual seabird bycatch is estimated by year, gear type, and region (BSAI and GOA) and can be found in the seabird section of the Ecosystem Considerations chapter of the annual SAFE Report, found at www.afsc.noaa.gov/refm/reem. The initial draft of this annual report is usually available to the public in October, with the final report usually available in December. Although NMFS agrees providing bycatch estimates to the public in a timely manner is important, the databases needed for this work are finalized in February or later each year, precluding an earlier distribution. While the reports to date have not included the level of detail described by the commenter, NMFS agrees that improved reporting of seabird bycatch estimates is an important goal. Several technical and scientific reports that provide estimates of seabird bycatch for more precise time/area/fishery cells are being prepared. The authors will consider addressing the recommendations made above in these reports.

Due to various data confidentiality considerations, NMFS does not release specific data identified by vessel in a report such as that described by the commenter. Specific data may be released on a case-by-case basis. Some vessel-specific data are available for release, as identified at § 679.50(k), but seabird bycatch data are currently not included in that category. NMFS is using vessel-specific data to identify vessels that have incidental take higher than fleet averages, and hopes to work with individual owners and operators to reduce seabird bycatch on their vessels. Industry-sponsored programs use vessel-specific data and this approach appears to be very effective in reducing seabird incidental take. Through broad-scale analysis, vessel-specific work, and continued coordination with industry, NMFS will be able to develop a measure of the effectiveness of the seabird avoidance measures. However, precise evaluations require experimental design and testing, as was conducted by the WSGP. The commenter also requested an analysis of vessel-specific or fleet-wide CPUEs comparing when observers are onboard with when they are not. That type of analysis is not possible, because NMFS does not have CPUE data

for vessels when no observer is on board.

NMFS acknowledges the requirement in the Biological Opinion for the Hawaiian longline fishery to provide annual reports of seabird incidental take, but notes such a requirement is not necessary for the North Pacific groundfish fisheries because these reports have been made available annually for several years. NMFS recognizes the importance of this information to stakeholders and plans to continue to provide these estimates and to produce reports with greater detail.

Comment 10: For the same reasons stated in comment 8, the commenter urges that the regulations be formally reviewed on a yearly basis and that the rules be revised as needed to enforce the proper and effective use of methodology to reduce bycatch until bird bycatch approaches zero.

Response: As new information becomes available on improvements that can be made to existing seabird bycatch reduction efforts, NMFS will consider this information and make appropriate recommendations for effective management. Seabird bycatch estimates are calculated annually and reported within the Council's SAFE reports for the Alaska groundfish fisheries. This provides a regular opportunity for the evaluation of bycatch estimates in the context of bycatch reduction efforts.

Comment 11: To address the inadequacy of the current state of knowledge on this seabird bycatch problem, the commenters urge that research to quantify the effectiveness of mitigation gear be continued; the research be expanded to determine the optimum gear deployment for small- and mid-sized vessels; and that the development of fishing and avoidance gear that decreases bycatch but does not (or minimally) interfere with fishing efficiency be continued and funded at an adequate level to provide meaningful results within the next three years.

Response: Our knowledge and understanding of seabird incidental take has improved greatly in recent years. Research to quantify the effectiveness of mitigation gear should be continued. NMFS is using three general approaches concurrently to quantify mitigation effectiveness. First, NMFS will continue monitoring seabird incidental take in commercial fisheries. As the seabird avoidance measures are used correctly, we expect the total incidental take to be greatly reduced. Current data collection procedures will allow for a general assessment of that over time. Second, NMFS will assist in the transfer of knowledge about effective seabird gear deployment from vessels with low or zero bycatch to vessels that experience higher levels of bycatch. Finally, NMFS will continue support for dedicated research using the collaborative model that has proved so successful. NMFS is currently providing partial support to WSGP in its efforts to develop new weighted groundlines which sink the gear faster while reducing safety issues for crewmembers. NMFS also supports efforts conducted by small vessel operators to develop mitigation measures specific to their fishery. That work is coordinated through the University of Alaska Marine Advisory Program and funded primarily through the USFWS. See responses to Comments 19 and 45 for more detailed information about these various research initiatives.

Comment 12: It is imperative that government agencies and research institutions work at an accelerated pace to properly quantify the problems and the success of bird deterrent gear in all vessel classes and in all the fisheries.

Response: NMFS is coordinating efforts with the USFWS, WSGP, Alaska Sea Grant Program, the University of Washington, North Pacific Albatross Working Group, Alaska Seabird Working Group, various fishery associations, and individual fishermen and researchers to work on priority issues and to avoid duplication of projects. We also share and exchange information with our partners in the southern oceans, so that each can learn from one another's activities. Agency seabird specialists are working to identify possible funding sources and develop appropriate projects to quantify problems and develop solutions where problems are thought to be greatest, and where we can have the most positive effect.

Comment 13: Three commenters suggested that the bird avoidance codes that longline fishermen and observers record need to be clarified and made consistent with each other. Also, the regulations need to be clarified that more than one device, and therefore more than one code, can be used at the same time. One commenter suggested that including both the "lining tube" and the "line shooter" in the same code category renders those data unusable for examining the efficacy of either method.

Response: The bird avoidance codes used by fishermen for recording information in their logbooks are in Table 19 and are revised in this final rule to reflect the revised measures. Codes for vessel logbooks are established by the NMFS Alaska Region Office and codes used by observers are established by the Observer Program. Table 19 has been provided to the Observer Program so that of bird code information can be recorded consistently. NMFS agrees that multiple bird avoidance devices can be used at one time and that the regulations need to be clarified that more than one code can be recorded. This final rule revises the recordkeeping and reporting requirements accordingly. Mitigation methods are most effectively evaluated using rigorous scientific protocols in controlled experiments, such as that used in the WSGP research study. Data collected by observers on the type of mitigation device used will be of limited use in scientific evaluations of specific gear alternatives. The numerous other variables in a commercial fishing setting that can impact the probability of birds being hooked would confound an analysis using observer data on mitigation type. Table 19 focuses on seabird avoidance measures that are required. The lining tube and line shooter are not represented by separate codes because neither is a required measure.

Comment 14: Three commenters supported the use of the proposed Seabird Avoidance Plan. It was thought to be a useful tool for boat captains and/or managers to further develop or clarify their vessel's bird avoidance plan. It could also serve the purpose of reminding the crew about what they need to do. Is this plan submitted just once a year? This proposed collection of information is necessary and even critical to the goals of the agency to greatly reduce/eliminate seabird bycatch.

Response: The objective of the Seabird Avoidance Plan is to ensure that vessel operators are aware of the issue of seabird incidental take and have developed an effective plan for using the required measures on their vessels to avoid and reduce any seabird incidental take. The Seabird Avoidance Plan is kept onboard the vessel and must be made available for inspection upon request by an authorized officer or observer, thus it is not submitted or mailed to NMFS. The Seabird Avoidance Plan is to be current and thus should be revised or updated whenever any elements change.

Comment 15: A commenter expressed concern that increasing seabird mortality from longline fisheries is affecting the populations of albatross and other seabirds. Further, since the adoption of regulations in Alaska longline fisheries in 1997, about 88,000 seabirds were estimated to be taken. The commenter believes this is convincing information that the current regulations are ineffective.

Response: Seabird bycatch in demersal groundfish fisheries off Alaska has declined 78.4 percent between 2000 and 2002. That decline could be due to numerous factors (see response to comment 3), including the voluntary implementation of the seabird avoidance measures described in this regulation by some fishery components beginning in 2001. These final regulations apply to demersal groundfish and halibut longline fisheries off Alaska. The measures delineated here are designed to reduce seabird bycatch in these fisheries. Additional research may provide the means to virtually eliminate seabird incidental take by these fisheries and greatly reduce or eliminate any seabird population decline that these fisheries may cause. Determining how current mortality levels may affect populations is difficult, given the lack of assessments for many of these species. NMFS is currently awaiting the results of a population status assessment being undertaken by USFWS for Laysan and black-footed albatross. The relatively low take levels of these two species in the Alaska hook-and-line fisheries is not likely impacting these species at the population level. The population of the endangered short-tailed albatross is currently increasing at an annual rate of 7 to 8 percent, despite incidental takes which may occur.

The cumulative effects of all longline mortality on seabird populations in the North Pacific are not well understood. The fishery-specific seabird bycatch estimates for fisheries operating in international waters and those of several nations' EEZs are not available. While we may greatly reduce the incidental take of albatross by implementing these measures in Alaskan demersal groundfish fisheries, efforts need to continue at the national and international levels as well. A recent paper published on potential cumulative effects of North Pacific pelagic longline fisheries on albatross populations illustrates the need for such cooperation (R.L. Lewison &L.B. Crowder, 2003, Estimating fishery bycatch and effects on a vulnerable seabird population. Ecological Applications 13:743–753). NMFS has played a role in these efforts and will continue to do so.

Although seabird mortalities in demersal groundfish fisheries have not been eliminated, NMFS actions to reduce seabird bycatch off Alaska have reduced seabird mortality and brought this issue to the attention of all vessel owners, operators, and crew. The regulatory climate supported a truly collaborative approach among the fishing industry, academia and agencies and allowed vessel operators some flexibility to test a variety of measures on their own. Operators were able to provide guidance to WSGP to choose those measures for testing that were the most likely to be effective while also preserving the safety of the crew and maintaining catch levels of target species. The current regulatory revisions resulted from that process.

Comment 16: The NMFS seabird bycatch estimates are very conservative as many birds fall off the lines after drowning and are not counted. One study estimated that mortality can be underestimated by 30 percent to 95 percent. A recent report from a Hawaiian longline project documents at least 30 percent more mortality from albatross hooked but never retrieved.

Response: NMFS agrees that if hooked or entangled birds fall or drop off the hooks (referred to as "drop-offs") prior to the gear being retrieved onboard, then the estimates of seabird mortalities from pelagic or demersal longline gear would be conservative. However, the examples used to suggest the degree to which this might occur for demersal longline gear are inappropriate. Drop-offs may occur while the gear is being deployed, while the gear is fishing, or during gear retrieval. While the degree to which drop-offs occur at any of these stages is unknown, drop-offs are most likely to occur when the gear has reached the surface and is being pulled out of the water. At that point the seabird carcass becomes heavy (no longer positive or neutrally buoyant) and is most likely, relative to other drop-off conditions, to tear off of the hook before being brought onboard. Using studies from other areas, fisheries, or gear types to develop an estimator for drop-offs in the North Pacific demersal longline fishery is inappropriate given differences in gear, monitoring protocol, predatory species, and/or seabird species. We are aware of one study from the southern oceans, that reported birds were under-sampled by onboard observers by up to 95 percent due to drop-offs (R. Gales, N. Brothers, and T. Reid, 1998. Seabird mortality in the Japanese tuna longline fishery around Australia, 1988–1995. Biological Conservation 86:37–56). However, these drop-offs occurred at the surface alongside the vessel. Because of the way observers were tasked in that particular fishery, they only counted those seabirds that were brought onboard the vessel. North Pacific groundfish observers spend sampling time directly monitoring the gear as it is being retrieved, and count all catch and bycatch regardless of whether it drops off the gear near the surface, is removed from the gear by the crew outboard of the vessel, or is brought onboard. Thus, the report of underestimated mortality from the report noted above cannot be extrapolated to the groundfish longline fishery. As noted earlier, assuming that the conditions causing drop-offs in a pelagic longline fishery for tuna off Hawaii are the same as those that may operate in a demersal longline fishery for groundfish off Alaska is not appropriate. NMFS is interested in accounting for unmonitored drop-off on demersal gear and is exploring the feasibility and options for conducting field research to explore this issue. Meanwhile, annual seabird bycatch estimates, viewed over several years, are an important index of bycatch levels and the effectiveness of seabird avoidance measures.

Comment 17: Under the current regulations, seabird mortality is up considerably in Alaska. During the 3–year period (1993–1996) before any regulations, an average of 14,527 seabirds were killed. From 1997–2001, an average 17,513 seabirds were killed in the Alaska groundfish fisheries.

Response: Many factors, both anthropogenic and non-anthropogenic, may affect seabird hooking and entanglement in longline gear. These factors may include geographic location of fishing activity; time of day; season; type of fishing operation and gear used; bait type; condition of the bait; length of time baited hooks remain at or near the surface of the water; water and weather conditions; availability of food (including bait and offal); bird size; bird behavior (feeding and foraging strategies); bird abundance and distribution; physical condition of the bird, and then of course the quality and correct deployment of seabird avoidance gear. These various factors are complex and very likely contribute to the extreme interannual variation in seabird bycatch estimates. Since 2000 in the BSAI, the average annual estimate of the total number of seabirds caught has declined from about 18,000 to less than 4,000 (78 percent reduction). Since 1998 in the GOA, the average annual estimate of the total number of seabirds caught has declined from about 1,500 to less than 300 (80 percent reduction). Although changes in bycatch from one year to the next are not necessarily a reflection of the successes or failures of the longline fleet to reduce bycatch, addressing the quality and performance standards of seabird avoidance gear is one direct method to affect change in the bycatch levels and rates.

Comment 18: Despite the conclusiveness of the WSGP study on the effectiveness of paired streamer

lines, the Council delayed its final action in October 2001 to accommodate fishermen that objected to the use of paired lines on their smaller vessels. The Council then adopted a proposal, approved by NMFS, that would exempt over 95 percent of all Alaska longline vessels from required use of paired streamer lines.

Response: The Council infrequently takes both initial and final action at a single meeting, particularly on an item which generates public comment and testimony. WSGP presented the results of its study to the Advisory Panel (AP), SSC, and the Council in October, public testimony on both the study and the draft EA/RIR/IRFA occurred in October, and the Council then commented on the draft EA/RIR/IRFA and took its initial action. Final action by the Council occurred at its next meeting in December. See the response to Comment 4. Paired streamer lines will be required on vessels over 55 ft (16.8 m) LOA and in 2000 these vessels accounted for 98 percent, 67 percent, and 58 percent of the harvest by hook-and-line vessels in the BSAI groundfish, GOA groundfish, and halibut fisheries, respectively. The BSAI groundfish fishery accounts for 85 percent of the combined BSAI and GOA hook effort (228 million hooks estimated). The remaining vessels that are over 26 ft (7.9 m) LOA and up to 55 ft (16.8 m) LOA, will be required to use single streamer lines in most instances. The WSGP study found that single streamer lines effectively reduced seabird bycatch by 71 to 96 percent compared to a control of no deterrent. Single streamer lines will be an adequate deterrent for use on these smaller vessels.

Comment 19: NMFS contends that since the WSGP study was conducted on vessels over 60 ft (18.3 m) LOA that its findings may not be applicable to smaller vessels. No evidence exists that paired streamer lines should not be applicable to vessels from 35 ft (10.7 m) to 60 ft (18.3 m) LOA. The USFWS has been funding and distributing free paired streamer lines to Alaska longliners and 42 percent of the free lines have been given to vessel owners with vessels under 55 ft (16.8 m) LOA.

Response: In the summer of 2002, the WSGP conducted a series of workshops at Alaska ports (Kodiak, Sitka, Cordova, Petersburg) on seabird avoidance for commercial longliners. WSGP staff who conducted the two-year study on larger longliners conducted these workshops and interviewed vessel skippers to ascertain what seabird avoidance measures could be deployed effectively and safely from these smaller vessels. Onboard trials were conducted in Sitka, Cordova, and Petersburg. Paired streamer lines could not be effectively deployed from these narrow-beamed vessels. Many did not have the superstructure or rigging from which to suspend the paired streamer lines. Vessel skippers reported that the paired lines tangled. Techniques for deploying single streamer lines are illustrated in the WSGP educational video that has been distributed to Alaska hook-and-line fishermen. Evidence from these WSGP port workshops as well as from vessel skippers indicates that these smaller vessels cannot effectively and safely deploy paired streamer lines. In addition to these port workshops, the WSGP, in collaboration with USFWS, has initiated a multi-year study to collect data on seabird abundance in proximity to fishing vessels, particularly in inside and nearshore waters. With the assistance of IPHC, the Alaska Department of Fish &Game (ADF&G), and NMFS, the WSGP is collecting these data from existing vessel platforms, the annual stock assessment longline surveys. Bird distribution and abundance information from these surveys may provide a clearer picture of the probability of vessels interacting with birds while fishing in these nearshore and inside waters. Preliminary information from both of these efforts by WSGP, the port workshops and bird surveys, will be available in 2004.

In 2000, the USFWS initiated a program to fund and distribute free streamer lines to Alaska longline fishermen. Each fisherman who applies receives 2 buckets, each containing a streamer line that meets the material standards being set forth in these final regulations. When skippers from smaller vessels were asked about their use of these paired streamer lines, they all indicated that they only deployed a single line and kept the second one onboard as a spare in the event of breakage or tangling.

Comment 20: The commenter believes that there should be a strong focus on many more vessels using paired streamer lines, including vessels fishing in the GOA, since they take many of the albatross killed. The GOA longline fishery accounts for on average (1993–1999) 93 percent of the black-footed albatross killed and 36 percent of the Laysan albatross killed. In 2000 and 2001, 20 black-footed albatross were taken and 160 Laysan albatross were taken in the GOA. That equates to 93 percent of all black-footed albatross killed in 2000–2001 being killed in the GOA where virtually no vessels would be required to use paired streamer lines under the proposed regulations.

Response: See responses to Comments 4 and 18. A very strong focus does exist on the required use of paired streamer lines on those vessels accounting for the vast majority of the harvest, i.e. the larger vessels. Considering all available bycatch data, the GOA longline fishery accounted for 90 percent of the black-footed albatross takes from 1993 to 2002 and 19 percent of the Laysan albatross takes during the same time period. This is a function of the distributional ranges of these respective species. Satellite telemetry data indicate that black-footed albatross travel in a more easterly direction from their breeding colonies in the Northwestern Hawaiian Islands, not typically foraging northward in the Bering Sea and western Aleutian Islands. The Laysan albatross travel in a more northerly direction from the Northwestern Hawaiian Islands, frequenting the Bering Sea and the Aleutian Islands. In 2001 and 2002, 105 black-footed albatross and 67 Laysan albatross were estimated taken in the GOA; for the same years, 4 black-footed albatross and 473 Laysan albatross were estimated taken in the BSAI. The commenter incorrectly suggests that little protection would be afforded these albatross in the GOA. Vessels accounting for about two-thirds of the GOA groundfish harvest would be required to use paired streamer lines (approximately 28 percent of the vessels that fished in 2000).

Comment 21: The commenter could find no documentation of the effectiveness of towed buoy bag lines, although most Alaskan longline vessels will be allowed to use these as their main deterrent device. The commenter urges NMFS to publish data indicating that a towed buoy bag is an effective deterrent to prevent seabird bycatch, specifically of albatross, before permitting their use in lieu of paired streamer lines. Additionally, the commenter notes that the WSGP study found that when single streamer lines were used, Laysan albatross attack rates were five times that when paired streamer lines were deployed. Despite these findings, the proposed regulations will either exempt all vessels under 55 ft (16.8 m) LOA or allow them to use either a single streamer line or a towed buoy bag. If the regulations are designed to avoid the killing of the endangered short-tailed albatross and other seabirds, why would the vast majority of longline vessels in Alaska be either exempt from mitigation measures or allowed to use a single streamer line or a towed buoy bag line?

Response: See section 4.1.2 of the EA/RIR/IRFA for documentation of the effectiveness of towed buoy bag lines.

Preliminary results from an experiment conducted by L kkeborg (Institute of Marine Research, Bergen, Norway) on a Norwegian longline vessel indicate that towed floats (i.e. buoy bag) reduced significantly the number of seabirds caught on baited hooks compared to when no seabird avoidance device was used. Appendix 5 to the EA/RIR/IRFA is an IPHC report on experiments with a bird avoidance device during IPHC longline surveys. IPHC conducted preliminary experiments in summer 1998 to evaluate the effectiveness of buoy bags in reducing the potential for seabird incidental take. The number of bait attacks by seabirds (i.e. attempts by seabirds to take baited hooks) was observed for sets when a buoy bag was towed compared to sets when no deterrent device was used (control). These observations were made for both sets using sablefish gear and sets using halibut gear. Bait attacks with the buoy bag deployed averaged 3.2 per skate for sablefish gear and 1.9 for halibut gear. Bait attacks with no deterrent device in use averaged 6.5 and 3.6 per skate for sablefish and halibut gear, respectively. The number of bait attacks with the buoy bag was about half the number with no device. Sablefish gear experienced about twice the number of attacks per skate as did the halibut gear, both with and without the bird bag, even though the sablefish gear had 4 times as many hooks. Thus, fewer bait attacks by seabirds occurred when a buoy bag was used compared to when no deterrent device was used. No comparisons were made with streamer lines.

The regulations are designed to avoid the killing of the short-tailed albatross and other seabirds and paired streamer lines are required on the vessels accounting for the vast majority of fish harvest. A more appropriate indicator of fishing and thus the possibility of bird/fishery interactions is amount of harvest rather than number of vessels. The amount of fish harvested by a single vessel varies greatly, depending upon numerous factors such as vessel size, hold capacity, length of fishing trip, and processing capability. Whereas the WSGP study found that paired streamer lines were more effective than single streamer lines (88 to 100 percent bycatch reduction compared to 71 to 96 percent for single lines), there are scenarios when single streamer lines are appropriate and can effectively reduce bycatch. The final regulations require paired streamer lines, the most effective and stringent of the devices evaluated, in those situations when more birds are more likely to be encountered fishing in the EEZ by larger vessels (and these are often the processing vessels that are more likely to attract birds due to the discharge of offal and processing waste). Single streamer lines (and in some instances buoy bags) are required of vessels fishing in inside waters where they are less likely to encounter albatross and other seabirds.

Comment 22: The proposed regulations are not consistent with the Magnuson-Stevens Act, NMFS's own policies of minimizing bycatch, the ESA, or the MBTA. In 2001, the Department of Interior's (DOI) Solicitor issued a final opinion on the applicability of the MBTA. He determined that the MBTA applies to the EEZ which means that it is illegal for U.S. citizens to kill seabirds. Over 17,000 seabirds on average are being killed annually in the Alaskan groundfish fisheries. The MBTA prohibits the take of any bird without a permit, accidentally or otherwise. The bycatch of seabirds in the Alaskan longline fishery is an illegal take and the regulations should propose to eliminate such illegal activity.

Response: The final regulations are consistent with the Magnuson-Stevens Act, NMFS's bycatch policies, the ESA, and the MBTA. The U.S. Government has never applied the MBTA outside U.S. territorial waters. The Department of the Interior has advised that the opinion to which the commenter refers has never been put into effect and remains under review within the Department of the Interior, and is therefore not relevant to this rulemaking.

Comment 23: Two commenters urge that all vessels at or over 100 ft (30.5 m) LOA should deploy, in addition to the paired streamer lines, another mitigation measure at all times. This measure would be: (1) additional line weights or a weighted groundline sufficient to sink the baited hooks at a rate of 0.3 meters per second, or (2) an underwater lining tube sufficient to deploy the lines at least 2 meters underwater at line setting and to assure that the lines sink the baited hooks below 10 meters when 100 meters aft of the stern.

Response: Given the proven effectiveness of avoidance gear that these vessels will be required to use (88–100 percent seabird bycatch reduction), the use of additional measures will remain at the discretion of the vessel operator. The WSGP study concluded that although adding weight to groundlines will sink gear faster, differences in vessel speed or setting logistics could reduce or eliminate the advantage of using weighted groundlines. Further, for the weighting to be practical and effective at reducing seabird bycatch, the weight must be integrated into the line itself rather than added at each deployment. Prototype integrated weight (IW) groundlines are currently being evaluated for efficacy and practicability in reducing seabird bycatch. Once the study is completed and results available, NMFS can evaluate the need for IW groundlines in the Alaska fisheries.

The WSGP study also evaluated the efficacy of the lining tube at reducing seabird bycatch. Given some operational limitations to its performance, as well as its cost (approximately $40,000 per unit), the mandatory use of a lining tube is not warranted. Operational limitations include depth below the surface at which the tube delivered gear changed with sea conditions, vessel loading causes variation in tube's effectiveness, propeller turbulence may cause the groundline to resurface, occasionally the groundline jumps out of the slot that runs along the side of the tube, and the lining tube can only be fitted to vessels that set gear from their lower decks.

Comment 24: Two commenters urge that NMFS should prohibit the discharge of offal during the deployment of longline gear or the presence of offal on the water within 300 ft (91.4 m) of the vessel during line setting. NMFS should also require that fish hooks be removed from discarded bait.

Response: NMFS agrees that regulating the discharge of offal from longline vessels can increase the range of effective options used to reduce seabird bycatch. The final regulations will require that if offal is discharged while gear is being set or hauled, it must be done in a manner that distracts seabirds from baited hooks to the extent practicable. The discharge site on board a vessel must be either aft of the hauling station or on the opposite side of the vessel from the hauling station. Additionally, hooks must be removed from any offal that is discharged. Lastly, operators of vessels discharging offal while gear is being set must eliminate directed discharge through chutes or pipes of residual bait or offal from the stern of the vessel. This would not include baits falling off the hook or offal discharges from other locations that parallel the gear and subsequently drift into the wake zone well aft of the vessel. For vessels not deploying gear from the stern, the directed discharge of residual bait or offal over sinking hook-and-line gear while gear is being deployed must be eliminated.

Comment 25: Two commenters urge that NMFS should require that longlines be set in such a way that if weights are added to the groundline, they do not cause the line to become taut.

Response: NMFS regulations essentially address this point when they require that the operators of applicable vessels must use hooks that when baited, sink as soon as they are put in the water. See response to Comment 23. Once new scientific information becomes available about IW groundlines, NMFS could consider if changes to the regulations are necessary regarding the weighting of groundlines.

Comment 26: NMFS should require the collection of seabird bycatch data (such as the number and species of seabirds hooked per thousand hooks) and should evaluate the effectiveness of paired streamer lines and other mitigation measures. Such data could be collected by observers or vessel operators. NMFS should compile these data annually and share this information at annual workshops attended by longline fishermen.

Response: NMFS requires the collection of seabird bycatch data in the Alaska groundfish fisheries. These data are collected by observers and analyzed annually to calculate seabird bycatch estimates for the BSAI and GOA groundfish fisheries. The estimates are included in the Council's annual SAFE report in the seabird section of the Ecosystem Considerations chapter. Seabird bycatch estimates are available back to 1993. This information is publicly available and can be found at the NMFS Alaska Region's seabird website *http://www.fakr.noaa.gov/protectedresources/ seabirds/actionplans.htm*

In the Biological Opinion on the Effects of the Total Allowable Catch (TAC) -Setting Process for the Gulf of Alaska and Bering Sea/Aleutian Islands Groundfish Fisheries to the Endangered Short-tailed Albatross (Phoebastria albatrus) and Threatened Steller's Eider (Polysticta stelleri) (TAC BiOp) issued by the USFWS in September 2003, NMFS is directed to collect information on the deployment and use of seabird avoidance measures for the largest possible sample of hook-and-line gear sets. Data shall be collected by observers, or other non-self-reporting means, and shall begin no later than January 1, 2004. These data will be summarized and reported to USFWS by September 30 of the calendar year following the report year. In response to this requirement, NMFS's Observer Program has established protocols for groundfish observers on longline vessels to collect this information beginning in 2004. Information about seabird bycatch estimates and the effectiveness of required seabird avoidance measures can be conveyed to the longline fishermen using these measures as well as other members of the interested public. However, some caution must be used when evaluating changes in annual levels of seabird bycatch. Seabird bycatch estimates display extreme inter-annual variation and seabird bycatch can be influenced by a complex myriad of factors, not just the use of seabird avoidance measures (see response to Comment 17). One cannot assume that increases in bycatch levels are solely attributable to lack of use of seabird avoidance measures by fishermen, or conversely that reductions in seabird bycatch levels are entirely due to the successful use of seabird avoidance gear.

Comment 27: NMFS should require all vessels with observers to participate in a computerized reporting system of seabird bycatch that protects their privacy but serves as part of a peer review report card. This is currently done voluntarily by 38 freezer-longliners in the BSAI through a private consultant. The WSGP study supported such a peer review system. NMFS should require all vessels with observers to participate, including the GOA longliners with observers.

Response: The peer-reviewed report card initiated by industry and shared among 38 freezer-longliners is a very effective program in which participants appear to have realized tremendous reductions in seabird bycatch on their vessels. NMFS plays a key role in supporting this program through the inseason data reporting system and web-based data access. Participants choose to share data among themselves and work through a private consultant who has appropriate data-sharing agreements and data access permissions. Because the program was voluntary and all participants provided documentation allowing the consultant access to their confidential data, it was a relatively easy program to support. However, concerns of data confidentiality would make it much more difficult to require such a program for all demersal longline vessels that carry observers. Development and implementation of such a program is outside the scope of this rulemaking. NMFS is pursuing an alternative and complementary approach to develop staff expertise on seabird avoidance measures, to internally identify vessels that have higher than average seabird incidental take, and then to offer these gear experts to vessels to assist with proper deployment of seabird avoidance measures. Meanwhile, NMFS will continue to support voluntary programs that adopt the model used by the freezer-longliners.

Comment 28: Before vessels are exempt from using paired streamer lines in winds measured at 30 knots or greater, another effective deterrent measure such as an underwater lining tube or weighted line should be used. The commenter noted that at 3 different NOAA weather buoy locations, winds exceeded 30 knots on 71, 90, and 23 days respectively for time periods ranging from about 330, 365, and 330 days, respectively. If it is unsafe to set paired streamer lines in high winds, how can the crew set miles of lines with baited hooks and haul them in and take fish from them in the same winds?

Response: The final regulations allow vessels normally required to use paired streamer lines, to deploy a single streamer line from the windward side of the vessel in winds exceeding 30 knots. This relaxation of the requirement for paired streamer lines is to address safety concerns. The windward side deployment of a single line is designed to prevent approaching seabirds from accessing the baited hooks. As discussed previously, single streamer lines have a proven effectiveness of 71 percent to 96 percent reduction in seabird bycatch; thus it is not necessary to require measures such as a lining tube or weighted groundlines as an alternative. Also, one of the operational limitations of the lining tube noted by WSGP researchers and others is that in rough sea conditions (e.g. high winds), the exit end of the lining tube periodically reaches the water's surface, thwarting the intent of sub-surface gear deployment. Information from NOAA's National Data Buoy Center indicates that the average wind speed at the 3 buoys noted by the commenter never exceeded an average wind speed of 30 knots (460066, south Aleutians; 46035, Bering Sea, north of Adak Island; and 46001, GOA, south of Kodiak). Safety concerns in commercial fisheries are a priority for NMFS and the U.S. Coast Guard. National Standard 10 of the Magnuson-Stevens Act requires that the conservation and management measures that implement fishery management plans shall, to the extent practicable, promote the safety of human life at sea. Thus, allowing the deployment of a single rather than paired streamer lines in winds exceeding 30 knots is consistent with National Standard 10 and the overall objective of reducing seabird bycatch.

Comment 29: Two commenters urge that performance standards should be required for seabird avoidance measures

used on vessels between 26 ft (7.9m) LOA and 55 ft (16.8m) LOA. The proposed regulations weaken seabird protections by exempting these vessels from critical performance standards. Performance standards are only being suggested for these smaller vessels. The extremely slow pace that NMFS moves in adopting regulatory changes may thwart efforts for years to come to assure that seabird mortality is eliminated or greatly reduced from these vessels unless these vessels are covered by performance standards.

Response: See NMFS's response to Comment 19. The performance standards required for seabird gear for vessels over 55 ft (16.8m) LOA are based on a WSGP scientific study conducted on vessels over 55 ft (16.8m) LOA. The "small boat" longline fleet off Alaska is comprised of over 1,000 vessels and is extremely diverse. Vessels range from skiffs, trollers, bowpickers, and schooners and are often used in other fisheries. A WSGP study was initiated in 2002 to study seabird avoidance gear requirements on smaller longline vessels. Once new information becomes available suggesting revised standards for smaller vessels, then these revised standards could be considered as regulatory requirements.

Comment 30: NMFS regulations should include a specified line-weighting regime for longline vessels. Adding weights to the groundline is known internationally to be the most effective way of getting hooks to sink and the most effective seabird deterrent when combined with a streamer line. The WSGP study did not rigorously investigate the combined use of weighted groundline with streamer lines. At minimum, the NMFS regulations should include a requirement that when weights are applied to the groundline, they should be spread out along the line. This would at least provide a temporary measure until more safe methods are developed for adding weights to the groundline.

Response: See NMFS's response to comments 23 and 25. Because of limitations with the application of weights at the time of gear deployment, researchers are exploring the feasibility and effectiveness of using groundlines with an integrated weight to achieve rapid sinking of baited hooks. IW lines are being tested in Alaska, New Zealand, and Australia. NMFS will consider new information about IW lines and results from these international studies prior to considering regulatory requirements for weighted groundlines.

Comment 31: NMFS should not allow exceptions from the use of paired or single streamer lines due to high knot winds. There is a higher activity level of seabirds in Alaska during the winter months, when the winds are normally highest, and during a time when the proposed seabird mitigation measures will be minimal. Also, in high winds the hooks tend to stay at the surface longer due to turbulence, increasing the exposure time of hooks to seabirds. Combined with a high activity of stressed breeding albatross during the winter months, this regulation could possibly increase seabird bycatch and especially albatross bycatch.

Response: NMFS has no data either to support or refute the presumptions that the activity level of seabirds is higher in Alaska during winter months, or that high wind conditions tend to keep hooks at the surface longer. We suspect that seabird activity may actually be lower in Alaska during winter months as opposed to other seasons, such as the breeding season, when reproductive activities (egg-laying, incubation, chick rearing) are underway. NMFS will maintain the gear and performance requirements relative to wind conditions as provided in the proposed rule. This exception is necessary to protect the crew. Deploying gear consistent with these measures from the open deck typically found on longline vessels that operate in these conditions would unnecessarily put crewmen at risk. NMFS is concerned about the issue, however, and additional research into integrated weight groundlines may best resolve this issue. NMFS will continue to evaluate and report on these issues.

Comment 32: The NMFS Observer Program should collect sufficient information to identify causes of seabird bycatch, including weather conditions. Because these data are not currently collected, the extent of seabird bycatch in Alaska during adverse weather condition remains unknown. NMFS should also be monitoring the life expectancy of the streamer lines and other measures, as this is important in developing design improvements.

Response: NMFS agrees that collecting information that identifies causes of seabird bycatch is important. NMFS has recently dedicated additional staff resources to work on seabird/fishery interaction issues, and expects to coordinate these investigations within NMFS and with collaborators. Some activities may be best conducted by observers. NMFS will work on this issue through a variety of means, including dockside visits, participation in skipper meetings, reviewing data already collected, and possibly deploying agency staff and observers aboard vessels at sea. However, just as it becomes a safety factor for crew to deploy seabird avoidance measures in high wind conditions, it also becomes unsafe for observers in some situations to conduct longline sampling. Observers are directed to stop sampling when heavy weather makes it unsafe to monitor longline gear retrieval.

NMFS does not plan to directly monitor the life expectancy of the streamer lines. Due to the required performance standards, the crew must maintain the gear in working order. It is the responsibility of the vessel operator to replace seabird avoidance gear that is no longer functioning properly. We expect that industry will notify NMFS and the manufacturer if it perceives a problem with longevity of the streamer lines.

Comment 33: NMFS should provide an annually updated detailed analysis of NMFS observer seabird bycatch data, including information by species, month, statistical area, gear, target fishery, vessel type and time of set, as well as seabird deterrent in use. NMFS should coordinate with USFWS to provide the Council and the public with these annual reports.

Response: NMFS currently collaborates with USFWS to provide annual reports on seabird incidental take to the Council as part of the annual SAFE report (see response to comment 9). These reports are available to the public. Currently, these reports are not at the level of detail noted by the commenter. NMFS has dedicated additional staff resources to work on seabird/fishery interaction issues and one goal is to improve bycatch reporting to the public. Annual summary reports will continue, and more detailed reports will be available periodically.

Comment 34: Whenever a management measure is introduced, the observer program should collect pertinent data to monitor the efficacy of the measure. Night setting was implemented in 1997 as a seabird avoidance measure option, even though no supporting data existed from the observer program. It wasn't until 2000 that observers began collecting data on time of set. The WSGP study revealed that night setting might actually increase bycatch of some species. Night setting may very well be detrimental to seabirds but we will not know until these data are released.

Response: It is probably not feasible for the Observer Program to collect pertinent data on every management measure implemented, given the critical importance of other core duties that observers carry out in support of fisheries management activities. See the

response to Comment 13 for a discussion on some of the limitations of using observer data to evaluate the effectiveness of mitigation measures. The initial 1997 regulations were based on the model of seabird avoidance requirements for vessels fishing in southern ocean areas regulated by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR). CCAMLR measures require night-setting as a method to avoid hooking birds. Based on the WSGP study which demonstrated an increased bycatch of fulmars during night sets, the regulation has been revised and no longer allows night-setting as an alternative method of reducing seabird incidental take.

Comment 35: NMFS should require that vessel operators cooperate with the observer in providing freezer/ice hold space for the retention of seabird carcasses if the observed is required to collect such carcasses. Negotiation for use of freezer space to hold seabird carcasses should not fall on the observer but should be a requirement of vessels carrying observers.

Response: Current regulations found at § 679.50(g)(1)(v) require vessel operators to provide the observer with access to storage areas and freezer holds, and at § 679.50(g)(1)(viii) to "provide * * * reasonable assistance to enable observers to carry out their duties * * *." The Observer Program is conducting one special project requiring observers to collect certain seabird carcasses. Vessel operators have complied with regulatory requirements and have cooperated with observers in providing sufficient freezer space for the storage of these special project specimens. If in the future NMFS requires additional collection of carcasses by observers, then appropriate steps will be taken to assure that adequate freezer storage space is made available on the vessel. The Observer Program has effectively used the pre-cruise briefing as one way of assuring appropriate vessel arrangements. Pre-cruise briefings allow for the identification of respective roles and responsibilities prior to departure. These vessel-specific arrangements between the observer and vessel skipper can also be made onboard. If an observer encounters non-compliance with vessel responsibility requirements, the observer can notify the Observer Program and document the incident. Given the decreasing numbers of seabirds taken, the retention of carcasses for a special project is not likely to be a burden on either the observer or the vessel operator.

Comment 36: Since the impetus for these regulations is the conservation of the short-tailed albatross, it is important to also consider the overall world population declines of both the Laysan and black-footed albatross. Because black-footed albatross have a relatively small world population, the declines are disturbing, especially in light of the high bycatch of black-footed albatross in the GOA where most of the fleet remains unmonitored.

Response: One objective of the regulations is conservation of an endangered species. Since NMFS and the Council first addressed these seabird avoidance requirements in 1996, it was acknowledged that conservation of other non-endangered species was also important. NMFS agrees that possible population declines of Laysan and black-footed albatross are important considerations. NMFS supports the albatross population status assessments currently being undertaken by the USFWS. Such assessments are consistent with the NPOA and necessary to determine the effects of longline mortality from the Alaska demersal groundfish and other longline fisheries throughout the North Pacific Ocean on these albatross populations. The amount of incidental take in the GOA seems unlikely to have contributed directly to a population decline of black-footed albatross. The average incidental take between 1993 and 2002 (176 birds) is only about 0.09 percent of the most recent population estimate of 200,000 albatross. Further, between 2000 and 2002 black-footed albatross incidental take declined by about 78 percent in the GOA. Many factors could contribute to the decline in incidental take (see comment 3), including both serious declines in the population itself and increased use of adequate seabird avoidance measures by vessel operators. NMFS remains concerned about potential declines of this species and continues to collaborate with partners to assess the direct and/or cumulative impacts of fishing mortality. While many of the vessels in the GOA are unobserved, the bycatch estimation procedures account for their fishing effort in determining an overall black-footed albatross incidental take estimate for that region. Because analysts assume that take rates are similar between observed and unobserved vessels, these estimates could be biased either upward or downward. The validity of this assumption is worth exploring.

Comment 37: We are pleased that NMFS is finally taking action to implement the improved regulations adopted by the Council. The Council took final action on these measures in December 2001. We were promised by NMFS staff that the regulations would be in place by August 2002. Why has it taken so long for the proposed rule to be published?

Response: Addressing seabird bycatch in longline fisheries is a NMFS priority. It is sometimes difficult to project staff workloads and allow for responsiveness to unscheduled activities and other priorities that require staff resources. NMFS proceeded as quickly as possible to promulgate final regulations.

Comment 38: Two commenters requested that more recent seabird bycatch data (from years 2000 to 2002) be used in the preamble to the rule and in the EA that accompanies the rule. The preamble to the proposed rule and the EA make repeated references to the seabird bycatch levels from 1993 to 1999 which do not reflect take levels since the implementation of seabird avoidance regulations. Since 1998, the first full year the regulations were in effect, the freezer-longliner fleet (which takes the bulk of the seabirds in the longline fisheries off Alaska) has reduced its incidental take by 85 percent. The 1993–1999 data may offer historical perspective, but it should be balanced by reference to recent performance under the seabird avoidance regulations. While we may expect interannual fluctuations in incidental take due to unpredictable biotic and abiotic factors, it is apparent that the regulations and industry efforts are having a highly positive effect, which should be reflected in the documentation.

Response: Since 2000, the seabird bycatch estimates have been incorporated into the seabird section of the Ecosystem Considerations chapter of the Council's SAFE reports. The seabird sections of the Ecosystem Considerations chapter are available at *http://www.fakr.noaa.gov/protectedresources/ seabirds/actionplans.htm*. See the preamble of this final rule for information on the 2000–2002 seabird bycatch estimates and take rates.

Comment 39: After extensive testimony from longline fishermen on the dangers inherent in deploying seabird avoidance gear under adverse conditions, at its December 2001 meeting the Council adopted a 'statement of intent' regarding the implementation and enforcement of the proposed seabird avoidance regulations and the specific performance standards. The Council's statement highlighted that NMFS needs to account for the context and setting of fishing operations on the vessel when considering the enforcement of performance standards required for streamer lines. Three commenters have requested that the

Council's statement of intent be included in the preamble to the final rule. One commenter additionally requested that the Council's statement of intent be inserted in observer handbooks and in materials used by enforcement agents. The commenter noted that the longline industry support for the revised regulations relied to a significant degree on this guarantee against unreasonable enforcement.

Response: The Statement of Council Intent on Seabird Avoidance Regulations and Performance Standards was included in the EA/RIR/IRFA (December 2002) prepared for the proposed rule and thus is not repeated here. The Council's statement was also summarized in its December 2001 newsletter. NMFS will provide this Statement of Intent to the Observer Program and the NOAA Office of Law Enforcement Alaska Region. NMFS agrees that it is very important to consider the context and setting of fishing operations in each and every alleged regulatory violation. On a case-by-case basis, NMFS considers the nature, circumstance, extent and gravity of any alleged violation when making enforcement decisions and the preparation of an appropriate enforcement response.

Enforcement of many of the regulations for the Alaska groundfish and IFQ fisheries are addressed through summary settlement schedules. These schedules reflect a progressive enforcement response, dependent on the severity of the violation and considered on a case-by-case basis. Such schedules provide information to assist persons required to comply with the regulations. NMFS is preparing a summary settlement schedule for the seabird avoidance regulations and upon completion the schedule will be made available at *http:// www.fakr.noaa.gov/ regs/ summary.htm.*

Comment 40: NMFS has proposed a regulation at 50 CFR 679.50(f)(1)(viii)(F) that would require that all seabirds from the observer-sampled portions of hauls using hook-and-line gear would be kept until sampled by the observer or as requested by an observer during non-sampled portions of hauls. This requirement conflicts with the provision proposed at 50 CFR § 679.24(e)(1)(vi) which calls for the safe release of seabirds that are brought on board alive. Current information suggests that, particularly for the short-tailed albatross, a live bird should be released as soon as possible. Our vessel association distributed copies of the booklet "Longline Fishing, Dollars and Sense" that contained textual and graphic descriptions of methods to release living seabirds without jeopardizing their lives. Perhaps the noted regulation at § 679.50 should specify that the requirement for retention pertains to dead seabirds.

Response: Nothing in this regulation is intended to conflict with the safe release of birds that are brought on board alive. Information from observers, vessel skippers and crew, and research scientists has indicated that live birds are rarely, if ever, hooked at the time of gear retrieval in demersal longline operations but rather are hooked or entangled at the time the gear is deployed and are subsequently pulled underwater. Thus, the regulation should not cause concern or endanger the lives of birds. In addition to the industry initiative to distribute information on safe-release and safe-handling procedures for live birds, the procedures are trained to observers and are available on the NMFS Alaska Region seabird website.

Comment 41: Although § 679.24(e)(3) of the proposed rule includes the general components and requirements for the Seabird Avoidance Plan, it would be helpful to have a proposed sample form that illustrates what would satisfy the requirements of the regulation.

Response: NMFS has prepared the form, Seabird Avoidance Plan, and it has received approval from OMB. The form will be made available to Alaska longline fishermen via mail, NMFS Alaska Region's seabird website *http:// www.fakr.noaa.gov/ protectedresources/ seabirds.html*, industry associations, and NMFS Enforcement offices, plus other appropriate locations as identified.

Comment 42: One commenter suggested that several corrections be made to text and figures in the EA that accompanied the proposed rule. The corrections related to: 1) the average seabird bycatch rate of vessels setting hook-and-line gear from the side (Figure 12), 2) a vessel 25 ft (7.6 m) LOA or less fishing offshore in the Fairweather Grounds (Figure 1), and 3) a short-tailed albatross sighting in interior Canada (Figures 1–4).

Response: NMFS has determined that the changes are not substantive and do not alter conclusions from the analysis of environmental effects. The USFWS maintains the database for short-tailed albatross sightings and provided the sightings data for Figures 1–4. NMFS has relayed this comment to the USFWS.

Comment 43: Two commenters suggest that the regulations should establish the goal of eliminating seabird bycatch and that the take of short-tailed albatross could be eliminated with the proper deployment of paired streamer lines, weighted lines, and offal discharge control during line setting.

Response: Although the Magnuson-Stevens Act definition of 'bycatch' does not include seabirds, the incidental take of seabirds is addressed as an issue in NMFS's National Bycatch Strategy and the guidelines for National Standard 9. The National Bycatch Strategy addresses regional efforts to enhance compliance with the take prohibitions of the ESA and to reduce takes of migratory birds. National Standard 9 of the Magnuson-Stevens Act calls for NMFS to minimize 'bycatch' to the extent practicable and for fishery management councils to consider the impact of conservation and management measures on birds. Thus, neither of these directives call for the elimination of bycatch. Although elimination of seabird bycatch through the use of effective seabird avoidance measures is a laudable goal, it is not currently practicable to specify it as such in regulatory language. The final seabird gear requirements are designed to reduce seabird bycatch. Fishermen do not intend to catch birds, but some are likely to be taken. As noted in the response to comment 17, both anthropogenic and non-anthropogenic factors may affect seabirds becoming hooked or entangled in longline gear. The new seabird gear requirements, when used correctly, will greatly reduce seabird takes of both the endangered short-tailed albatross and other more common species in longline fisheries.

Comment 44: The USFWS, the federal trust resource agency for migratory birds, appreciates that NMFS' efforts and regulations are intended to reduce the incidental take of all seabirds and not just those listed under the ESA.

Response: Since 1996 when NMFS and the Council first regulated seabird bycatch in longline fisheries, it was important that efforts address both endangered and non-endangered species. The vast majority of seabirds incidentally taken in the Alaska groundfish fisheries are northern fulmars, a very common species with a world population of 2 to 3 million. As an element of the Bering Sea and Gulf of Alaska ecosystem, it is important that the take of fulmars and other bird species is reduced.

Comment 45: The Council's SSC and representatives from the longline industry identified the need for education and outreach to fishermen and for further research on methods and performance standards, particularly for small [less than 55 ft (16.8m) LOA] vessels. The proposed rule notes that this would improve the effectiveness of

seabird avoidance measures and guide future regulatory changes to the standards guidelines for small vessels, which currently are voluntary. Additionally, the regulations for small vessels in certain inside waters may be revised, pending development of more information on the interactions between seabirds and fishing gear in those sectors of the fishery. The USFWS believes this is a prudent approach and highlights the needs for NMFS and USFWS to continue to promote and assist the research necessary to address these issues in the coming years.

Response: See the response to Comment 19. The Alaska longline fleet is very diverse. Seabird avoidance measures that successfully avoid birds on one type of vessel may not work the same way (or at all) on a different type of vessel. The WSGP study and the resulting performance and material standards for streamer lines focused on the larger vessel [greater than 55 ft (16.8m) LOA]. Vessels can differ not only in length but also area fished and proximity to shore, type of gear and bait used, number and experience of crew, vessel speed at gear deployment, number of days fished annually, hold capacity, and ability to process fish onboard (and thus amount of offal discharged). All of these elements affect the likelihood of encountering birds and the potential for interacting with them. In the summer of 2002, WSGP initiated several projects to explore the seabird bycatch issue on small vessels fishing in inside or nearshore waters. Workshops were conducted in Sitka, Petersburg, and Cordova port towns in Southeast Alaska. WSGP scientists shared outreach information with local fishermen and worked with skippers and crew onboard their vessels to deploy streamer lines and buoy bag lines. In addition to these port workshops, the WSGP, in collaboration with USFWS, has initiated a multi-year study to collect data on seabird abundance in proximity to fishing vessels, particularly in inside and nearshore waters. Bird distribution and abundance information from the WSGP study may provide a clearer picture of the probability of vessels interacting with birds while fishing in these nearshore and inside waters. Preliminary information from both of these efforts by WSGP, the port workshops and bird surveys, will be available in 2004. Results from these projects will contribute to efforts to best manage this seabird/fishery interaction for this portion of the fleet.

NMFS agrees that research efforts are important to provide the best available scientific information on which to base fishery management decisions. NMFS has collaborated with USFWS for the past 3 years on various research efforts to address management needs. USFWS has received a total of approximately $1.5 million in Congressional appropriations to address Alaska seabird bycatch initiatives. Many of the research projects mentioned have been funded by this initiative. Other funded projects include: testing of IW longline gear, seeking innovative solutions to seabird bycatch on small longline vessels, observer training materials, continued distribution of free streamer lines, and production of an educational video. USFWS collaborators include WSGP, NMFS, ADF&G, the Alaska Marine Advisory Program, and numerous industry associations.

Comment 46: The SSC suggested that less stringent regulations were needed for inside waters of Southeast Alaska, because short-tailed albatross do not frequent those waters. The USFWS comments that this is probably true today, but historical records suggest that this "coastal" albatross might have used these waters in the past. This may become an issue in the future as the population grows. The USFWS agrees with the SSC recommendation that additional study is needed on seabird abundance and interactions with fisheries in inside waters.

Response: The term "coastal" albatross was used at a time when the short-tailed albatross population may have numbered in the millions, prior to the time the population was decimated by feather hunters around the turn of the century. Pre-exploitation worldwide population estimates of short-tailed albatross are not known; the total number of birds harvested may provide some indication, since the harvest drove the species nearly to extinction. Between approximately 1885 and 1903, an estimated 5 million short-tailed albatross were harvested from the breeding colony on Torishima. The current worldwide population estimate is 1,800. It is probable that the total foraging range of the species has contracted during the post-exploitation period and the species may not be found in all of its former locations. As the USFWS notes in its Biological Opinion on the effects of the BSAI and GOA FMPs on the short-tailed albatross, some of the 'coastal' nature of the species' distribution could have been simply related to its more extensive marine range. Additionally, the historical middens were located in the Aleutian Islands, a habitat and area quite distinct from Southeast Alaska. Historical evidence does not provide information about the occurrence of short-tailed albatross in Southeast Alaska.

NMFS concurs that additional study is needed on seabird abundance and interactions with fisheries in inside waters. See the response to comment 19 for a description of work that was initiated in 2002 to address this. As the short-tailed albatross population grows and expands into its former range, we would expect that the potential for interactions with fishing vessels in those same areas would increase. NMFS and other agencies are collaborating with USFWS to promote the reporting of short-tailed albatross from existing platforms of opportunity such as commercial fishing vessels, agency survey vessels, and cruise and ferry ships. To date, the USFWS database includes 990 observation records of short-tailed albatross. Between 1975 and 1991, only 56 sightings of short-tailed albatross were reported, with the majority reported since 1991. These records do not necessarily represent 990 unique short-tailed albatross and may reflect vessel distribution rather than albatross abundance and distribution. The recent satellite telemetry collaboration project undertaken by the United States (USFWS) and Japan will greatly enhance our knowledge of the at-sea distribution of this endangered species.

Comment 47: The Council recommended studies to determine if performance standards should be modified or eliminated for vessels less than 55 ft (16.8 m) LOA when fishing at night from November to April. Given that the WSGP study found more gear interactions with Laysan albatross and northern fulmars during night sets, USFWS emphasizes that this issue of allowing night setting should be more fully addressed prior to making future regulatory changes.

Response: Prior to any modifications to these final seabird avoidance requirements and the issue of night-setting in particular as a method to avoid seabird take, an investigation would be necessary. Although some seabird avoidance methods are effective for most seabirds, some species exhibit characteristics (e.g. daily activity cycle, diving depth) which may make them more prone to interactions with fishing vessels and the deployment of gear.

Comment 48: In addition to the proposed requirement that all seabirds from observer-sampled hauls be kept by the fishing crew until the observer can process them, the USFWS also recommends that all seabird carcasses be retained for transport to laboratories for complete processing. This would allow for the collection of all possible

information on birds taken as bycatch in this fishery, as is done in some international fisheries. The more that is known about the demographics of the birds taken in fisheries, the better resource agencies can assess potential population effects and effectiveness of mitigation methods. The need for retaining and analyzing bird carcasses has been identified as an important issue by the North Pacific Albatross Working Group.

Response: Bird carcasses should be retained, returned with the observer to a field station, and then transported to laboratories for complete processing. This activity was done during the High Seas Driftnet Program, 1990–1992, where NMFS and the USFWS coordinated closely on seabird incidental take in those fisheries and shared duties to recover seabird carcasses. In that program, NMFS assigned observers to retain carcasses, provided the proper gear and forms to observers, and arranged for observers to return the carcasses to port. The USFWS trained observers on seabird topics and collection procedures, coordinated closely with NMFS to manage the transport of seabird and marine mammal specimens from these ports to Seattle, and established a recipient laboratory to handle and process the seabird specimens. Beginning in 1993, and several times since, NMFS staff have requested that the USFWS again collaborate together on a seabird carcass collection program for groundfish observers that paralleled that of the High Seas Driftnet Program. Unfortunately, the USFWS has, with one exception (see below), been unable to retain a laboratory to handle a comprehensive carcass collection program. With no end-user for carcasses, it was inappropriate to assign this task to observers and require fishermen to make freezer space available. The USFWS did select a vendor to receive some specimens beginning in 2001, and NMFS responded quickly by tasking specific observers to retain specimens in a special collection project. In 2002, NMFS staff participating in the North Pacific Albatross Working Group volunteered to take on a lead role in developing a carcass collection program. No funding source to support this project has as yet been identified, but a team that includes staff from federal (including the USFWS) and state agencies and other individuals are working on identifying agency funds, or preparing proposals to other funding sources, in the hopes of starting such a program.

Comment 49: The USFWS concurs with the Council's suggestion to develop an "industry-generated seabird avoidance incident reporting form." This form would allow vessel operators to report on the effectiveness of methods or operational issues that occur during the deployment of seabird avoidance gear. This form would allow industry to directly contribute to a format that would be readily accessible and available for analysis by our agencies.

Response: The industry might benefit if it created an "industry-generated seabird avoidance incident reporting form" for vessel operators. Accordingly, NMFS asked those operators to maintain the forms on the vessel and forward copies to their home offices and/or fishery associations. Industry input and cooperation have been critical to developing seabird avoidance measures, and these forms may provide an excellent means of furthering the collaboration of government and industry. The effectiveness of streamer lines and other measures will vary among vessels, and each operator will likely need to adapt the seabird avoidance measures for their vessel. These forms could help identify operational difficulties and the actions that were taken to resolve those difficulties. If that information is shared between operators on a single vessel, and among operators within a fleet, it would support a best-practices approach for seabird avoidance measures.

Comment 50: Maintaining healthy seabird populations provides multiple human and ecological benefits. Due to their status as top predators in the food web, seabirds are particularly important in providing key information regarding the general health of the marine environment. The proposed enhancements to the current seabird measures will mitigate interactions with the endangered short-tailed albatross and other seabirds in hook-and-line fisheries off Alaska. The commenter supports the enhancements and congratulates the government for taking this important action to effect such regulatory revisions.

Response: NMFS agrees.

Classification

The Council recommended this action to the Secretary for adoption pursuant to its authority under the Magnuson-Stevens Act and other applicable laws. NMFS prepared an EA/RIR/IRFA for the proposed revisions to the seabird avoidance measures in the hook-and-line groundfish fisheries of the BSAI and GOA and in the Pacific halibut fishery in U.S. Convention waters off Alaska that describes the management background, the purpose and need for action, the management alternatives, and the socioeconomic impacts of the alternatives.

The Administrator, Alaska Region, NMFS (Regional Administrator), has determined that this final rule is necessary for the conservation and management of the groundfish fisheries of the BSAI and GOA and the Pacific halibut fishery off Alaska. The Regional Administrator also has determined that this final rule is consistent with the Magnuson-Stevens Act, the Halibut Act, and other applicable laws. No relevant Federal rules exist that duplicate, overlap, or conflict with this action.

NMFS also prepared a FRFA describing the impact of this action on small entities. Copies of this FRFA are available from NMFS (see **ADDRESSES**). A description of the final action, the reason the action is being considered, and the legal basis for this action are contained at the beginning of this preamble. The FRFA incorporates the Initial Regulatory Flexibility Analysis (IRFA) and its findings. No comments on the IRFA were received during the public comment period on the proposed rule. Thus, no new data were incorporated into the analysis during the comment period that would result in findings that differ from those previously described. A description of the impacts of this action on small entities was summarized in the proposed rule (68 FR 6386, February 7, 2003). The entities that would be directly regulated by the final regulations are fishing operations using vessels longer than 26 ft (7.9 m) LOA, using hook-and-line gear while fishing for IFQ or CDQ halibut, IFQ sablefish, or groundfish in the EEZ off of Alaska, except for operations using vessels less than or equal to 32 ft (9.8 m) LOA using hook-and-line gear in IPHC area 4E in waters shoreward of the EEZ. In 2000, an estimated 962 small groundfish hook-and-line catcher vessels, 18 small groundfish catcher-processors, and 1,043 small halibut vessels would have been directly regulated by this action. There is believed to be overlap between the counts of groundfish vessels and halibut vessels, since some vessels would have been used in both fisheries. To the extent that any of these vessels are partners with CDQ groups, the alternatives addressed in this analysis could indirectly impact the six CDQ groups representing the 65 western Alaska communities that are eligible for the CDQ Program. The CDQ groups and the communities they represent all are small entities under the RFA.

Under the final rule, the measures required of all applicable vessels over

26 ft (7.9 m) LOA will be expected to be of minimal cost. A bird streamer line is estimated to cost $50 to $250 and line weights represent a variable cost depending upon the necessary amount of weights to sink the baited hooks. Procedural or operational changes may be required in fishing operations.

The incidental take limit for short-tailed albatross could be exceeded during longline fishing operations. If the regulatory revisions under the final rule improve and strengthen the current seabird avoidance measures, then the likelihood of encountering and taking a short-tailed albatross would be reduced. Therefore, the likelihood of a fishery closure and its ensuing economic impacts would be reduced. If the anticipated take of short-tailed albatross was exceeded in either the groundfish fishery or the halibut fishery, the actual economic impacts resulting from a modification of the reasonable and prudent measures established to minimize take of short-tailed albatross would depend upon the revised measures, which could range from measures required in this rule to closures. The economic impact of fishery closures would depend upon the length of time of the closed period and the extent of the closure. The 1999 exvessel value of the Pacific cod fishery for hook-and-line gear was estimated at approximately $72 million, approximately $71 million for the sablefish fishery, and totaled approximately $150 million for all groundfish species caught with hook-and-line gear. The 2000 exvessel value of the Pacific halibut fishery was estimated at $67 million. Such economic impacts on small entities could result in a substantial reduction in annual gross revenues and could, therefore, potentially have a significant adverse economic impact on a substantial number of small entities. Data are currently not available upon which to draw net revenue conclusions about these probable effects.

The Council considered recommending performance standards for seabird avoidance measures used on vessels greater than 26 ft (7.9 m) LOA and less than or equal to 55 ft (16.8 m) LOA. Until further information becomes available, performance standards for these smaller vessels are suggested only as guidelines.

Three alternatives to the required seabird avoidance measures in this final rule were also considered. The status quo alternative, while posing no additional burden on small entities, would not alter the operations of the hook-and-line fisheries in ways that would significantly reduce the potential for the incidental take of seabirds. It is associated with a heightened chance of fishery closure due to incidental harvest of the endangered short-tailed albatross. Premature fishery closure could be very burdensome for small entities. Although fishery closures were not an alternative to this action considered by the Council, closures could be considered under the Biological Opinion issued under ESA if the incidental take limit is exceeded. The second alternative considered, revisions to existing regulations based on the Council's final action in April 1999, did not specifically address performance and material standards for bird streamer lines. The correct design and deployment of bird scaring lines are known to improve the effectiveness of these seabird avoidance devices. The exemption for vessels under 35 ft (10.7 m) LOA may increase the likelihood of short-tailed albatross takes and consequent fishery closure. Closure could have a substantial adverse impact on small entities. The third alternative considered, revisions to existing regulations based on recommendations from a two-year scientific research study conducted by the WSGP on the effectiveness of seabird avoidance measures used in hook-and-line fisheries off Alaska, would have substantially reduced the likelihood of seabird takes, including takes of the endangered short-tailed albatross, and reduce the potential for fisheries closures. But, it does not mitigate the direct impacts of the regulations on small entities.

The preferred alternative, which is implemented by this final rule, should substantially reduce the likelihood of seabird takes, including takes of short-tailed albatross and reduce the potential for fisheries closures. It does substantially mitigate the direct impacts of the regulations on small entities. The FRFA describes several steps taken in the preferred alternative to minimize the impacts on small entities. As described in Table 2 of the FRFA, "Several modifications reduce the requirements on some classes of small entities: (1) vessels under 26 feet are exempt, (2) performance and material standards are guidelines for vessels between 26 and 55 feet, (3) vessels 32 feet or less fishing halibut in IPHC area 4E are exempt. The improvements made to the seabird avoidance measures with this final rule are expected to be much greater than with any of the other alternatives that were considered and evaluated.

The Small Business Regulatory Enforcement Fairness Act requires agencies to publish one or more Small Entity Compliance Guides for each rule or group of related rules for which the agency prepares a FRFA. The Small Entity Compliance Guide is to be written in plain language and explain the actions a small entity must take to comply with the rule or group of rules. NMFS has prepared a Small Entity Compliance Guide for this action and it is available at *http://www.fakr.noaa.gov/protectedresources/seabirds/guide.htm*.

The Seabird Avoidance Plan will also serve to aid small entities in that it is written in plain language, contains illustrations of the required seabird avoidance measures, and describes most of the requirements that must be taken to comply with this rule.

This rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under control number 0648–0474. Public reporting burden for the Seabird Avoidance Plan is estimated to average 8 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS and OMB (see **ADDRESSES**).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

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

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Recordkeeping and reporting requirements.

Dated: December 31, 2003.

Rebecca Lent,

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

■ For the reasons discussed in the preamble, 50 CFR part 679 is amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*

■ 2. In § 679.2 under "Authorized fishing gear," a new paragraph for the definition

of "snap gear" is added in numerical order, and the definition for "Seabird" is added in alphabetical order to read as follows:

§ 679.2 Definitions.

* * * * *

Authorized fishing gear * * *

* * * * *

(17) *Snap gear* means a type of hook-and-line gear where the hook and gangion are attached to the groundline using a mechanical fastener or snap.

* * * * *

Seabird means those bird species that habitually obtain their food from the sea below the low water mark.

* * * * *

■ 3. In § 679.5, paragraph (c)(1)(xvii) is revised to read as follows:

§ 679.5 Recordkeeping and reporting (R&R).

* * * * *

(c) * * *

(1) * * *

(xvii) The bird avoidance gear code(s);

* * * * *

■ 4. In § 679.24, paragraph (e) is revised to read as follows:

§ 679.24 Gear limitations.

* * * * *

(e) *Seabird avoidance program for vessels fishing with hook-and-line gear.*--(1) *Applicability.* The operator of a vessel that is longer than 26 ft (7.9 m) LOA fishing with hook-and-line gear must comply with the seabird avoidance requirements as specified in paragraphs (e)(2) through (e)(4) of this section while fishing for:

(i) IFQ halibut or CDQ halibut,

(ii) IFQ sablefish, and

(iii) Groundfish in the EEZ off Alaska.

(2) *Seabird Avoidance Requirements.* The operator of a vessel described in paragraph (e)(1) of this section must:

(i) *Gear onboard.* Have onboard the vessel the seabird avoidance gear as specified in paragraph (e)(4) of this section;

(ii) *Gear inspection.* Upon request by an authorized officer or observer, make the seabird avoidance gear available for inspection;

(iii) *Gear use.* Use seabird avoidance gear as specified in paragraph (e)(4) of this section that meets performance and material standards as specified in paragraph (e)(5) of this section, while hook-and-line gear is being deployed.

(iv) *Sink baited hooks.* Use hooks that when baited, sink as soon as they are put in the water.

(v) *Offal discharge.* (A) If offal is discharged while gear is being set or hauled, discharge offal in a manner that distracts seabirds from baited hooks, to the extent practicable. The discharge site on board a vessel must be either aft of the hauling station or on the opposite side of the vessel from the hauling station.

(B) Remove hooks from any offal that is discharged.

(C) Eliminate directed discharge through chutes or pipes of residual bait or offal from the stern of the vessel while setting gear. This does not include baits falling off the hook or offal discharges from other locations that parallel the gear and subsequently drift into the wake zone well aft of the vessel.

(D) For vessels not deploying gear from the stern, eliminate directed discharge of residual bait or offal over sinking hook-and-line gear while gear is being deployed.

(vi) *Safe release of seabirds.* Make every reasonable effort to ensure birds brought on board alive are released alive and that, wherever possible, hooks are removed without jeopardizing the life of the birds.

(3) *Seabird Avoidance Plan.* A Seabird Avoidance Plan must:

(i) Be written, current, and onboard the vessel.

(ii) Contain the following information:

(A) Vessel name.

(B) Master's name.

(C) Type of bird avoidance measures utilized.

(D) Positions and responsibilities of crew for deploying, adjusting, and monitoring performance of deployed gear.

(E) Instructions and/or diagrams outlining the sequence of actions required to deploy and retrieve the gear to meet specified performance standards.

(F) Procedures for strategic discharge of offal, if any.

(G) The NMFS "Seabird Avoidance Plan" form, completed and signed by vessel operator. Vessel operator's signature shall indicate the operator has read the plan, reviewed it with the vessel crew, made it available to the crew, and has instructed the vessel crew to read it.

(iii) Be made available for inspection upon request by an authorized officer or observer.

(4) *Seabird avoidance gear requirements.* (See also Table 20 to this part.) The operator of a vessel identified in paragraph (e)(1) of this section must comply with the following requirements:

(i) While fishing with hook-and-line gear, including snap gear, in NMFS Reporting Area 649 (Prince William Sound), 659 (Eastern GOA Regulatory Area, Southeast Inside District), or state waters of Cook Inlet:

(A) A minimum of 1 buoy bag line as specified in paragraph (e)(5)(i) of this section must be used by vessels greater than 26 ft (7.9 m) LOA and less than or equal to 55 ft (16.8 m) LOA without masts, poles, or rigging.

(B) A minimum of 1 buoy bag line as specified in paragraph (e)(5)(i) of this section must be used by vessels greater than 26 ft (7.9 m) LOA and less than or equal to 32 ft (9.8 m) LOA with masts, poles, or rigging.

(C) A minimum of a single streamer line as specified in paragraph (e)(5)(ii)(B) of this section must be used by vessels greater than 32 ft (9.8 m) LOA and less than or equal to 55 ft (16.8 m) LOA with masts, poles, or rigging.

(D) A minimum of a single streamer line of a standard as specified in paragraph (e)(5)(ii) of this section must be used by vessels greater than 55 ft (16.8 m) LOA.

(ii) While fishing with hook-and-line gear other than snap gear in Federal waters (EEZ) not including NMFS Area 659, or in state waters not specified in paragraph (e)(4)(i):

(A) A minimum of 1 buoy bag line as specified in paragraph (e)(5)(i) of this section and one other device as specified in paragraph (e)(6) of this section must be used by vessels greater than 26 ft (7.9 m) LOA and less than or equal to 55 ft (16.8 m) LOA without masts, poles, or rigging.

(B) A minimum of a single streamer line as specified in paragraph (e)(5)(ii)(B) of this section and one other device as specified in paragraph (e)(6) of this section must be used by vessels greater than 26 ft (7.9 m) LOA and less than or equal to 55 ft (16.8 m) LOA with masts, poles, or rigging.

(C) A minimum of paired streamer lines of a standard as specified in paragraph (e)(5)(iii) of this section must be used by vessels greater than 55 ft (16.8 m) LOA.

(iii) While fishing with snap gear in the EEZ (not including Area 659) or state waters not specified in paragraph (e)(4)(i):

(A) A minimum of 1 buoy bag line as specified in paragraph (e)(5)(i) of this section and one other device as specified in paragraph (e)(6) of this section must be used by vessels greater than 26 ft (7.9 m) LOA and less than or equal to 55 ft (16.8 m) LOA without masts, poles, or rigging.

(B) A minimum of a single streamer line as specified in paragraph (e)(5)(iv)(B) of this section and one other device as specified in paragraph (e)(6) of this section must be used by vessels greater than 26 ft (7.9 m) LOA and less than or equal to 55 ft (16.8 m) LOA with masts, poles, or rigging.

(C) A minimum of a single streamer line of a standard as specified in paragraph (e)(5)(iv) of this section and one other device as specified in paragraph (e)(6) of this section must be used by vessels greater 55 ft (16.8 m) LOA with masts, poles, or rigging.

(iv) While fishing with hook-and-line gear other than snap gear for IFQ halibut, CDQ halibut, or IFQ sablefish, in waters shoreward of the EEZ, requirements as specified in paragraphs (e)(4)(ii) and (e)(8) must be used.

(5) *Seabird avoidance gear performance and material standards:*

(i) *Buoy bag line weather exception.* In winds exceeding 45 knots (storm or Beaufort 9 conditions), the use of a buoy bag line is discretionary.

(ii) *Single streamer standard.* (A) A single streamer line must:

(*1*) Be a minimum of 300 feet (91.4 m) in length;

(*2*) Have streamers spaced every 16.4 ft (5 m);

(*3*) Be deployed before the first hook is set in such a way that streamers are in the air for a minimum of 131.2 ft (40 m) aft of the stern and within 6.6 ft (2 m) horizontally of the point where the main groundline enters the water.

(*4*) Have individual streamers that hang attached to the mainline to 9.8 in (0.25 m) above the waterline in the absence of wind.

(*5*) Have streamers constructed of material that is brightly colored, UV-protected plastic tubing or 3/8 inch polyester line or material of an equivalent density.

(B) *Weather exception:* In winds exceeding 45 knots (storm or Beaufort 9 conditions), the use of a single streamer line is discretionary.

(iii) *Paired streamer standard:* (A) At least one streamer line must be deployed before the first hook is set and two streamer lines must be fully deployed within 90 seconds.

(B) *Weather exceptions*: In conditions of wind speeds exceeding 30 knots (near gale or Beaufort 7 conditions), but less than or equal to 45 knots, a single streamer must be deployed from the windward side of the vessel. In winds exceeding 45 knots (storm or Beaufort 9 conditions), the use of streamer lines is discretionary.

(C) Streamer lines must:

(*1*) Be deployed in such a way that streamers are in the air for a minimum of 131.2 ft (40 m) aft of the stern for vessels under 100 ft (30.5 m) and 196.9 ft (60 m) aft of the stern for vessels 100 ft (30.5 m) or over;

(*2*) Be a minimum of 300 feet (91.4 m) in length;

(*3*) Have streamers spaced every 16.4 ft (5 m);

(*4*) For vessels deploying hook-and-line gear from the stern, the streamer lines must be deployed from the stern, one on each side of the main groundline.

(*5*) For vessels deploying gear from the side, the streamer lines must be deployed from the stern, one over the main groundline and the other on one side of the main groundline.

(*6*) Have individual streamers that hang attached to the mainline to 9.8 in (0.25 m) above the waterline in the absence of wind.

(*7*) Have streamers constructed of material that is brightly colored, UV-protected plastic tubing or 3/8 inch polyester line or material of an equivalent density.

(iv) *Snap gear streamer standard:* (A) For vessels using snap gear, a single streamer line must:

(*1*) Be deployed before the first hook is set in such a way that streamers are in the air for 65.6 ft (20 m) aft of the stern and within 6.6 ft (2 m) horizontally of the point where the main groundline enters the water.

(*2*) Have a minimum length of 147.6 ft (45 m).

(B) *Weather exception:* In winds exceeding 45 knots (storm or Beaufort 9 conditions), the use of a single streamer line is discretionary.

(6) *Other seabird avoidance devices and methods.* As required at paragraphs (e)(4)(ii)(A) and (B) and (e)(4)(iii) of this section, include the following:

(i) Add weights to groundline.

(ii) Use a buoy bag line or single streamer line, of standards as appropriate and as specified in paragraph (e)(5) of this section.

(iii) To distract birds away from the setting of baited hooks, discharge fish, fish parts (i.e. offal) or spent bait.

(7) *Other methods.* The following measures or methods must be accompanied by the applicable seabird avoidance gear requirements as specified in paragraph (e)(4) of this section:

(i) Night-setting,

(ii) Line shooter, or

(iii) Lining tube.

(8) *Seabird avoidance exemption.* Nothwithstanding any other paragraph in this part, operators of vessels 32 ft (9.8 m) LOA or less using hook-and-line gear in IPHC Area 4E in waters shoreward of the EEZ are exempt from seabird avoidance regulations.

■ 5. In § 679.32, new paragraph (f)(5) is added to read as follows:

§ 679.32 Groundfish and halibut CDQ catch monitoring.

* * * * *

(f) * * *

(5) *Seabird avoidance requirements.* The CDQ group, and vessel owner or operator must comply with all of the seabird avoidance requirements at § 679.42(b)(2).

■ 6. In § 679.42, paragraph (b)(2) is revised to read as follows:

§ 679.42 Limitations on use of QS and IFQ.

* * * * *

(b) * * *

(2) *Seabird avoidance gear and methods.* The operator of a vessel using gear authorized at § 679.2 while fishing for IFQ halibut, CDQ halibut, or hook-and-line gear while fishing for IFQ sablefish must comply with requirements for seabird avoidance gear and methods set forth at § 679.24(e).

* * * * *

■ 7. In § 679.50, paragraph (g)(1)(viii)(F) is added to read as follows:

§ 679.50 Groundfish Observer Program applicable through December 31, 2007.

* * * * *

(g) * * *

(1) * * *

(viii) * * *

(F) Collecting all seabirds that are incidentally taken on the observer-sampled portions of hauls using hook-and-line gear or as requested by an observer during non-sampled portions of hauls.

* * * * *

■ 8. In part 679, Table 19 is revised and Table 20 to part 679 is added to read as follows:

TABLE 19 TO PART 679. SEABIRD AVOIDANCE GEAR CODES

VESSEL LOGBOOK	
CODE	SEABIRD AVOIDANCE GEAR OR METHOD
1	*Paired Streamer Lines*: Used during deployment of hook-and-line gear to prevent birds from taking hooks. Two streamer lines used, one on each side of the main groundline. Each streamer line consists of three components: a length of line, streamers attached along a portion of the length and one or more float devices at the terminal end. See performance and material standards at § 679.24(e)(5)(iii).

TABLE 19 TO PART 679. SEABIRD AVOIDANCE GEAR CODES—Continued

VESSEL LOGBOOK	
CODE	SEABIRD AVOIDANCE GEAR OR METHOD
2	*Single Streamer Line*: Used during deployment of hook-and-line gear to prevent birds from taking hooks. The streamer line consists of three components: a length of line, streamers attached along a portion of the length and one or more float devices at the terminal end. See performance and material standards at § 679.24(e)(5)(ii).
3	*Single Streamer Line, used with Snap Gear*: Used during the deployment of snap gear to prevent birds from taking hooks. The streamer line consists of three components: a length of line, streamers attached along a portion of the length and one or more float devices at the terminal end. See performance and material standards at § 679.24(e)(5)(iv).

TABLE 19 TO PART 679. SEABIRD AVOIDANCE GEAR CODES—Continued

VESSEL LOGBOOK	
CODE	SEABIRD AVOIDANCE GEAR OR METHOD
4	*Buoy Bag Line*: Used during the deployment of hook-and-line gear to prevent birds from taking hooks. A buoy bag line consists of two components: a length of line (without streamers attached) and one or more float devices at the terminal end. See performance and material standards at § 679.24(e)(5)(i).
Other Device used in conjunction with Single Streamer Line or Buoy Bag Line.	
5	*Add weights to groundline*: Applying weights to the groundline for the purpose of sinking the hook-and-line gear more quickly and preventing seabirds from accessing the baited hooks.
6	*Additional Buoy Bag Line or Single Streamer Line*: Using a second buoy bag line or streamer line for the purpose of enhancing the effectiveness of these deterrent devices at preventing seabirds from accessing baited hooks.

TABLE 19 TO PART 679. SEABIRD AVOIDANCE GEAR CODES—Continued

VESSEL LOGBOOK	
CODE	SEABIRD AVOIDANCE GEAR OR METHOD
7	*Strategic Offal Discharge*: Discharging fish, fish parts (i.e. offal) or spent bait for the purpose of distracting seabirds away from the main groundline while setting gear.
Additional Device Used	
8	*Night Fishing*: Setting hook-and-line gear during dark hours. *Line Shooter*: A hydraulic device designed to deploy hook-and-line gear at a speed slightly faster than the vessel's speed during setting. *Lining Tube*: A device used to deploy hook-and-line gear through an underwater-setting device. *Other* (Describe)
9	No Deterrent Used Due to Weather. [See weather exceptions at § 679.24(e)(5)(i)(B), (e)(5)(ii)(B), (e)(5)(iii)(B), (e)(5)(iv)(B).]
0	No Deterrent Used.

TABLE 20 TO PART 679. SEABIRD AVOIDANCE GEAR REQUIREMENTS FOR VESSELS, BASED ON AREA, GEAR, AND VESSEL TYPE. (SEE § 679.24(E) FOR COMPLETE SEABIRD AVOIDANCE PROGRAM REQUIREMENTS; SEE 679.24(E)(1) FOR APPLICABLE FISHERIES)

If you operate a vessel deploying hook-and-line gear, including snap gear, in inside waters ["NMFS Reporting Area 649 (Prince William Sound), 659 (Eastern GOA Regulatory Area, Southeast Inside District) or in state waters of Cook Inlet"], and your vessel is...	Then you must use this seabird avoidance gear in conjunction with requirements at § 679.24(e)...
>26 ft to 32 ft LOA	minimum of one buoy bag line
>32 ft to 55 ft LOA and does not have masts, poles, or rigging	minimum of one buoy bag line
>32 ft to 55 ft LOA and has masts, poles, or rigging	minimum of a single streamer line
>55 ft LOA	minimum of a single streamer line of a standard specified at § 679.24(e)(5)(ii)

If you operate a vessel deploying hook-and-line gear, other than snap gear, in the EEZ, not including any inside waters listed above, and your vessel is...	Then you must use this seabird avoidance gear in conjunction with requirements at § 679.24(e)...
>26 ft to 55 ft LOA and does not have masts, poles, or rigging	minimum of one buoy bag line and one other device[1]
>26 ft to 55 ft LOA and has masts, poles, or rigging	minimum of a single streamer line and one other device[1]
>55 ft LOA	minimum of paired streamer lines of a standard specified at § 679.24(e)(5)(iii)

If you operate a vessel deploying hook-and-line gear, in the EEZ, not including any inside waters listed above, and it is snap gear, and your vessel is...	Then you must use this seabird avoidance gear in conjunction with requirements at § 679.24(e)...
>26 ft to 55 ft LOA and does not have masts, poles, or rigging	minimum of one buoy bag line and one other device[1]
>26 ft to 55 ft LOA and has masts, poles, or rigging	minimum of a single streamer line and one other device[1]
>55 ft LOA	minimum of a single streamer line of a standard specified at § 679.24(e)(5)(iv) and one other device[1]

If you operate a vessel deploying hook-and-line gear other than snap gear, in state waters of IPHC Area 4E, and your vessel is...	Then you must use this seabird avoidance gear in conjunction with requirements at § 679.24(e)...
>32 ft to 55 ft LOA and does not have masts, poles, or rigging	minimum of one buoy bag line and one other device[1]
>32 ft to 55 ft LOA and has masts, poles, or rigging	minimum of a single streamer line and one other device[1]

If you operate a vessel deploying hook-and-line gear other than snap gear, in state waters of IPHC Area 4E, and your vessel is...	Then you must use this seabird avoidance gear in conjunction with requirements at § 679.24(e)...
>55 ft LOA	minimum of paired streamer lines of a standard specified at § 679.24(e)(5)(iii)

If you operate a vessel deploying hook-and-line gear, in state waters of IPHC Area 4E, and it is snap gear, and your vessel is...	Then you must use this seabird avoidance gear in conjunction with requirements at § 679.24(e)...
>32 ft to 55 ft LOA and does not have masts, poles, or rigging	minimum of one buoy bag line and one other device[1]
>32 ft to 55 ft LOA and has masts, poles, or rigging	minimum of a single streamer line and one other device[1]
>55 ft LOA	minimum of a single streamer line of a standard specified at § 679.24(e)(5)(iv) and one other device[1]

[1]other device = weights added to groundline, another buoy bag line or single streamer line, or strategic offal discharge [see § 679.24(e)(6) for more details]

[FR Doc. 04–378 Filed 1–12–04; 8:45 am]
BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 030818203–3328–02; I.D. 071503D]

RIN 0648–AR32

Fisheries of the Exclusive Economic Zone Off Alaska; Groundfish Observer Program

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

ACTION: Final rule.

SUMMARY: NMFS issues a final rule to amend regulations governing the North Pacific Groundfish Observer Program (Observer Program). This action is necessary to provide added flexibility in the deployment of observers in the Exclusive Economic Zone (EEZ) off the coast of Alaska. This action is intended to ensure continued collection of high quality observer data. It is necessary to support the management objectives of the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area and the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMPs) and to promote the goals and objectives contained in those FMPs.

DATES: Effective on February 12, 2004.

ADDRESSES: Copies of the Final Regulatory Flexibility Analysis (FRFA) prepared for this regulatory action and the Environmental Assessment (EA) prepared for the Extension of the Interim North Pacific Groundfish Observer Program beyond 2002 may be obtained from the Alaska Region, NMFS, P.O. Box 21668, Juneau, AK 99802, Attn: Lori Durall.

FOR FURTHER INFORMATION CONTACT: Jason Anderson, 907–586–7228 or *jason.anderson@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

NMFS manages the U.S. groundfish fisheries of the Gulf of Alaska (GOA) and the Bering Sea and Aleutian Islands Management Area (BSAI) in the EEZ under the FMPs. The North Pacific Fishery Management Council (Council) prepared the FMPs pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). Regulations implementing the FMPs appear at 50 CFR part 679. General regulations that pertain to U.S. fisheries appear at subpart H of 50 CFR part 600.

The Council adopted, and NMFS approved and implemented, the Interim Groundfish Observer Program (Interim Program) in 1996 (61 FR 56425, November 1, 1996), which superseded the North Pacific Fisheries Research Plan (Research Plan). The requirements of the Interim Program were extended through 1998 (62 FR 67755, December 30, 1997), again through 2000 (63 FR 69024, December 15, 1998), again through 2002 (65 FR 80381, December 21, 2000), and again through 2007 (67 FR 72595, December 6, 2002). The Interim Program provides the regulatory framework for the collection by observers of data necessary for the conservation and management of the groundfish fisheries managed under the FMPs. Further, it authorizes mandatory observer coverage requirements for vessels and shoreside processors, and establishes vessel, processor, and observer provider responsibilities relating to the Observer Program.

A proposed rule to amend regulations governing housing requirements for observers deployed in the groundfish fisheries governed by the FMPs was published in the **Federal Register** on September 3, 2003 (68 FR 52378), for a 30–day public review and comment period which ended October 3, 2003. NMFS received one letter of comment on the proposed rule, which is summarized and responded to in Response to Comments, below.

A final rule to amend regulations governing observer coverage requirements for vessels and shoreside processors in the North Pacific Groundfish Fisheries was published in the **Federal Register** on January 7, 2003 (68 FR 715). The intent of the final rule was to address concerns about: (1) Shoreside processor observer coverage; (2) shoreside processor observer logistics; (3) observer coverage requirements for vessels fishing with groundfish pot gear; and (4) confidentiality of observer personal information. This final rule is intended to correct and clarify specific provisions of the January 7 rule.

Comments and Responses

One letter of comment was received on the proposed rule that contained four unique comments. Comments are summarized and responded to here.

Comment 1: The public should be able to comment on proposed rules through email.

Response: NMFS will begin accepting email comments on February 2, 2004.

Comment 2: Honest observers should be hired and not work in collusion with fishermen.

Response: NMFS has determined that reasonable housing for observers facilitates their ability to furnish unbiased data. Further, regulations at § 679.50(j)(2)(i) describe limitations on conflict of interest. These include requirements that observers must have no direct financial interest in a North Pacific fishery managed by an FMP and may not serve on a vessel owned or operated by someone who had previously employed the observer. Further, regulations at § 679.50(j)(2)(ii) require observers to accurately sample

catch and record data according to the Observer Manual. Observers who do not perform duties according to the Observer Manual or who knowingly record information which is not factual are subject to actions which include suspension, decertification, and/or prosecution.

Comment 3: NMFS should employ video technology to monitor shipboard and dockside operations.

Response: To the extent video technology is related to improved observer working conditions, NMFS agrees. In addition, NMFS is researching alternative technology which may be suitable for monitoring components of the fisheries. The International Pacific Halibut Commission recently completed a study examining the feasibility of electronic monitoring systems in the Pacific halibut longline fleet operating off the coast of Alaska. If alternative technologies are feasible, efficient, and provide high quality data, then NMFS may incorporate such technology in future monitoring programs.

Comment 4: NMFS should hire undercover investigators to keep fishermen and observers honest.

Response: The NMFS Office of Law Enforcement (OLE) is charged with enforcement of the laws and regulations which govern fisheries off the coast of Alaska. They use various methods in their enforcement program, including undercover operations. Undercover operations are mainly used when other methods would not work for a specific situation, and are not undertaken lightly.

Observer Deployment Logistics

This final rule amends the observer provider responsibility regulations to allow an observer to be housed: (1) On a stationary floating processor; (2) on a vessel he or she will be assigned to; (3) on a vessel for 24 hours following the completion of an offload when the observer has duties and is scheduled to disembark; and (4) on a vessel for 24 hours following the vessel's arrival in port when the observer is scheduled to disembark. In addition, this final rule makes two additional revisions to the proposed rule.

Subsequent to publication of the January 7 final rule, Observer Program staff received comments from two separate observer providers concerned with their ability to effectively deploy observers under the current regulations at § 679.50(i)(2)(vi). In order to account for potential logistics problems, both observer providers described a common practice whereby observers are flown to their port of departure 3 or 4 days before the vessel is scheduled to depart. Flight cancellations and delays due to weather are common, so fishing companies often request that observers arrive prior to their anticipated departure date.

Observers often arrive at their assigned vessel and encounter delays in the vessel's departure. Vessel operators often are unable to predict exactly when they will be able to leave port for a fishing trip due to weather, mechanical failure, labor disputes, and other unanticipated problems. These delays result in periods of time when an observer may be housed on an assigned vessel that is not traveling to fishing grounds or actively involved in fishing. These circumstances were not considered when promulgating the January 7 final rule.

Current regulations at § 679.50(i)(2)(vi) prevent observers from being housed on an assigned vessel until 24 hours before its departure time. The intent of regulations at § 679.50(i)(2)(vi) is to avoid lodging an observer aboard a vessel on which he or she is not working or currently assigned. This action clarifies NMFS' intent by removing the 24 hour restriction and provides fishing operations increased flexibility to deal with these uncertainties, and observer providers improved opportunities to serve their customers.

This action also provides for housing observers aboard stationary floating processors. Current regulations at § 679.50(i)(2)(vi)(B) govern the housing requirements for observers assigned to shoreside processing facilities and for observers between vessel or shoreside assignments while still under contract to an observer provider. Observers commonly are deployed to stationary floating processors and catcher vessels delivering to stationary floating processors. Stationary floating processors often are in remote locations and observers commonly are housed on these stationary floating processors before, after, and in between catcher vessel assignments and while assigned to a stationary floating processor. This action extends the housing requirements to observers being deployed in these circumstances. Given the remoteness of these stationary floating processors, NMFS considers the practice of housing observers deployed to catcher vessels delivering to stationary floating processors reasonable. Accommodation requirements at § 679.50(i)(2)(vi)(B) for observers being housed on stationary floating processors are the same as those for a licensed hotel, motel, bed and breakfast, or other shoreside accommodation.

Further, this action clarifies two housing situations where the observer is scheduled to disembark the vessel. First, the observer could be housed on a vessel for up to 24 hours following the completion of an offload when the observer has duties and is scheduled to disembark after completing those duties. This accounts for assignments to catcher boats that target pollock, where the observer is required to monitor the offload for prohibited species. Second, the observer could be housed on a vessel for up to 24 hours following the vessel's arrival in port where the observer is scheduled to disembark. This accounts for assignments to all other vessels where the observer's duties are complete upon arrival to port.

This action amends current regulations at § 679.50(i)(2)(vi)(D) by removing unnecessary text. Existing regulations require that observers be provided housing within the standards outlined in the regulations. Therefore, alternative housing must be arranged if these standards are not met. The ancillary conditions previously contained in subparagraph (D) were interpretive and their removal does not change the intent of NMFS.

NMFS identified two necessary changes from the proposed rule to the final rule. Section 679.50(i)(2)(vi)(A)(2) is changed to provide consistency with terminology used in § 679.50(i)(2)(vi)(B) and (C). By changing text to require observer providers to provide lodging, per diem, and any other necessary services to observers assigned to vessels or shoreside or stationary floating processing facilities, the regulations are clarified and consistent with NMFS intent.

During review of the final rule, NMFS determined that § 679.50(i)(2)(vi)(C)(1) of the proposed rule was ambiguous. NMFS recognizes that there may be logistical difficulties in the deployment of an observer and departure of the vessel. Further, NMFS determined that vessels would only pay for an observer for those days necessary to coordinate the observer's logistics and the vessel's departure plans. This text is modified to allow an observer to be housed on a vessel to which he or she is assigned prior to that vessel's departure from port.

Classification

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

NMFS prepared a FRFA. The FRFA incorporates the IRFA and a summary of the analyses completed to support the action. A copy of this analysis is available from the NMFS (see **ADDRESSES**). The need for, and objectives of, this action are described

above in the preamble and are not repeated here.

The proposed rule was published in the **Federal Register** on September 3, 2003 (68 FR 52378). An Initial Regulatory Flexibility Analysis (IRFA) was prepared for the proposed rule, and described in the classifications section of the preamble to the rule. The public comment period ended on October 3, 2003. No comments were received on the IRFA.

For this action, the small regulated entities include: (1) Fishing vessels with observer coverage requirements and total gross annual revenues of less than $3.5 million from all the operation's commercial activity taken together; (2) processing facilities with observer coverage requirements and fewer than 500 employees, when all their affiliated operations, worldwide, are combined; (3) the Community Development Quota groups; and (4) observer providers. Therefore, small regulated entities could number about 350, although this number declines to about 215 if the catcher vessels in the American Fisheries Act pollock cooperatives are excluded, as the Regulatory Flexibility Act "affiliation" criteria suggest they appropriately be.

This regulation does not impose new recordkeeping or reporting requirements on the regulated small entities.

The preferred alternative does not have any adverse impacts on small entities. The effective impacts of the preferred alternative relative to the status quo are to (1) clarify the regulatory basis for the current practice of housing catcher vessel observers on floating processors between deployments, and (2) provide fishing operations and observer providers with the ability to efficiently deal with the uncertainties associated with departure from port, such as mechanical problems or adverse weather conditions, in a manner fully compliant with regulations. In general, the information on operating behavior and costs that would make it possible to predict how fishermen and markets will react to the new regulation, and how their costs and revenues will change, is not available. However, in qualitative terms, the impacts of the preferred alternative are beneficial.

The preferred alternative provides fishing operations with planning flexibility to deal with these uncertainties, and to give observer providers improved opportunities to serve their customers. The action would have an effect equivalent to the lengthening of a fishing trip. Observers would receive normal contracted compensation for the additional days. Regulations currently require vessels to provide food and accommodations to observers assigned to that vessel, just as they would for any other crew member. Since observers may not be housed on vessels they are not assigned to, vessels have an incentive to hire observers (and feed them) for only those days necessary for coordinating their departure from port.

The status quo is the alternative to the preferred action. The status quo was rejected because it would not accomplish the objectives of the action. This alternative decreases the observer provider's ability to effectively deploy observers. In order to account for possible weather delays and other potential logistics problems, observer providers often send observers to their port of departure prior to their assigned vessel's scheduled departure. The uncertainties associated with departure from port and the economic costs associated with this uncertainty make this alternative less desirable than the preferred alternative. Because this alternative results in adverse impacts to small entities, this alternative was rejected.

List of Subjects in 50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: January 7, 2004.

Rebecca Lent,

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

■ For the reasons set out in the preamble, 50 CFR part 679 is amended as follows:

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 1. The authority citation for 50 CFR part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.*, 1801 *et seq.*, and 3631 *et seq.*

■ 2. In § 679.50, paragraphs (i)(2)(vi)(A)(2), (B), (C), and (D) are revised to read as follows:

§ 679.50 Groundfish Observer Program (effective through 12/31/07).

* * * * *

(i) * * *

(2) * * *

(vi) * * *

(A) * * *

(2) Lodging, per diem, and any other services necessary to observers assigned to fishing vessels or shoreside or stationary floating processing facilities.

(B) Except as provided in paragraphs (i)(2)(vi)(C) and (i)(2)(vi)(D) of this section, each observer deployed to a shoreside processing facility or stationary floating processor, and each observer between vessel, stationary floating processor or shoreside assignments while still under contract with a permitted observer provider, shall be provided with accommodations at a licensed hotel, motel, bed and breakfast, stationary floating processor, or other shoreside accommodations for the duration of each shoreside assignment or period between vessel or shoreside assignments. Such accommodations must include an assigned bed for each observer and no other person may be assigned that bed for the duration of that observer's stay. Additionally, no more than four beds may be in any room housing observers at accommodations meeting the requirements of this section.

(C) An observer under contract may be housed on a vessel to which he or she is assigned:

(*1*) Prior to their vessel's initial departure from port;

(*2*) For a period not to exceed twenty-four hours following the completion of an offload when the observer has duties and is scheduled to disembark; or

(*3*) For a period not to exceed twenty-four hours following the vessel's arrival in port when the observer is scheduled to disembark.

(D) During all periods an observer is housed on a vessel, the observer provider must ensure that the vessel operator or at least one crew member is aboard.

* * * * *

[FR Doc. 04–696 Filed 1–12–04; 8:45 am]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 69, No. 8
Tuesday, January 13, 2004

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

OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2634

RIN 3209–AA00

Proposed Revisions to the Certificates of Divestiture Regulation

AGENCY: Office of Government Ethics (OGE).

ACTION: Proposed rule amendments.

SUMMARY: The Office of Government Ethics is proposing a plain language revision of its regulation concerning Certificates of Divestiture. The proposed rule also would revise certain procedures for issuing Certificates of Divestiture and the definition of permitted property into which proceeds of the sale of property are reinvested.

DATES: Comments are invited and must be received in writing on or before March 15, 2004.

ADDRESSES: Send comments to the Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005–3917. Attention: Deborah J. Bortot. Comments also may be sent electronically to OGE's Internet E-mail address: *usoge@oge.gov*. For E-mail messages, the subject line should include the following reference: "Comments on proposed revisions to the Certificates of Divestiture regulation."

FOR FURTHER INFORMATION CONTACT: Deborah J. Bortot, Office of Government Ethics; Telephone: 202–482–9300; TDD: 202–482–9293; FAX: 202–482–9237.

SUPPLEMENTARY INFORMATION:

I. Background

Section 1043 of the Internal Revenue Code of 1986, 26 U.S.C. 1043, was enacted as part of the Ethics Reform Act of 1989 (Pub. L. 101–194). Section 1043 authorizes OGE to issue a Certificate of Divestiture to an eligible person who is divesting property in order to comply with a Federal conflict of interest law, regulation, rule, or Executive order, or if requested by a congressional committee as a condition of confirmation. A person who receives a Certificate of Divestiture may defer payment of capital gains tax as long as he or she timely purchases certain permitted property with the proceeds of the sale. OGE published an interim rule on April 18, 1990 (at 55 FR 14407–14409) implementing section 1043. On June 25, 1996, the Office of Government Ethics published a final rule at 61 FR 32633–32636. The final rule was based on comments to the interim rule and on OGE's experience under the interim rule and the May 1990 Technical Corrections to the Ethics Reform Act of 1989 (Pub. L. 101–280), which amended section 1043 of the Internal Revenue Code of 1986. The Certificates of Divestiture regulation is now codified at subpart J of 5 CFR part 2634. After reevaluating the regulation to see whether changes might be needed, OGE has decided to publish these proposed revisions to make certain improvements.

II. Discussion of Proposed Changes

We are proposing to improve the current Certificates of Divestiture regulation by: Organizing the material more logically; using shorter sentences; eliminating unnecessary technical language; and stating the rule's requirements more clearly. We invite your comments as to whether this proposed rule would be easier to understand and how we could further improve its clarity. The following discussion summarizes the most important changes that OGE is proposing.

To add more harmony and uniformity to ethics program rules, OGE is proposing a change to the meaning of "diversified investment fund." In order to qualify for deferral of capital gains, an eligible person must reinvest proceeds from the sale of property pursuant to a Certificate of Divestiture into "permitted property" during the 60-day period beginning on the date of such sale. "Permitted property" must consist only of obligations of the United States or "diversified investment funds." Subpart J defines what constitutes a "diversified investment fund" for this purpose.

Proposed § 2634.1002 would change the meaning of a "diversified investment fund," in paragraph (2) of the definition of permitted property, to track the definition of "diversified mutual fund" and "diversified unit investment trust" as those terms are used in 5 CFR 2640.102. However, similar to current § 2634.1003(a), proposed § 2634.1002 would continue to explain that ethics program requirements applicable to specific agencies and positions might, in some cases, limit the choices of "permitted property," including the specific "diversified investment fund" in which an employee may reinvest.

Several changes are proposed that would streamline the procedures OGE uses to issue a Certificate of Divestiture. Unlike the current regulation, the proposed rule would permit an employee to submit a written request for a Certificate of Divestiture on behalf of another eligible person such as a spouse or minor child. Under proposed § 2634.1004(a)(3), the employee would have to state in the request that the eligible person holding the property required to be divested has agreed to divest the property.

Proposed § 2634.1004(b)(1) would clarify the information related to financial disclosure that OGE needs to receive as part of the Certificate of Divestiture request in the case of a Government employee who is not required to file a financial disclosure report. Whereas current § 2634.1002(b)(1)(ii)(B) refers generally to information required to be disclosed on a financial disclosure report, a parallel provision in proposed § 2634.1004(b)(1) would require an employee who does not file a financial disclosure report to submit a listing of the employee's interests that would be required to be disclosed on a confidential financial disclosure report excluding gifts and travel reimbursements. Further, while the current regulation is silent as to the timing and length of the period for reporting this information, the proposed rule would clarify that the reporting period is the preceding twelve months from the date the requirement to divest first applied or the date the employee first agreed that the property would be divested. In the case of an employee who is required to file a financial disclosure report, the proposed rule would continue to require that OGE receive a copy of the latest report filed by the employee. The submission of information related to financial disclosure ensures that OGE can determine whether the employee has

agreed to divest all similar interests that create a conflict of interest.

In addition, the proposed rule would simplify the procedure for issuing a Certificate of Divestiture where a congressional committee requests divestiture of the property as a condition of confirmation and the request is consistent with a custom of the committee. To substantiate the request of a committee, proposed § 2634.1004(c) would allow the designated agency ethics official to submit a statement that shows a custom of the committee requires the property be divested as a condition of confirmation.

Finally, the proposed rule would also simplify the procedure related to the timing of a submission of a request to OGE. OGE will continue to consider requests submitted beyond the applicable time period for divestiture. However, proposed § 2634.1004(e) would require the designated agency ethics official to provide OGE with an explanation for the delay if the request is not submitted within the applicable time period specified in proposed § 2634.1004(e).

III. Matters of Regulatory Procedure

Administrative Procedure Act

Interested persons are invited to submit written comments to OGE on this proposed regulation, to be received on or before March 15, 2004. The Office of Government Ethics will review all comments received and consider any modifications to this rule as proposed which appear warranted before adopting the final rule on this matter.

Executive Order 12866

In promulgating this proposed rule, the Office of Government Ethics has adhered to the regulatory philosophy and the applicable principles of regulation set forth in section 1 of Executive Order 12866, Regulatory Review and Planning. In addition, these proposed amendments have been reviewed by the Office of Management and Budget under that Executive order. Moreover, in accordance with section 6(a)(3)(B) of E.O. 12866, the preamble to these proposed revisions, to be codified once finalized in a revised subpart J of 5 CFR part 2634, notes the legal basis and benefits of as well as the need for the regulatory action. There should be no appreciable increase in costs to OGE or the executive branch of the Federal Government in administering this regulation, once finalized, since the proposed provisions would only clarify and improve the Certificates of Divestiture regulatory procedures. Finally, this proposed rulemaking is not economically significant under the Executive order and will not interfere with State, local or tribal governments.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this proposed amendatory regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed amendatory rule will not have a significant economic impact on a substantial number of small entities because it primarily affects Federal executive branch employees and members of their immediate families.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply to this proposed amended regulation because it does not contain any information collection requirements that require the approval of the Office of Management and Budget.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this proposed rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (as adjusted for inflation) in any one year.

Congressional Review Act

The Office of Government Ethics has determined that this proposed rulemaking involves a nonmajor rule under the Congressional Review Act (5 U.S.C. chapter 8) and will, before the future final rule takes effect, submit a report thereon to the U.S. Senate, House of Representatives and General Accounting Office in accordance with that law.

List of Subjects in 5 CFR Part 2634

Certificates of divestiture, Conflict of interests, Financial disclosure, Government employees, Penalties, Privacy, Reporting and recordkeeping requirements, Trusts and trustees.

Approved: January 7, 2004.

Marilyn L. Glynn,

Acting Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to amend subpart J of 5 CFR part 2634 as follows:

PART 2634—EXECUTIVE BRANCH FINANCIAL DISCLOSURE, QUALIFIED TRUSTS, AND CERTIFICATES OF DIVESTITURE

1. The authority citation for part 2634 continues to read as follows:

Authority: 5 U.S.C. App. (Ethics in Government Act of 1978); 26 U.S.C. 1043; Pub. L. 101–410, 104 Stat. 890, 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990), as amended by Sec. 31001, Pub. L. 104–134, 110 Stat. 1321 (Debt Collection Improvement Act of 1996); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

2. Subpart J of part 2634 is revised to read as follows:

Subpart J—Certificates of Divestiture

Sec.

Subpart J—Certificates of Divestiture

§ 2634.1001 Overview.

(a) *Purpose.* 26 U.S.C. 1043 and the rules of this subpart allow an eligible person to defer the payment of capital gains tax on property that is sold in order to comply with conflict of interest requirements. In order to defer the gains, an eligible person must obtain a Certificate of Divestiture from the Director of the Office of Government Ethics before the sale of the property. This subpart describes the circumstances when a Certificate of Divestiture may be obtained and establishes the procedure that the Office of Government Ethics uses to issue Certificates of Divestiture.

(b) *Scope.* The Internal Revenue Service has jurisdiction over the tax aspects of a divestiture made pursuant to a Certificate of Divestiture. Internal Revenue Service requirements for reporting dispositions of property and making an election under section 1043 not to recognize capital gains must be followed by eligible persons wishing to make such an election. An eligible person seeking a Certificate of

Divestiture should consult his personal tax advisor and the Internal Revenue Service for guidance on these matters.

(c) *Policy.* The purpose of section 1043 and the rules of this subpart is to minimize the burden that would result from the payment of capital gains tax on the sale of assets to comply with conflict of interest requirements. Minimizing this burden will aid in attracting and retaining highly qualified personnel in the executive branch and will ensure the confidence of the public in the integrity of Government officials and decision-making processes.

§ 2634.1002 Definitions.

For purposes of this subpart:

Eligible person means:

(1) Any officer or employee of the executive branch of the Federal Government, except a person who is a special Government employee as defined in 18 U.S.C. 202;

(2) The spouse or any minor or dependent child of the individual referred to in paragraph (1) of this definition; and

(3) Any trustee holding property in a trust in which an individual referred to in paragraph (1) or (2) of this definition has a beneficial interest in principal or income.

Permitted property means:

(1) An obligation of the United States; or

(2) A diversified investment fund. A diversified investment fund is a diversified mutual fund or diversified unit investment trust, as defined in 5 CFR 2640.102(a), (k) and (u);

(3) Provided, however, a permitted property cannot be any holding prohibited by statute, regulation, rule, or Executive order. As a result, requirements applicable to specific agencies and positions may limit an eligible person's choices of permitted property. An employee seeking a Certificate of Divestiture should consult the appropriate designated agency ethics official to determine whether a statute, regulation, rule, or Executive order may limit choices of permitted property.

§ 2634.1003 General rule.

The Director of the Office of Government Ethics may issue a Certificate of Divestiture for specific property in accordance with the procedures of § 2634.1004 of this subpart if the Director determines that divestiture of the property by an eligible person is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or Executive order, or if divestiture is required by a congressional committee as a condition of confirmation. A Certificate of Divestiture cannot be issued for property that already has been sold.

Example 1 to § 2634.1003: An employee is directed to divest shares of stock, a limited partnership interest, and foreign currencies. If the sale of these assets will result in capital gains under the Internal Revenue Code, the employee may request and receive a Certificate of Divestiture.

Example 2 to § 2634.1003: An employee of the Department of Commerce is directed to divest his shares of XYZ stock acquired through the exercise of options held in an employee benefit plan. His gain from the sale of the stock will be treated as ordinary income. Because only capital gains realized under Federal tax law are eligible for deferral under section 1043, a Certificate of Divestiture cannot be issued for the sale of the XYZ stock.

Example 3 to § 2634.1003: During her Senate confirmation hearing, a nominee to a Department of Defense (DOD) position is directed to divest stock in a DOD contractor as a condition of her confirmation. Eager to comply with the order to divest, the nominee sells her stock immediately after the hearing and prior to being confirmed by the Senate. Once she is a DOD employee, she requests a Certificate of Divestiture for the stock. Because the Office of Government Ethics cannot issue a Certificate of Divestiture for property that has already been divested, the employee's request for a Certificate of Divestiture will be denied.

Example 4 to § 2634.1003: After receiving a Certificate of Divestiture, the spouse of a Food and Drug Administration employee sold stock in a regulated company. Between the time of the request for the Certificate of Divestiture and the sale of the stock, the stock price dropped and the spouse sold the stock at a loss. Because the sale of the stock did not result in capital gains, the spouse has no need for the Certificate of Divestiture and cannot submit it to the Internal Revenue Service for deferral of gains. No further action need be taken by the employee or the employee's spouse in connection with the Certificate of Divestiture.

§ 2634.1004 How to obtain a Certificate of Divestiture.

(a) *Employee's request to the designated agency ethics official.* An employee seeking a Certificate of Divestiture must submit a written request to the designated agency ethics official at his or her agency. The request must contain:

(1) A full and specific description of the property that will be divested. For example, if the property is corporate stock, the request must include the number of shares for which the eligible person seeks a Certificate of Divestiture;

(2) A brief description of how the eligible person acquired the property;

(3) A statement that the eligible person holding the property has agreed to divest the property; and

(4)(i) The date that the requirement to divest first applied; or

(ii) The date the employee first agreed that the eligible person would divest the property in order to comply with conflict of interest requirements.

(b) *Designated agency ethics official's submission to the Office of Government Ethics.* The designated agency ethics official must forward to the Director of the Office of Government Ethics the employee's written request described in paragraph (a) of this section. In addition, the designated agency ethics official must submit:

(1) A copy of the employee's latest financial disclosure report. If the employee is not required to file a financial disclosure report, the designated agency ethics official must obtain from the employee, and submit to the Office of Government Ethics, a listing of the employee's interests that would be required to be disclosed on a confidential financial disclosure report excluding gifts and travel reimbursements. For purposes of this listing, the reporting period is the preceding twelve months from the date the requirement to divest first applied or the date the employee first agreed that the eligible person would divest the property;

(2) An opinion that describes why divestiture of the property is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or Executive order; and

(3) A brief description of the employee's position or a citation to a statute that sets forth the duties of the position.

(c) *Divestitures required by a congressional committee.* In the case of a divestiture required by a congressional committee as a condition of confirmation, the designated agency ethics official must submit appropriate evidence that the committee requires the divestiture. A transcript of congressional testimony or a written statement from the designated agency ethics official concerning the committee's custom regarding divestiture are examples of evidence of the committee's requirements.

(d) *Divestitures for property held in a trust.* In the case of divestiture of property held in a trust, the employee must submit a copy of the trust instrument, as well as a list of the trust's current holdings, unless the holdings are listed on the employee's most recent financial disclosure report. In certain cases involving divestiture of property held in a trust, the Director may not issue a Certificate of Divestiture unless the parties take actions which, in the

opinion of the Director, are appropriate to exclude, to the extent practicable, parties other than eligible persons from benefitting from the deferral of capital gains. Such actions may include, as permitted by applicable State law, division of the trust into separate portfolios, special distributions, dissolution of the trust, or anything else deemed feasible by the Director, in his or her sole discretion.

Example 1 to paragraph (d): An employee has a 90% beneficial interest in an irrevocable trust created by his grandfather. His four adult children have the remaining 10% beneficial interest in the trust. A number of the assets held in the trust must be sold to comply with conflicts of interest requirements. Due to State law, no action can be taken to separate the trust assets. Because the adult children have a small interest in the trust and the assets cannot be separated, the Director may consider issuing a Certificate of Divestiture to the trustee for the sale of all of the conflicting assets.

(e) *Time requirements.* A request for a Certificate of Divestiture does not extend the time in which an employee otherwise must divest property required to be divested pursuant to an ethics agreement, or prohibited by statute, regulation, rule, or Executive order. Therefore, an employee must submit his or her request for a Certificate of Divestiture as soon as possible once the requirement to divest becomes applicable. The Office of Government Ethics will consider requests submitted beyond the applicable time period for divestiture. If the designated agency ethics official submits a request to the Office of Government Ethics beyond the applicable time period for divestiture, he must explain the reason for the delay. (See 5 CFR 2634.802 and 2635.403 for rules relating to the time requirements for divestiture.)

(f) *Response by the Office of Government Ethics.* After reviewing the materials submitted by the employee and the designated agency ethics official, and making a determination that all requirements have been met, the Director will issue a Certificate of Divestiture. The certificate will be sent to the designated agency ethics official who will then forward it to the employee.

§ 2634.1005 Rollover into permitted property.

(a) *Reinvestment of proceeds.* In order to qualify for deferral of capital gains, an eligible person must reinvest the proceeds from the sale of the property divested pursuant to a Certificate of Divestiture into permitted property during the 60-day period beginning on the date of the sale. The proceeds may be reinvested into one or more types of permitted property.

Example 1 to paragraph (a): A recently hired employee of the Department of Transportation receives a Certificate of Divestiture for the sale of a large block of stock in an airline. He may split the proceeds of the sale and reinvest them in an S&P Index Fund, a diversified Growth Stock Fund, and U.S. Treasury bonds.

Example 2 to paragraph (a): The Secretary of Treasury sells certain stock after receiving a Certificate of Divestiture and is considering reinvesting the proceeds from the sale into U.S. Treasury securities. However, because the Secretary of the Treasury is prohibited by 31 U.S.C. 329 from being involved in buying obligations of the United States Government, the Secretary cannot reinvest the proceeds in such securities. However, she may invest the proceeds in a diversified mutual fund. See the definition of *permitted property* at § 2634.1002.

(b) *Internal Revenue Service reporting requirements.* An eligible person who elects to defer the recognition of capital gains from the sale of property pursuant to a Certificate of Divestiture must follow Internal Revenue Service rules for reporting the sale of the property and the reinvestment transaction.

§ 2634.1006 Cases in which Certificates of Divestiture will not be issued.

The Director of the Office of Government Ethics, in his or her sole discretion, may deny a request for a Certificate of Divestiture in cases where an unfair or unintended benefit would result. Examples of such cases include:

(a) *Employee benefit plans.* The Director will not issue a Certificate of Divestiture if the property is held in a pension, profit-sharing, stock bonus, or other employee benefit plan and can otherwise be rolled over into an eligible tax-deferred retirement plan within the 60-day reinvestment period.

(b) *Complete divestiture.* The Director will not issue a Certificate of Divestiture unless the employee agrees to divest all of the property that presents a conflict of interest, as well as other similar or related property that also presents a conflict of interest under a Federal conflict of interest statute, regulation, rule, or Executive order. However, any property that qualifies for a regulatory exemption at 5 CFR part 2640 need not be divested for a Certificate of Divestiture to be issued.

Example 1 to paragraph (b): A new senior official at the Federal Aviation Administration owns stock in several airlines. The official is expected to participate in a matter dealing with the imposition of new safety standards on commercial airlines. The employee must divest his interest in all of the airline stock that exceeds the amounts he is permitted to retain under the exemptions to 18 U.S.C. 208, which are described at 5 CFR part 2640.

Example 2 to paragraph (b): A Department of Agriculture employee owns shares of stock in Better Workspace, Inc. valued at $25,000. As part of his official duties, the employee is assigned to evaluate bids for a contract to renovate office space at his agency. The Department's designated agency ethics official discovers that Better Workspace is one of the companies that has submitted a bid and directs the employee to sell his stock in the company. Because Better Workspace is a publicly traded security, the employee could retain up to $15,000 of the stock under the regulatory exemption for interests in securities at 5 CFR 2640.202(a). He would be able to request a Certificate of Divestiture for the $10,000 of Better Workspace stock that is not covered by the exemption. Alternatively, he could request a Certificate of Divestiture for the entire $25,000 worth of stock. If he chooses to sell his stock down to an amount permitted under the regulatory exemption, the Office of Government Ethics will not issue additional Certificates of Divestiture if the value of the stock goes above $15,000 again.

(c) *Property acquired under improper circumstances.* The Director will not issue a Certificate of Divestiture:

(1) If the eligible person acquired the property at a time when its acquisition was prohibited by statute, regulation, rule, or Executive order; or

(2) If circumstances would otherwise create the appearance of a conflict with the conscientious performance of Government responsibilities.

§ 2634.1007 Public access to a Certificate of Divestiture.

A Certificate of Divestiture issued pursuant to the provisions of this subpart is available to the public in accordance with the rules of § 2634.603 of this part.

[FR Doc. 04–685 Filed 1–12–04; 8:45 am]
BILLING CODE 6345–02–P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1135

[Docket No. AO–380–A18; DA–01–08–W]

Milk in the Western Marketing Area; Proposed Termination of the Order

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed termination of order.

SUMMARY: This document invites written comments on the proposed termination of the order regulating the handling of milk in the Western marketing area. A proposal amending the Western order failed to receive the required two-thirds

approval in a recent producer referendum. Since the Department has determined that the provisions of the proposed amended order are necessary to effectuate the declared policy of the applicable statutory authority, it is necessary to consider terminating the present order.

DATES: Comments are due on or before February 12, 2004.

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

SUPPLEMENTARY INFORMATION: The Department is issuing this proposed action in conformance with Executive Order 12866.

This proposed termination has been reviewed under Executive Order 12988, Civil Justice Reform. This action is not intended to have a retroactive effect. If adopted, this proposed action will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with the action.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Small Business Consideration

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this proposed action will not have a significant economic impact on a substantial number of small entities. This rule would eliminate the regulatory impact of the order on dairy farmers and regulated handlers. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than $750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees.

In the Western Federal milk order 550 of the 860 dairy producers (farmers), or 64 percent, whose milk was pooled under the order in June 2003 would meet the definition of small businesses. On the processing side, 15 of the 42 milk plants or 36 percent associated with the Western milk order during June 2003 would qualify as "small businesses".

Interested parties are invited to submit comments on the probable regulatory and informational impact of this proposed action on small entities.

Proposed Termination of Rule

Notice is hereby given that, pursuant to the provisions of the Agricultural Marketing Agreement Act, the termination of the order regulating the handling of milk in the Western marketing area is being considered.

All persons who want to send written data, views, or arguments about the proposed termination should send two copies to the USDA/AMS/Dairy Division, Order Formulation and Enforcement Branch Room 2971—Stop 0231, 1400 Independence Avenue, SW., Washington, DC 20250–0231, by the 30th day after the publication of this notice in the **Federal Register**. The period for filing comments is limited to 30 days because a longer period would not provide the time needed to complete the required procedures before the termination is to be effective.

The comments that are received will be made available for public inspection in the Dairy Division during normal business hours (7 CFR 1.27 (b)).

Statement of Consideration

The proposed action would terminate the order regulating the handling of milk in the Western marketing area.

On August 8, 2003, the Department issued a tentative final decision on proposed amendments to the Western Federal milk order, which was published August 18, 2003 (68 FR 49375). The document was then followed by a referendum order for the Western marketing area to ascertain whether producers supplying that market approve the issuance of the proposed amended order.

The enabling statute requires that at least two-thirds of the producers (measured in terms of either number or volume) voting in a referendum must approve the issuance of a order before it can be put into effect. Less than two-thirds percent of the voting producers in the referendum approved the issuance of the proposed amended order for the Western marketing area. In these circumstances, where it has been concluded that the order should be amended to effectuate the declared policy of the enabling statute and that the amended order was not approved by producers, it appears that continuation of the existing Western order would not be in conformity with the applicable statutory authority. Therefore, it is necessary to consider terminating the present order.

The period for filing comments is limited to 30 days because a longer period would not provide the time needed to complete the required procedures before and coordinate the termination with amendatory action being taken on milk orders for neighboring markets.

List of Subjects in 7 CFR Part 1135

Milk marketing orders.

Authority: 7 U.S.C. 601–674.

Dated: January 7, 2004.

A.J. Yates,

Administrator, Agricultural Marketing Service.

[FR Doc. 04–689 Filed 1–12–04; 8:45 am]

BILLING CODE 3410–02–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD05–03–168]

RIN 1625–AA–09

Drawbridge Operation Regulation; Chincoteague Channel, Chincoteague, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commander, Fifth Coast Guard District, is proposing to change the regulations that govern the operation of the SR 175 drawbridge across the Chincoteague Channel, mile 3.5, at Chincoteague, Virginia. These regulations are necessary to facilitate public safety during the Annual Pony Swim. This proposed change to the drawbridge operation schedule will allow the Chincoteague Channel Bridge to remain in the closed position from 7 a.m. to 5 p.m. on the last Wednesday and Thursday in July of every year.

DATES: Comments and related material must reach the Coast Guard on or before March 15, 2004.

ADDRESSES: You may mail comments and related material to the Commander (oan-b), Fifth Coast Guard District, Federal Building, 4th Floor, 431 Crawford Street, Portsmouth, Virginia 23703–5004. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the above address between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Linda L. Bonenberger, Bridge Management Specialist, Fifth Coast Guard District, at (757) 398–6227.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (CGD05–03–168), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8 1/2 by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not plan to hold a public meeting. But you may submit a request for a meeting by writing to the Commander, Fifth Coast Guard District at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

Background and Purpose

The Town of Chincoteague has requested a change from the current operating regulation set out in 33 CFR 117.5 that requires the drawbridge to open promptly and fully for the passage of vessels when a request to open is given.

The purpose of the change is to accommodate the Pony Swim across the Assateague Channel between Assateague Island and Chincoteague Island that takes place every year on the last Wednesday and Thursday in July. The herd is owned by the Chincoteague Volunteer Fire Department and managed by the National Park Service. This annual event began in the 1700's, but in 1925 the Fire Department took over the event that is also referred to as the Chincoteague Volunteer Fireman's Carnival. The proceeds from the auctioning of the ponies provide a source of revenue for the fire company and it also serves to trim the herd's numbers. On Wednesdays, the ponies are led across the Assateague Channel from Assateague Island to Chincoteague where they are auctioned off. On Thursdays, the remaining ponies are led back across the channel to Assateague Island.

Due to the high volume of spectators that attend this yearly event, it is necessary to close the draw span on each of these days between the hours of 7 a.m. to 5 p.m. This will reduce vehicular traffic congestion and increase public safety on this small island as a result of drawbridge openings where the SR 175 bridge is the only access.

The proposed change would allow the Chincoteague Channel Bridge to remain in the closed position each year from 7 a.m. to 5 p.m. on the last Wednesday and Thursday of July.

Since the Pony Swim is a well-known annual event, and is publicly advertised, vessel operators can arrange their transits to minimize any impact caused by the closure. Vessel operators with mast heights lower than 15 feet still can transit through the fixed bridge across Chincoteague Channel during this event since only the bridge is closed and not the waterway. The Atlantic Ocean is the only alternate route for vessels with a mast height greater than 15 feet.

Discussion of Proposed Rule

We propose to change the current operating regulation set out in 33 CFR 117.5 that requires the drawbridge to open on demand for the passage of vessels when a request to open is given. A new section, 117.1005, would be inserted and allow the bridge to remain closed to vessel traffic from 7 a.m. to 5 p.m. on the last Wednesday and Thursday in July of every year.

Regulatory Evaluation

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

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

This conclusion was based on the fact that the proposed change will have a very limited impact on maritime traffic transiting this area. Since the Chincoteague Channel will remain open to navigation during this event, mariners with mast height less than 15 feet may still transit through the bridge and vessels with mast height greater than 15 feet can use the Atlantic Ocean to the west or transit after the closed hours.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

The proposed rule would not have a significant economic impact on a substantial number of small entities because even though the rule closes the Chincoteague Channel bridge to mariners, those with mast heights less than 15 feet will still be able to transit through the bridge during the closed hours and mariners whose mast heights are greater than 15 feet will be able to use the Atlantic Ocean as an alternate route or transit after the closed hours.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1966 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact Waverly

Gregory, Bridge Administrator, Fifth Coast Guard District, (757) 398–6222.

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Environment

We have analyzed this proposed rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this proposed rule is categorically excluded, under figure 2–1, paragraph (32)(e) of the Instruction, from further environmental documentation. Allowing the draw to remain closed for vessels at the times indicated on the last Wednesday and Thursday in July of every year would have no individually or cumulatively significant impact on the environment.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

2. § 117.1005 is added to read as follows:

§ 117.1005 Chincoteague Channel.

The draw of the SR 175 bridge, mile 3.5 at Chincoteague need not open for the passage of vessels from 7 a.m. to 5 p.m. on the last Wednesday and Thursday in July of every year.

Dated: December 31, 2003.

Sally Brice-O'Hara,

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

[FR Doc. 04–637 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AI73

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for Three Threatened Mussels and Eight Endangered Mussels in the Mobile River Basin

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the reopening of the comment period for the proposed rule to designate critical habitat for 11 mussels in the Mobile River Basin under the Endangered Species Act of 1973, as amended (Act). The comment period is being reopened to provide notification to Clay, Elmore, Lee, and Lowndes Counties, Alabama, and to allow all interested parties another opportunity to comment on the proposed rule and the associated draft economic analysis. Comments previously submitted need not be resubmitted and will be fully considered in the final determination of the proposal.

DATES: The comment period is hereby reopened until January 23, 2004. We must receive comments on the proposal and draft economic analysis from all interested parties by the closing date. Any comments that we receive after the closing date will not be considered in the final rule.

ADDRESSES: Copies of the proposed designation and draft economic analysis are available on the Internet at *http://southeast.fws.gov/hotissues,* or by writing to the Field Supervisor, U.S. Fish and Wildlife Service, 6578 Dogwood View Parkway, Suite A, Jackson, MS 39213; or by calling Mississippi Field Office, telephone 601/965–4900.

Written comments and materials concerning the proposal or draft economic analysis may be submitted to us by any one of several methods:

1. You may submit written comments and information to the Field Supervisor, U.S. Fish and Wildlife Service, 6578 Dogwood View Parkway, Suite A, Jackson, MS 39213.

2. You may hand-deliver written comments and information to our Mississippi Field Office, at the above address, or fax your comments to 601/965–4340.

3. You may send comments by electronic mail (e-mail) to *paul_hartfield@fws.gov*. For directions on how to submit electronic filing of comments, see the "Public Comments Solicited" section.

Comments and materials received, as well as supporting documentation used in preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Paul Hartfield, Mississippi Field Office, at the above address (telephone 601/321–1125, facsimile 601/965–4340).

SUPPLEMENTARY INFORMATION:

Background

We listed the fine-lined pocketbook, orange-nacre mucket, and Alabama moccasinshell as threatened species, and the Coosa moccasinshell, ovate clubshell, southern clubshell, dark pigtoe, southern pigtoe, triangular kidneyshell, upland combshell, and southern acornshell as endangered species under the Act on March 17, 1993 (58 FR 14330).

On March 26, 2003, we published in the **Federal Register** a proposed rule to designate critical habitat for these species (68 FR 14752). The proposed designation includes portions of the Tombigbee River drainage in Mississippi and Alabama; portions of the Black Warrior River drainage in Alabama; portions of the Alabama River drainage in Alabama; portions of the Cahaba River drainage in Alabama; portions of the Tallapoosa River drainage in Alabama and Georgia; and portions of the Coosa River drainage in Alabama, Georgia, and Tennessee. The proposed designation encompasses a total of approximately 1,760 kilometers (km) (1,093 miles (mi)) of river and stream channels.

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area as critical habitat, provided such exclusion will not result in the extinction of the species. Consequently, we prepared a draft economic analysis concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES** section). On August 14, 2003 (68 FR 48581), the comment period was reopened through October 14, 2003, to receive comments on the draft economic analysis and to accommodate a public hearing. The public hearing was held on October 1, 2003, in Birmingham, Alabama.

Section 4(b)(5) of the Act requires that we give actual notice of the proposed regulation to the States and to each county in which the species are believed to occur.

Following closure of the second comment period on October 14, 2003, we became aware that we had failed to directly notify four of the counties affected by the proposed critical habitat designation. Therefore, we have provided the regulation to Clay, Elmore, Lee, and Lowndes Counties, Alabama, and reopened the comment period until the date specified above in DATES, to allow all interested parties another opportunity to comment on the proposed rule and the associated draft economic analysis. Legal notices announcing the reopening of the comment period are being published in newspapers concurrently with this **Federal Register** notice. For further information regarding the proposed critical habitat for the 11 Mobile River Basin mussels, please refer to the proposed rule (68 FR 14752; March 26, 2003).

Public Comments Solicited

We are soliciting comments and information from the public, governmental agencies, the scientific community, industry, or any other interested party on any aspects of the proposed designation of critical habitat for the 11 Mobile River Basin mussels or the draft economic analysis. The comment period for both the proposed rule and the draft economic analysis now closes on the date specified above in **DATES**. Previously submitted comments and information need not be resubmitted. Our final determination on the proposed critical habitat will take into consideration comments and any additional information received by the date specified above.

Please submit electronic comments as an ASCII file format and avoid the use of special characters and encryption. Please also include "Attn: RIN 1018–AI73" and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly by calling our Mississippi Field Office (see **ADDRESSES** section).

Our practice is to make all comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. In some circumstances, we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this prominently at the beginning of your comments. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Author

The primary author of this notice is Paul Hartfield (see **ADDRESSES** section).

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: December 23, 2003.

Paul Hoffman,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 04–514 Filed 1–12–04; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register
Vol. 69, No. 8
Tuesday, January 13, 2004

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Foreign Agricultural Service

Trade Adjustment Assistance for Farmers

AGENCY: Foreign Agricultural Service, USDA.

ACTION: Notice.

The Administrator, Foreign Agricultural Service (FAS), today denied a petition for trade adjustment assistance (TAA) that was filed on December 4, 2003, by the U.S. Rice Producers Association, Houston, Texas.

SUPPLEMENTARY INFORMATION: Upon investigation, the Administrator determined that increasing imports of rice did not contribute importantly to the decline in domestic producer prices during the August 2002—July 2003 marketing year. Key factors contributing to the decline, according to an investigation conducted for the Administrator, were the growth in U.S. production and increased carry-in stocks of U.S.-produced rice. Increases in rice imports had only a minimal impact on the decline in domestic producer prices, because most imports are varieties of rice not produced in the United States and thus not directly competitive with U.S. rice production.

FOR FURTHER INFORMATION, CONTACT: Jean-Louis Pajot, Coordinator, Trade Adjustment Assistance for Farmers, FAS, USDA, (202) 720–2916, E-mail: *trade.assistance@fas.usda.gov.*

Dated: January 8, 2004.

A. Ellen Terpstra,

Administrator, Foreign Agricultural Service.

[FR Doc. 04–793 Filed 1–12–04; 8:45 am]

BILLING CODE 3410–10–P

DEPARTMENT OF AGRICULTURE

Forest Service

Trinity County Resource Advisory Committee (RAC)

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Trinity County Resource Advisory Committee (RAC) will meet on February 2, 2004 in Weaverville, California. The purpose of the meeting is to discuss the selection of Title II projects under Pub. L. 106–393, H.R. 2389, the Secure Rural Schools and Community Self-Determination Act of 2000, also called the "Payments to States" Act.

DATES: The meeting will be held on February 2, 2004 from 6:30 to 8:30 p.m.

ADDRESSES: The meeting will be held at the Trinity County Public Utilities District Conference Room, 26 Ponderosa Lane, Weaverville, California.

FOR FURTHER INFORMATION CONTACT: Joyce Andersen, Designated Federal Official, USDA, Shasta Trinity National Forests, P.O. Box 1190, Weaverville, CA 96093. Phone: (530) 623–1709. E-mail: *jandersen@fs.fed.us.*

SUPPLEMENTARY INFORMATION: The meeting will focus on developing a strategy for selecting Title II projects for implementation in Fiscal Year 2005. There will also be brief presentations about the Healthy Forests Restoration Act and Stewardship contracting. The meeting is open to the public. Public input opportunity will be provided and individuals will have the opportunity to address the committee at that time.

Dated: January 7, 2004.

Jean M. Hawthorne,

Acting Deputy Forest Supervisor.

[FR Doc. 04–629 Filed 1–12–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Ouachita-Ozark Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Meeting notice for the Ouachita-Ozark Resource Advisory Committee under Section 205 of the Secure Rural Schools and Community Self Determination Act of 2000 (Pub. L. 106–393.

SUMMARY: This notice is published in accordance with section 10(a)(2) of the Federal Advisory Committee Act. Meeting notice is hereby given for the Ouachita-Ozark Resource Advisory Committee pursuant to Section 205 of the Secure Rural Schools and Community Self Determination Act of 2000, Public Law 106–393. Topics to be discussed include: Scott County Title II projects and next meeting dates and agendas.

DATES: The meeting will be held on January 29, 2004, beginning at 6 p.m. and ending at approximately 9 p.m.

ADDRESSES: The meeting will be held at the Scott County Courthouse, 100 W. First Street, Waldron, AR 71958.

FOR FURTHER INFORMATION CONTACT: Caroline Mitchell, Committee Coordinator, USDA, Ouachita National Forest, P.O. Box 1270, Hot Springs, AR 71902. (501–321–5318).

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Committee discussion is limited to Forest Service staff, Committee members, and elected officials. However, persons who wish to bring matters to the attention of the Committee may file written statements with the Committee staff before or after the meeting. A public input session will be provided and individuals who made written requests by January 28, 2004, will have the opportunity to address the committee at that session. Individuals wishing to speak or propose agenda items must send their names and proposals to Bill Pell, DFO, P.O. Box 1270, Hot Springs, AR 71902.

Dated: January 5, 2004.

Bill Pell,

Designated Federal Officer.

[FR Doc. 04–634 Filed 1–12–04; 8:45 am]

BILLING CODE 3410–52–M

DEPARTMENT OF AGRICULTURE

Grain Inspection, Packers and Stockyards Administration

Deposting of Stockyards

AGENCY: Grain Inspection, Packers and Stockyards Administration, USDA.

ACTION: Notice.

SUMMARY: We are deposting four stockyards. These facilities can no longer be used as stockyards and, therefore, are no longer required to be posted.

EFFECTIVE DATE: January 13, 2004.

SUPPLEMENTARY INFORMATION: The Grain Inspection, Packers and Stockyards Administration (GIPSA) administers and enforces the Packers and Stockyards Act of 1921, as amended and supplemented (7 U.S.C. 181—229) (P&S Act). The P&S Act prohibits unfair, deceptive, and fraudulent practices by livestock market agencies, dealers, stockyard owners, meat packers, swine contractors, and live poultry dealers in the livestock, poultry, and meatpacking industries.

Section 302 of the P&S Act (7 U.S.C. 202) defines the term "stockyard" as follows:

* * * any place, establishment, or facility commonly known as stockyards, conducted, operated, or managed for profit or nonprofit as a public market for livestock producers, feeders, market agencies, and buyers, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce.

Section 302(b) of the P&S Act requires the Secretary to determine which stockyards meet this definition, and to notify the owner of the stockyard and the public of that determination by posting a notice in each designated stockyard. After giving notice to the stockyard owner and to the public, the stockyard is subject to the provisions of Title III of the P&S Act (7 U.S.C. 201–203 and 205–217a) until the Secretary deposts the stockyard by public notice.

We depost a stockyard when the facility can no longer be used as a stockyard. Some of the reasons a facility can no longer be used as a stockyard include: the facility has been moved and the posted facility is abandoned, the facility has been torn down or otherwise destroyed, such as by fire, the facility is dilapidated beyond repair, or the facility has been converted and its function changed.

This document notifies the public that the following four stockyards no longer meet the definition of stockyard and that we are deposting the facilities.

Facility No.	Stockyard name and location	Date posted
CO–151	Western Slope Livestock Auction, Montrose, Colorado	January 26, 1984.
ID–125	Weiser Livestock Commision, Weiser, Idaho	March 29, 1950.
MO–228	Nixa Livestock Auction Co., Nixa, Missouri	October 24, 1972.
TX–165	Ennis Livestock Market Co., Ennis, Texas	January 09, 1957.

Effective Date

This notice is effective upon publication in the **Federal Register** because it relieves a restriction and, therefore, may be made effective in less than 30 days after publication in the **Federal Register** without prior notice or other public procedure.

Authority: 7 U.S.C. 202.

Donna Reifschneider,

Administrator, Grain Inspection, Packers and Stockyards Administration.

[FR Doc. 04-570 Filed 1–12–04; 8:45 am]

BILLING CODE 3410–EN–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Dairyland Power Cooperative, Inc.; Notice of Intent To Hold Public Scoping Meetings and Prepare an Environmental Impact Statement

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of intent to hold public scoping meetings and prepare an environmental impact statement.

SUMMARY: The Rural Utilities Service (RUS) intends to hold public scoping meetings and prepare an environmental impact statement (EIS) in connection with possible impacts related to a project being proposed by Dairyland Power Cooperative, Inc. (DPC), of La Crosse, Wisconsin. The proposal consists of the construction and operation of a coal-fired electric generation facility, consisting of a single 400 Megawatt (MW) unit, at a site in Mitchell or Chickasaw Counties, Iowa.

DATES: RUS will conduct the public scoping meetings in an open-house format on January 28, 2004, from 3 p.m. to 7 p.m., at the Pinicon Restaurant, Highway 63 and 18 South, in New Hampton, Iowa, and on January 29, 2004, from 3 p.m. to 7 p.m., at the First Lutheran Church, 212 North Main Street, in St. Ansger, Iowa.

FOR FURTHER INFORMATION CONTACT: Nurul Islam, Environmental Protection Specialist, RUS, Engineering and Environmental Staff, 1400 Independence Avenue, SW., Stop 1571, Washington, DC 20250–1571, telephone: (202) 720–1414 or e-mail: *nurul.islam@usda.gov,* or Rob Palmberg, Dairyland Power Cooperative, Inc., 3200 East Avenue South, La Crosse, WI 54602–0817, telephone: (608) 788–4000, extension 483 or e-mail: *rmp@dairynet.com.*

SUPPLEMENTARY INFORMATION: DPC proposes to construct and operate a 400 MW coal-fired electric generation facility at one of two sites in northeast Iowa. The Otranto site is located approximately 6 miles north of St. Ansgar in Mitchell County. The New Hampton site is located approximately 4 miles east of New Hampton in Chickasaw County. Construction of the project will require interconnection with existing electric transmission lines, the upgrade of existing electric transmission lines and/or the construction of new electric transmission lines. The schedule developed by DPC would place the facility in commercial operation by the spring of 2009. Alternatives to be considered by RUS include no action, purchased power, load management, renewable energy sources, distributed generation, and alternative site locations. Comments regarding the proposed project may be submitted (orally or in writing) at the public scoping meetings or in writing within 30 days after the January 29, 2004, meeting to RUS at the address provided in this notice.

The DPC and their consultants have prepared an alternatives evaluation and a site selection study for the proposed project. The studies are available for public review at RUS or DPC, at the addresses provided in this notice. These studies are also available at the public libraries in St. Ansgar and New Hampton. Please consult local notices for locations.

From information provided in the studies mentioned above, input that

may be provided by government agencies, private organizations, and the public, RUS will prepare a Draft EIS. The Draft EIS will be available for review and comment for 45 days. A Final EIS will then be prepared that considers all comments received. The Final EIS will be available for review and comment for 30 days. Following the 30-day comment period, RUS will prepare a Record of Decision (ROD). Notices announcing the availability of the Draft and Final EIS and the ROD will be published in the **Federal Register** and in local newspapers.

Any final action by RUS related to the proposed project will be subject to, and contingent upon, compliance with all relevant Federal, State and local environmental laws and regulations and completion of the environmental review requirements as prescribed in the RUS Environmental Policies and Procedures (7 CFR part 1794).

Dated: January 5, 2004.

Lawrence R. Wolfe,

Acting Director, Engineering and Environmental Staff.

[FR Doc. 04–604 Filed 1–12–04; 8:45 am]

BILLING CODE 3410–15–P

CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

Notice To Cancel a Sunshine Act Meeting Scheduled for January 14, 2004

The January 14, 2004, public meeting of the Chemical Safety and Hazard Investigation Board in connection with its investigation into the cause of a deadly explosion and the leakage of 26,000 pounds of aqua ammonia into the atmosphere from the DD Williamson & Co., Inc. plant in Louisville, Kentucky, has been cancelled. The public meeting had been scheduled to begin at 9:30 a.m. local time on January 14, 2004, at the Galt House, 140 North Fourth Street, Louisville, KY. The original **Federal Register** notice announcing the meeting was published on Thursday, December 18, 2003, 68 FR 70487.

Due to the recent receipt of new information relevant to the investigation and the need to conduct further inquiry, the Board (Merritt, Poje, Bresland, and Medina) has unanimously voted to cancel the meeting scheduled for January 14, 2004, and to reschedule it for a later date.

The DD Williamson incident occurred at 2:10 a.m. on Friday, April 11, 2003, when a vessel explosion at the DD Williamson plant killed an operator and caused extensive damage to the western end of the facility. As a consequence of the explosion, 26,000 pounds of aqua ammonia (29.4% ammonia solution in water) leaked into the atmosphere, forcing the evacuation of 26 residents. The DD Williamson plant employs approximately 45 people and is located in a mixed industrial and residential neighborhood approximately 1.5 miles east of downtown Louisville.

For more information, please contact Raymond Porfiri at the Chemical Safety and Hazard Investigation Board at (202) 261–7600, or visit our Web site at: *www.csb.gov.*

Raymond C. Porfiri,

Deputy General Counsel.

[FR Doc. 04–792 Filed 1–9–04; 1:05 pm]

BILLING CODE 6350–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket No. 54–2002]

Foreign-Trade Zone 202: Application for Expansion and Reorganization Amendment of Application

Notice is hereby given that the application of the Board of Harbor Commissioners of the City of Los Angeles, grantee of FTZ 202, for authority to expand and reorganize FTZ 202 in the Los Angeles, California, area (Doc. 54–2002, 67 FR 72643, 12/6/02, and as amended, 68 FR 17342, 4/9/03), has been further amended to include a parcel (0.39 acres, 10,833 sq. ft. bldg.) at the Howard Hartry, Inc. facility as part of Site 1 at the Port of Los Angeles Harbor complex and to include a parcel (2.53 acres, 110,092 sq. ft. bldg.) at the Exel Global Logistics, Inc. facility as part of Site 2 at the Los Angeles International Airport. The application otherwise remains unchanged.

Comments on the change may be submitted to the Foreign-Trade Zones Board, U.S. Department of Commerce, FCB—Suite 4100W, 1401 Constitution Avenue, NW., Washington, DC 20230, by January 30, 2004.

Dated: January 7, 2004.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 04–703 Filed 1–12–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1310]

Expansion of Foreign-Trade Zone 2 New Orleans, LA

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board of Commissioners of the Port of New Orleans, grantee of Foreign-Trade Zone No. 2, submitted an application to the Board for authority to expand FTZ 2 in the New Orleans, Louisiana area, within the New Orleans Customs port of entry (FTZ Docket 50–2002, filed 11/6/2002; amended 2/3/03);

Whereas, notice inviting public comment was given in the **Federal Register** (67 FR 70047, 11/20/2002 and 68 FR 5270, 2/3/03) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal, as amended, is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand FTZ 2, as amended, is approved, subject to the Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 30th day of Decemeber 2003.

James J. Jochum,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 04–701 Filed 1–12–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1314]

Expansion of Foreign-Trade Zone 93, Research Triangle Park, North Carolina, Area

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Triangle J Council of Governments, grantee of Foreign-Trade

Zone 93, submitted an application to the Board for authority to expand FTZ 93 to include on a permanent basis the area within Temporary Site 1A (85 acres) located at the World Trade Park adjacent to Raleigh-Durham International Airport, and to replace existing Site 3 with a new Site 3 (240 acres) located at the Holly Springs Business Park in Holly Springs, North Carolina, within the Raleigh-Durham Customs port of entry (FTZ Docket 31–2003; filed 6/18/03);

Whereas, notice inviting public comment was given in the **Federal Register** (68 FR 38010, 6/26/03) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest;

Now, therefore, the Board hereby orders:

The application to expand FTZ 93 is approved, subject to the Act and the Board's regulations, including Section 400.28.

Signed at Washington, DC, this 30th day of December 2003.

James J. Jochum,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 04–702 Filed 1–12–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570–827]

Certain Cased Pencils from the People's Republic of China; Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Preliminary Results and Rescission in Part of the Antidumping Duty Administrative Review of Certain Cased Pencils from the People's Republic of China.

SUMMARY: The Department of Commerce (the Department) has preliminarily determined that sales by the respondents in this review, covering the period December 1, 2001, through November 30, 2002, have been made at prices less than normal value (NV). In addition, we are rescinding this review with respect to Guangdong Stationery & Sporting Goods Imports & Export Co., Ltd. (GSSG) because GSSG withdrew its request for an administrative review in a timely manner and no other interested party requested a review of GSSG. Furthermore, we are preliminarily rescinding this review with respect to Tianjin Custom Wood Processing Co., Ltd. (TCW) because TCW reported, and the Department confirmed, that it made no shipments of subject merchandise to the United States during the period of review (POR). If these preliminary results are adopted in the final results of this review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. The Department invites interested parties to comment on these preliminary results.

EFFECTIVE DATE: January 13, 2004.

FOR FURTHER INFORMATION CONTACT: Paul Stolz, Christopher Zimpo or Magd Zalok, AD/CVD Enforcement, Office 4, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC, 20230; telephone (202) 482–4474, (202) 482–2747 and (202) 482–4162, respectively.

SUPPLEMENTARY INFORMATION:

Period of Review

The POR is December 1, 2001 through November 30, 2002.

Background

On December 2, 2002, the Department published in the **Federal Register** a notice of "Opportunity to Request Administrative Review" of the antidumping duty order on certain cased pencils from the People's Republic of China (PRC), covering the period December 1, 2001, through November 30, 2002. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 67 FR 71533–34.

On December 27, 2002, in accordance with 19 C.F.R. §351.213(b), a PRC exporter, Shandong Rongxin Import and Export Co., Ltd. (Rongxin), and a PRC producer of pencils, Laizhou City Guangming Pencil-Making Co., Ltd., requested an administrative review of the order on certain cased pencils from the PRC. On December 30, 2002, the Writing Instrument Manufacturers Association, a trade association composed of domestic pencil producers, and Sanford Corporation; Tennessee Pencil Company, Musgrave Pencil Company, Moon Products, Inc., and General Pencil Company (collectively, the petitioners), requested that the Department conduct an administrative review of exports of subject merchandise made by 12 producers/exporters.[1] In addition, on December 31, 2002, China First Pencil Company, Ltd. (CFP/Three Star[2]), Orient International Holding Shanghai Foreign Trade Co., Ltd. (SFTC) and GSSG requested reviews of their exports of subject merchandise to the United States.

The Department published a notice announcing its initiation of an antidumping duty administrative review covering the exports of the above-referenced companies during the POR. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 68 FR 3009 (January 22, 2003).

On January 15, 2003, we issued antidumping duty questionnaires to the exporters/producers subject to this review. In its February 21, 2003 response to the Department's questionnaire, TCW stated that it did not export subject merchandise to the United States during the POR. On February 26, 2003, within 90 days of publication of the notice of initiation for this review, GSSG withdrew its request for an administrative review. CFP/Three Star, SFTC and Rongxin submitted timely questionnaire responses. The remaining exporters/producers did not submit questionnaire responses and did not request that we extend the applicable deadlines for doing so.

Pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (the Act),

[1] The 12 producers/exporters covered by the petitioners' request are Rongxin, China First Pencil Company, Ltd./Shanghai Three Star Stationery Industry Corp., Orient International Holding Shanghai Foreign Trade Co., Ltd., Tianjin Custom Wood Processing Co., Ltd., Anhui Import/Export Group Corp., Beijing Light Industrial Products Import/Export Corporation, China National Light Industrial Products Import/Export Corp., Dalian Light Industrial Products Import/Export Corp., Liaoning Light Industrial Products Import/Export Corp., Qingdao Light Industrial Products Import/Export Corp., Shandong Light Industrial Products Imports/Export Corp., and Sichuan Light Industrial Products Import/Export Corp.

[2] In the final results of the 1999 - 2000 administrative review of the order on certain cased pencils from the PRC, the Department determined that CFP and Shanghai Three Star Stationery Industry Corp. (Three Star) are sufficiently intertwined to warrant treating these two entities as a single entity for purposes of our antidumping analysis. This combined entity is referred to herein as CFP/Three Star. *See Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 67 FR 48612,48613 (July 25, 2002).

the Department may extend the deadline for completion of the preliminary results of an administrative review if it determines that it is not practicable to complete the preliminary results of a review within the statutory time limit of 245 days. On August 19, 2003, in accordance with the Act, the Department extended the time limit for the preliminary results of this review until December 31, 2003. *See Certain Cased Pencils from the People's Republic of China: Extension of Time Limit for Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 51551 (August 27, 2003).

The Department is conducting this administrative review in accordance with section 751 of the Act.

Scope of the Order

Imports covered by this order are shipments of certain cased pencils of any shape or dimension (except as noted below) which are writing and/or drawing instruments that feature cores of graphite or other materials, encased in wood and/or man-made materials, whether or not decorated and whether or not tipped (*e.g.*, with erasers, etc.) in any fashion, and either sharpened or unsharpened. The pencils subject to the order are classified under subheading 9609.10.00 of the Harmonized Tariff Schedule of the United States (HTSUS). Specifically excluded from the scope of the order are mechanical pencils, cosmetic pencils, pens, non-cased crayons (wax), pastels, charcoals, chalks, and pencils produced under U.S. patent number 6,217,242, from paper infused with scents by the means covered in the above-referenced patent, thereby having odors distinct from those that may emanate from pencils lacking the scent infusion. Also excluded from the scope of the order are pencils with all of the following physical characteristics: 1) length: 13.5 or more inches; 2) sheath diameter: not less than one-and-one quarter inches at any point (before sharpening); and 3) core length: not more than 15 percent of the length of the pencil.

Although the HTSUS subheading is provided for convenience and customs purposes our written description of the scope of the order is dispositive.

Preliminary Partial Rescission of Review

We are preliminarily rescinding this review with respect to TCW and Laizhou because they made no shipments of subject merchandise to the United States during the POR. The Department reviewed CBP data which indicate that these companies did not export subject merchandise to the United States during the POR.

Final Partial Rescission of Review

In addition, we are rescinding this review with respect to GSSG because this company withdrew its request for review and no other interested party requested a review of GSSG. Pursuant to 19 C.F.R. §351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of the notice announcing initiation of the requested review. GSSG withdrew its request for review within the 90 day time limit. Accordingly, we are rescinding the administrative review of GSSG's exports of subject merchandise for the period December 1, 2001, through November 30, 2002, and will issue appropriate assessment instructions to CBP.

Verification

As provided in section 782(i) of the Act, during August and September 2003, the Department conducted a verification of CFP/Three Star. During the verification of CFP/Three Star, the Department followed standard procedures in order to test the information submitted by the respondent. These procedures include on-site inspection of the manufacturers' facilities, examination of relevant sales and financial records, and selection of relevant source documentation as exhibits. Our verification findings are in the report: Verification of the Questionnaire Responses of China First Pencil Co., Ltd./Shanghai Three Star Stationery Industry Corp. in the 2001 - 2002 Administrative Review of Certain Cased Pencils from the People's Republic of China (Verification Report), the public version of which is on file in the Department's Central Records Unit, room B099, of the main Commerce building (CRU-Public File).

Separate Rates Determination

In proceedings involving nonmarket economy (NME) countries, the Department begins with a rebuttable presumption that all companies within the country are subject to governmental control and thus should be assessed a single antidumping duty deposit rate. It is the Department's policy to assign all exporters of merchandise subject to investigation in a NME country this single rate, unless an exporter can demonstrate that its export activities are sufficiently independent so that it should be granted a separate rate. Rongxin, CFP/Three Star and SFTC provided the separate rates information requested by the Department and reported that their export activities are not subject to governmental control.

We examined the separate rates information provided by Rongxin, CFP/Three Star and SFTC in order to determine whether the companies are eligible for a separate rate. The Department's separate rates test, which is used to determine whether an exporter is independent from governmental control, does not consider, in general, macroeconomic/border-type controls, *e.g.*, export licenses, quotas, and minimum export prices, particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision-making process at the individual firm level. *See Certain Cut-to-Length Carbon Steel Plate from Ukraine: Final Determination of Sales at Less than Fair Value*, 62 FR 61754, 61757 (November 19, 1997); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 62 FR 61276, 61279 (November 17, 1997).

To establish whether a firm is sufficiently independent from governmental control of its export activities so as to be entitled to a separate rate, the Department analyzes each entity exporting the subject merchandise under a test arising out of the *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (*Sparklers*), as amplified by the *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*). In accordance with the separate rates criteria, the Department assigns separate rates in NME cases only if the respondents can demonstrate the absence of both *de jure* and *de facto* governmental control over export activities.

1. Absence of *De Jure* Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies. *See Sparklers*, 56 FR at 20508 (May 6, 1991).

Rongxin, CFP/Three Star and SFTC reported that the merchandise under

review was not subject to restrictive stipulations associated with their export licenses (*e.g.*, pencils were not on the government's list of products subject to export restrictions or subject to special export licensing requirements). Rongxin, CFP/Three Star and SFTC submitted copies of their business licenses in their questionnaire responses. We found no inconsistencies with their statements regarding the absence of restrictive stipulations associated with their business licenses. Furthermore, Rongxin, CFP/Three Star and SFTC submitted copies of PRC legislation demonstrating the statutory authority for establishing the *de jure* absence of governmental control over the companies. Thus, the evidence on the record supports a preliminary finding of the absence of *de jure* governmental control based on: (1) an absence of restrictive stipulations associated with the business licenses of Rongxin, CFP/Three Star and SFTC; and (2) the applicable legislative enactments decentralizing control of PRC companies.

2. Absence of *De Facto* Control

The Department typically considers four factors in evaluating whether a respondent is subject to *de facto* governmental control of its export functions: (1) whether the export prices are set by, or are subject to, the approval of a governmental agency; (2) whether the respondent has the authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independentdecisions regarding the disposition of profits or financing of losses. *See Silicon Carbide*, 59 FR at 22586–87 (May 2, 1994); *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

As stated in previous cases, there is some evidence that certain enactments of the PRC central government have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. *See Silicon Carbide*, 56 FR at 22587 (May 2, 1994). Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether respondents are, in fact, subject to a degree of governmental control which would preclude the Department from assigning separate rates.

Rongxin, CFP/Three Star and SFTC reported that they determine prices for sales of the subject merchandise based on market principles, the cost of the merchandise, and profit. Moreover, Rongxin, CFP/Three Star and SFTC stated that they negotiated the price directly with their customers. Also, Rongxin, CFP/Three Star and SFTC claimed that their prices are not subject to review or guidance from any governmental organization. In addition, the record indicates that Rongxin, CFP/Three Star and SFTC have the authority to negotiate and sign contracts and other agreements. Further, Rongxin, CFP/Three Star and SFTC claimed that their negotiations are not subject to review or guidance from any governmental organization. Finally, there is no evidence on the record to suggest that there is any governmental involvement in the negotiation of their contracts.

Furthermore, Rongxin, CFP/Three Star and SFTC reported that they have autonomy in making decisions regarding the selection of management. Rongxin, CFP/Three Star and SFTC indicated that their selection of management is not subject to review or guidance from any governmental organization and there is no evidence on the record to suggest that there is any governmental involvement in the selection of the management of Rongxin, CFP/Three Star and SFTC .

Finally, Rongxin, CFP/Three Star and SFTC reported that they retain the proceeds of their export sales, and their management determines how to use profits. There is no evidence on the record with respect to Rongxin, CFP/Three Star and SFTC to suggest that there is any governmental involvement in decisions regarding disposition of profits or financing of losses.

Therefore, the evidence on the record supports a preliminary finding of the absence of *de facto* governmental control based on record statements and supporting documentation showing that: (1) Rongxin, CFP/Three Star and SFTC set their own export prices independent of the government and without the approval of a governmental authority; (2) Rongxin, CFP/Three Star and SFTC have the authority to negotiate and sign contracts and other agreements; (3) Rongxin, CFP/Three Star and SFTC have adequate autonomy from the government regarding the selection of management; and (4) Rongxin, CFP/Three Star and SFTC retain the proceeds from their sales and make independent decisions regarding the disposition of profits or financing of losses.

The evidence placed on the record of this review by Rongxin, CFP/Three Star and SFTC demonstrates an absence of governmental control, both in law and in fact, with respect to their exports of the merchandise under review, in accordance with the criteria identified in *Sparklers* and *Silicon Carbide*. Therefore, for purposes of these preliminary results, we are granting separate rates to Rongxin, CFP/Three Star and SFTC .

Fair Value Comparisons

To determine whether the respondents' sales of subject merchandise were made at less than NV, we compared the export price (EP) to NV, as described in the "Export Price" and "Normal Value" sections of this notice, below.

Export Price

In accordance with section 772(a) of the Act, the Department calculated EPs for sales by Rongxin, CFP/Three Star and SFTC to the United States because the subject merchandise was sold directly to unaffiliated customers in the United States (or to unaffiliated resellers outside the United States with knowledge that the merchandise was destined for the United States) prior to importation and CEP methodology was not otherwise indicated. We made deductions from the net sales price for foreign inland freight and foreign brokerage and handling. Each of these services was provided by a NME vendor, and thus, as explained in the "Normal Value" section below, we based the deductions for these movement charges on values from a surrogate country.

For the reasons stated in the "Normal Value" section below, we selected India as the surrogate country. We valued foreign brokerage and handling using Indian values that were reported in the public version of the questionnaire response placed on the record in *Certain Stainless Steel Wire Rod from India; Preliminary Results of Antidumping Duty Administrative and New Shipper Review*, 63 FR 48184 (September 9, 1998). We identify the source used to value foreign inland freight in the "Normal Value" section of this notice, below. We adjusted these values, as appropriate, to account for inflation or deflation between the effective period and the POR. We calculated the inflation or deflation adjustments for these values using the wholesale price indices (WPI) for India as published in the International Monetary Fund's (IMF's) publication, *International Financial Statistics*.

Normal Value

For exports from NME countries, section 773(c)(1) of the Act provides that the Department shall determine NV

using a factors of production (FOP) methodology if: (1) the subject merchandise is exported from a NME country, and (2) available information does not permit the calculation of NV using home-market prices, third-country prices, or constructed value under section 773(a) of the Act. 19 C.F.R. §351.408 sets forth the methodology used by the Department to calculate the NV of merchandise exported from NME countries. In every case conducted by the Department involving the PRC, the PRC has been treated as a NME country. Because none of the parties to this proceeding contested such treatment, we calculated NV in accordance with section 773(c)(3) and (4) of the Act and 19 C.F.R. §351.408(c).

In accordance with section 773(c)(3) of the Act, the FOPs utilized in producing pencils include, but are not limited to: (1) Hours of labor required; (2) quantities of raw materials employed; (3) amounts of energy and other utilities consumed; and (4) representative capital costs, including depreciation. In accordance with section 773(c)(4) of the Act, the Department valued the FOPs, to the extent possible, using the costs of the FOP in one or more market economy countries that are (1) at a level of economic development comparable to that of the PRC, and (2) significant producers of comparable merchandise. We determined that India is comparable to the PRC in terms of per capita gross national product and the national distribution of labor. Furthermore, India is a significant producer of comparable merchandise. In instances where Indian surrogate value information was not available, we relied on Indonesian, Philippine, and U.S. values as noted below. Indonesia and the Philippines are also comparable to the PRC in terms of per capita gross national product and the national distribution of labor, and are significant producers of comparable merchandise. *See Memorandum From Jeffrey May, Director, Office of Policy, to Holly Kuga, Senior Office Director, AD/CVD Enforcement*, dated March 3, 2003, and *Memorandum from Paul Stolz to File*, dated December 30, 2003, which are in the CRU-Public File. We valued Chinese lindenwood, the type of wood used to produce pencils in the PRC, using publicly available, published U.S. prices for American basswood.[3]

In accordance with section 773(c)(1) of the Act, for purposes of calculating NV, we attempted to value the FOPs using surrogate values that were in effect during the POR. However, if we were unable to obtain surrogate values that were in effect during the POR, we adjusted the values, as appropriate, to account for inflation or deflation between the effective period and the POR. We calculated the inflation or deflation adjustments for all factor values, as applicable, except labor, using the WPI for the appropriate surrogate country as published in *International Financial Statistics*. We valued the FOP as follows:

(1) We valued Chinese lindenwood pencil slats using publicly available, published U.S. prices for American basswood lumber because price information for Chinese lindenwood and American basswood is not available from any of the potential surrogate countries. The U.S. lumber prices for basswood are published in the © *2002 Hardwood Market Report* for the period December 2001 through November 2002.

(2) We valued the following material inputs using Indian import data from the Monthly Statistics of the Foreign Trade of India (MSFTI) for December 2001 through November 2002: Acetone, alkyds resin, beeswax, black cores, butanes, butyl ester, calcium carbonate, castor oil, color cores, cellulose, erasers, dibutyl ester, diluent, dyestuff, ethanol, ethyl ester, ferrules, foam grips, foil, formaldehyde, glitter, glue, graphite powder, hardening oil, heat transfer film, kaolin clay, key chains, lithopone, malice acid ester, methyl benzene, nitro-paint/lacquer, penetrating agent, pigment, plastic, printing ink, propylene, pyroxylin, sawdust/wood, soap, soft agent, stearic acid, sticker paper, talcum powder, titanium, toppers, velvet wrap, wax and dye.

(3) In accordance with 19 C.F.R. §351.408 (c)(1), we valued lacquer and the input materials used by CFP/Three Star to produce erasers at acquisition cost because these inputs were purchased from a market economy supplier and paid for using a market economy currency. Although one of CFP/Three Star's production facilities purchased black cores, color cores, and erasers from a market economy supplier using a market economy currency, we did not consider the acquisition cost reported for this facility in valuing cores, or erasers because CFP/Three Star based the reported acquisition cost on selected purchases rather than all purchases during the POR. Therefore, we valued the cores and erasers that were purchased by CFP/Three Star from a market economy supplier using MSFTI and Indonesian data, respectively, for December 2001 through November 2002. See the Verification Report at 16 for further details.

(4) We valued the following packing materials using Indian import data from the MSFTI for December 2001 through November 2002: Cardboard cartons, master cartons, packing boxes, packing tape, pallets, paper labels, plastic boxes, plastic canisters, plastic shrink wrap, plastic straps, and polybags.

(5) With respect to energy, we valued natural gas using Indonesian prices reported in *Energy Prices and Taxes, Quarterly Statistics (Third Quarter 2002)*, published by the International Energy Agency. We valued electricity using the 2002 industry/commercial category-wise average tariff for electricity (U.S. dollars/kWh) used by Indian industrial enterprises from the publicly available *Key World Energy Statistics (2002) (Energy Statistics)*, published by the International Energy Agency. We also valued diesel fuel and coal using the Indian value reported in *Energy Statistics*.

(6) We valued water and steam using the Indian prices reported in *Second Water Utilities Data Book* (1997), published by the Asian Development Bank.

(7) In accordance with 19 C.F.R. §351.408(c)(3), we valued labor using a regression-based wage rate for the PRC listed in the Import Administration web site under "Expected Wages of Selected NME Countries." *See http://ia.ita.doc.gov/wages*.

(8) We derived ratios for factory overhead, selling, general and administrative (SG&A) expenses, and profit using the financial statements of Asia Wood International Corporation, a Philippine wood products producer. From this information, we were able to calculate factory overhead as a percentage of direct materials, labor, and energy expenses; SG&A expenses as a

[3] In the antidumping investigation of certain cased pencils from the PRC, the Department found Chinese lindenwood and American basswood to be virtually indistinguishable and thus used U.S. prices for American basswood to value Chinese lindenwood. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China*, 59 FR 55625, 55632 (November 8, 1994). This methodology was upheld by the Court of International Trade. *See Writing Instrument Manufacturers Association, Pencil Section, et al. v. United States*, Slip Op. 97-151 (Ct. Int'l. Trade, Nov. 13, 1997) at 16.

percentage of the total cost of manufacturing; and profit as a percentage of the sum of the total cost of manufacturing and SG&A expenses.

(9) We used the following sources to value truck and rail freight services provided to transport the finished product to the port and direct materials, packing materials, and coal from the suppliers of the inputs to the producers. We valued truck freight services using the 1999 rate quotes reported by Indian freight companies and used in the less than fair value antidumping investigation of bulk aspirin from the PRC. *See Notice of Final Determination of Sales at Less Than Fair Value: Bulk Aspirin From the People's Republic of China*, 65 FR 33805 (May 25, 2000). We valued rail freight services using the April 1995 rates published by the Indian Railway Conference Association. We adjusted these values, as appropriate, to account for inflation or deflation between the effective period and the POR.

For further discussion of the surrogate values used in this review, see the *Memorandum From The Team Regarding Selection of Surrogate Values for Factors of Production for the Preliminary Results of the Administrative Review of Certain Cased Pencils from the People's Republic of China*, (December 30, 2003), which is on file in the CRU-Public File.

Use of Partial Facts Available

Section 776(a)(1) of the Act provides for the use of facts available if information needed by the Department to make a determination is not on the record. In this review, CFP/Three Star failed to report certain sales of subject merchandise. (*See* the Verification Report at 6). Because the necessary information regarding the unreported sales is not on the record, the Department has resorted to the use of facts available in order to calculate the dumping margin on these sales.

Pursuant to section 776(b) of the Act, when the Department uses facts available in reaching its determination, it may apply adverse inferences, if an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information. We have preliminarily determined that the record in this review does not indicate that CFP/Three Star failed to act to the best of its ability to comply with a request for information. While preparing reconciliation documentation requested by the Department at verification, company officials discovered that they failed to report a limited number of U.S. sales. Company officials explained that the omission occurred because the sales in question were made and invoiced shortly before the end of the POR but were posted in the company's accounting records for the period after the end of the POR. Given the limited number of transactions at issue and the level of cooperation received from company officials, we preliminarily determine that the use of an adverse inference in selecting from among the facts otherwise available is not warranted. As partial facts available, we preliminarily assigned to the unreported sales the weighted-average dumping margin calculated for CFP/Three Star's reported sales.

Use of Total Adverse Facts Available

Eight producers/exporters named in the notice of initiation of this review did not respond to the Department's antidumping duty questionnaire. Because these entities failed to demonstrate that they are entitled to a separate rate, we are treating them as part of a single PRC-wide entity. Given that the eight producers/exporters, which are part of the PRC-wide entity, did not respond to the Department's antidumping duty questionnaire, we have preliminarily determined that these entities did not act to the best of their abilities to comply with our request for information. Therefore, pursuant to section 776(a)and (b) of the Act, we are relying on adverse facts available to determine the dumping margin for the PRC-wide entity. Specifically, as adverse facts available, we have assigned to the PRC-wide entity, the highest dumping margin from any prior segment of this proceeding, 114.90 percent, which is the current PRC-wide rate.

Corroboration

Section 776(c) of the Act provides that when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as "[i]nformation derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise." *See* the Statement of Administrative Action (SAA), H.R. Doc. 103–316 at 870 (1994). Corroborate means that the Department will satisfy itself that the secondary information to be used has probative value. *See* SAA at 870. To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. However, the SAA, at 869, emphasizes that the Department need not prove that the selected facts available are the best alternative information.

In this review, we are using, as facts available, the weighted-average dumping margin calculated for CFP/Three Star's reported sales and the highest dumping margin from this or any prior segment of the proceeding. The weighted-average dumping margin calculated for CFP/Three Star's reported sales is not considered secondary information because it is based on information obtained during the course of this review. Therefore, the Department is not required to corroborate this margin. The highest dumping margin from this or any prior segment of the proceeding is the current PRC-wide rate of 114.90 percent. This rate was calculated in the 1999 - 2000 administrative review of the order on certain cased pencils from the PRC. *See Notice of Amended Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Cased Pencils from the People's Republic of China*, 67 FR 59049 (September 19, 2002). Therefore, the PRC-wide rate of 114.90 percent constitutes secondary information within the meaning of the SAA. *See* SAA at 870. However, unlike other types of information, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. Thus, in an administrative review, if the Department chooses, as facts available, a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin if it was calculated from verified sales and cost data. The 114.90 percent PRC-wide rate is based on verified information provided by Kaiyuan Group Corporation in the 1999 - 2000 administrative review of the order on certain cased pencils from the PRC. This rate has not been invalidated judicially. Therefore, we consider this rate to be reliable. With respect to the relevance aspect of corroboration, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Nothing in the record of this review calls into question the relevancy of the margin selected as adverse facts available. Moreover, the selected margin is the rate currently applicable to uncooperative exporters. Thus it is appropriate to use

the selected rate as adverse facts available in the instant review.

Preliminary Results of Review

As a result of our review, we preliminarily determine that the following margins exist for the period December 1, 2001 through November 30, 2002:

Manufacturer/exporter	Margin (percent)
Shandong Rongxin Import and Export Co., Ltd.	87.49
China First Pencil Company, Ltd. /Shanghai Three Star Stationery Industry Corp.	26.52
Orient International Holding Shanghai Foreign Trade Co., Ltd.	30.43
PRC-Wide Rate	114.90

The Department will disclose to parties to this proceeding the calculations performed in reaching the preliminary results within ten days of the date of announcement of the preliminary results. An interested party may request a hearing within 30 days of publication of the preliminary results. *See* 19 C.F.R. §351.310(c). Interested parties may submit written comments (case briefs) within 30 days of publication of the preliminary results and rebuttal comments (rebuttal briefs), which must be limited to issues raised in the case briefs, within five days after the time limit for filing case briefs. See 19 C.F.R. §351.309(c)(1)(ii) and 19 C.F.R. §351.309(d). Parties who submit arguments are requested to submit with the argument (1) a statement of the issue, (2) a brief summary of the argument and (3) a table of authorities. Further, the Department requests that parties submitting written comments provide the Department with a diskette containing the public version of those comments. We will issue a memorandum identifying the date of a hearing, if one is requested. Unless the deadline is extended pursuant to section 751(a)(3)(A) of the Act, the Department will issue the final results of this administrative review, including the results of our analysis of the issues raised by the parties in their comments, within 120 days of publication of the preliminary results. The assessment of antidumping duties on entries of merchandise covered by this review and future deposits of estimated duties shall be based on the final results of this review.

Assessment Rates

Upon completion of this administrative review, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. We have calculated exporter-specific antidumping duty assessment rates for subject merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales to the total quantity of sales examined. We calculated exporter-specific assessment rates because there is no information on the record which identifies the importers of record. The Department will issue appropriate assessment instructions directly to CBP within 15 days of publication of the final results of review. If these preliminary results are adopted in the final results of review, we will direct CBP to assess the resulting assessment rates, calculated as described above, on each of the importer's entries during the review period.

Cash Deposit Requirements

The following deposit requirements will apply to all shipments of pencils from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(1) of the Act: (1) The cash deposit rates for the reviewed companies named above will be the rates for those firms established in the final results of this administrative review; (2) for any previously reviewed or investigated PRC or non-PRC exporter, not covered in this review, with a separate rate, the cash deposit rate will be the company-specific rate established in the most recent segment of this proceeding; (3) for all other PRC exporters, the cash deposit rate will be the PRC-wide rate established in the final results of this review; and (4) the cash deposit rate for any non-PRC exporter of subject merchandise from the PRC will be the rate applicable to the PRC exporter that supplied that exporter. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Notification to Interested Parties

This notice serves as a preliminary reminder to importers of their responsibility under 19 C.F.R. §351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing this determination in accordance with sectionssection 751(a)(1) and 777(i)(1) of the Act.

Dated: December 30, 2003.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–699 Filed 1–12–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–852]

Creatine Monohydrate from the People's Republic of China; Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of Antidumping Duty Administrative Review.

SUMMARY: On November 6, 2003, the Department of Commerce published the preliminary results of the 2002/2003 administrative review of the antidumping duty order on creatine monohydrate from the People's Republic of China. We gave interested parties an opportunity to comment on the preliminary results but received no comments. The final results do not differ from the preliminary results of review, in which we found that the respondent did not make sales in the United States at prices below normal value.

EFFECTIVE DATE: January 13, 2004.

FOR FURTHER INFORMATION CONTACT: Blanche Ziv, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–4207.

SUPPLEMENTARY INFORMATION:

Background

On November 6, 2003, the Department of Commerce ("the Department") published in the **Federal Register** the preliminary results of its administrative review of creatine monohydrate ("creatine") from the People's Republic of China ("PRC") (*Creatine Monohydrate from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 62767 (November 6, 2003) ("*Preliminary Results*"). We invited parties to comment on our preliminary results of review. We received no comments. The Department has now completed the antidumping duty administrative review in accordance with section 751 of the Tariff Act of 1930 (the "Act").

Scope of Order

The product covered by this order is creatine monohydrate, which is commonly referred to as "creatine." The chemical name for creatine monohydrate is N (aminoiminomethyl) - N - methylglycine monohydrate. The Chemical Abstracts Service ("CAS") registry number for this product is 6020–87–7. Creatine monohydrate in its pure form is a white, tasteless, odorless powder, that is a naturally occurring metabolite found in muscle tissue. Creatine monohydrate is provided for in subheading 2925.20.90 of the *Harmonized Tariff Schedule of the United States* ("HTSUS"). Although the HTSUS subheading and the CAS registry number are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Period of Review

The period of review ("POR") is February 1, 2002, through January 31, 2003.

Final Results of the Review

We received no comments from interested parties on our preliminary results. In addition, we have determined that no changes to our analysis are warranted for purposes of these final results. The weighted-average dumping margin for Suzhou Sanjian Nutrient & Health products Co., Ltd. ("Sanjian") for the period February 1, 2002, through January 31, 2003, is zero percent.

We will instruct U.S. Customs and Border Protection ("CBP") to liquidate entries of the subject merchandise from Sanjian during the period February 1, 2002, through January 31, 2003 without regard to antidumping duties. All other entries of the subject merchandise during the POR will be liquidated at the antidumping rate in place at the time of entry.

The Department will issue appropriate assessment instructions directly to the CBP within 15 days of publication of these final results of review.

Cash Deposit Requirements

The following deposit rates will be effective upon publication of these final results for all shipments of creatine monohydrate from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Act:(1) for Sanjian, which has a separate rate, no antidumping duty deposit will be required; (2) for a company previously found to be entitled to a separate rate and for which no review was requested, the cash deposit rate will be the rate established in the most recent review of that company; (3) for all other PRC exporters the cash deposit rate will be 153.70 percent, the PRC-wide rate established in the less than fair value ("LTFV") investigation; and (4) for non-PRC exporters of subject merchandise from the PRC, the cash deposit rate will be the rate applicable to the PRC exporter that supplied that exporter. These deposit rates shall remain in effect until publication of the final results of the next administrative review.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding APOs

This notice also serves as a reminder to parties subject to administrative protective order ("APO") of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: January 6, 2004.

James J. Jochum,

Assistant Secretary for Import Administration.

[FR Doc. 04–698 Filed 1–12–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A-580–839]

Certain Polyester Staple Fiber From Korea: Notice of Extension of Time Limit for 2002–2003 Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Extension of Time Limit.

SUMMARY: The Department of Commerce is extending the time limit for the preliminary results of the current review of the antidumping duty order on certain polyester staple fiber from Korea. The period of review is May 1, 2002 through April 30, 2003. This extension is made pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act.

EFFECTIVE DATE: January 13, 2004.

FOR FURTHER INFORMATION CONTACT: Julie Santoboni or Andrew McAllister, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–4194 or (202) 482–1174, respectively.

Statutory Time Limits

Section 751(a)(3)(A) of the Act requires the Department to issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an order for which a review is requested and a final determination within 120 days after the date on which the preliminary results are published. If it is not practicable to complete the review within the time period, section 751(a)(3)(A) of the Act allows the Department to extend these deadlines to a maximum of 365 days and 180 days, respectively.

Background

On July 1, 2003, the Department published a notice of initiation of administrative review of the antidumping duty order on certain polyester staple fiber ("PSF") from Korea, covering the period May 1, 2002, through April 30, 2003 (68 FR 39055). The preliminary results for the antidumping duty administrative review of certain PSF from Korea are currently due no later than January 31, 2004.

Extension of Time Limits for Preliminary Results

The respondents in this proceeding have outstanding original and supplemental questionnaire responses. Because the Department requires time to review and analyze these responses once they are received, it is not practicable to complete this review within the originally anticipated time limit (*i.e.*, January 31, 2004). Therefore, the Department of Commerce is extending the time limit for completion of the preliminary results to not later than June 1, 2004, in accordance with section 751(a)(3)(A) of the Act.

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: January 7, 2004.

Jeffrey A. May,

Deputy Assistant Secretary for AD/CVD Enforcement.

[FR Doc. 04–700 Filed 1–12–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[C–201–810]

Certain Cut-to-Length Carbon Steel Plate from Mexico: Final Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of Countervailing Duty Administrative Review.

SUMMARY: On September 8, 2003, the Department of Commerce (the Department) published in the Federal Register its preliminary results of administrative review of the countervailing duty order on certain cut-to-length carbon steel plate (CTL Plate) from Mexico for the period January 1, 2001, through December 31, 2001. We are now issuing the final results.

Based on our analysis of the comments received, we have made no changes to the net subsidy rate. Therefore, the final results do not differ from the preliminary results. The final net subsidy rate for the reviewed company is listed below in the section entitled "Final Results of Review."

EFFECTIVE DATE: January 13, 2004.

FOR FURTHER INFORMATION CONTACT: Eric B. Greynolds at (202) 482–6071 or Lyman Armstrong at (202) 482–3601, Office of AD/CVD Enforcement VI, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, Room 4012, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

Background

On September 8, 2003, the Department published the preliminary results of the administrative review of the countervailing duty order on certain cut-to-length carbon steel plate from Mexico. *See Certain Cut-to-Length Carbon Steel Plate from Mexico: Preliminary Results of Countervailing Duty Administrative Review*, 68 FR 52895 (September 8, 2003) (*Preliminary Results*). This review covers one manufacturer/exporter, Altos Hornos de Mexico, S.A. (AHMSA). The review covers the period January 1, 2001, through December 31, 2001, and 17 programs.

Scope of the Review

The products covered by this administrative review are certain cut-to-length carbon steel plates. These products include hot-rolled carbon steel universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 millimeters but not exceeding 1,250 millimeters and of a thickness of not less than 4 millimeters, not in coils and without patterns in relief), of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain hot-rolled carbon steel flat-rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness, as currently classifiable in the Harmonized Tariff Schedules of the United States (HTSUS) under item numbers 7208.31.0000, 7208.32.0000, 7208.33.1000, 7208.33.5000, 7208.41.0000, 7208.42.0000, 7208.43.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.11.0000, 7211.12.0000, 7211.21.0000, 7211.22.0045, 7211.90.0000, 7212.40.1000, 7212.40.5000, and 7212.50.0000. Included in this administrative review are flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (*i.e.*, products which have been "worked after rolling")--for example, products which have been bevelled or rounded at the edges. Excluded from this administrative review is grade X-70 plate. HTSUS subheadings are provided for convenience and customs purposes. The written description of the scope of this proceeding is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the "Issues and Decision Memorandum" (Decision Memorandum) dated January 6, 2004, which is hereby adopted by this notice. A list of issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as Appendix I. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum which is on file in room B-099 of the Main Commerce Building. In addition, a complete version of the Decision Memorandum can be accessed directly on the World Wide Web at *http://www.ia.ita.doc.gov*, under the heading "Federal Register Notices." The paper copy and electronic version of the Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we have made no changes to the net subsidy rate.

Final Results of Review

In accordance with 19 CFR 351.221(b)(4)(I), we calculated an individual subsidy rate for the producer/exporter subject to this review. We will instruct the U.S. Customs and Border Protection (CBP) to assess countervailing duties as indicated below on all appropriate entries. For the period January 1, 2001, through December 31, 2001, we determine the net subsidy rate for the reviewed company to be as follows:

Manufacturer/Exporter	Net Subsidy Rate
AHMSA	13.37 %

The Department will also instruct CBP to collect cash deposits of estimated countervailing duties in the percentage detailed above of the f.o.b. invoice price on all shipments of the subject merchandise from the reviewed company, entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this review.

Because the Uruguay Round Agreements Act (URAA) replaced the general rule in favor of a country-wide rate with a general rule in favor of individual rates for investigated and reviewed companies, the procedures for establishing countervailing duty rates, including those for non-reviewed companies, are now essentially the same as those in antidumping cases, except as provided for in section 777A(e)(2)(B) of the Tariff Act of 1930, as amended (the Act). The requested review will normally cover only those companies specifically named. *See* 19 CFR 351.213(b). Pursuant to 19 CFR 351.212(c), for all companies for which a review was not requested, duties must be assessed at the cash deposit rate, and cash deposits must continue to be collected at the rate previously ordered. As such, the countervailing duty cash deposit rate applicable to a company can no longer change, except pursuant to a request for a review of that company. *See Federal-Mogul Corporation and the Torrington Company v. United States*, 822 F. Supp. 782 (CIT 1993); *Floral Trade Council v. United States*, 822 F. Supp. 766 (CIT 1993). Therefore, the cash deposit rates for all companies except that covered by this review will be unchanged by the results of this review.

We will instruct CBP to continue to collect cash deposits for non-reviewed companies at the most recent company-specific or country-wide rate applicable to the company. Accordingly, the cash deposit rates that will be applied to non-reviewed companies covered by this order will be the rate for each such company established in the most recently completed administrative review segment conducted under the Act. If such a review has not been conducted, the rate established in the most recently completed administrative proceeding pursuant to the statutory provisions that were in effect prior to the URAA amendments is applicable. *See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Mexico*, 58 FR 37352 (July 9, 1993). These rates shall apply to all non-reviewed companies until a review of a company assigned these rates is requested. In addition, for the period January 1, 2001, through December 31, 2001, the assessment rates applicable to all non-reviewed companies covered by this order are the cash deposit rates in effect at the time of entry.

This notice serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 USC 1675(a)(1)).

Dated: January 6, 2004.

James J. Jochum,

Assistant Secretaryfor Import Administration.

Appendix I—Issues Discussed in Decision Memorandum

http://www.ia.ita.doc.gov, under the heading ("**Federal Register** Notices").

Methodology and Background Information

[FR Doc. 04–697 Filed 1–12–04; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Public Safety Spectrum Management Forum

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice of public meeting.

SUMMARY: The U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA) will host a two-day public safety spectrum management

forum that is open to the public. Both days will include invited speakers and breakout discussion sessions designed to garner public comment on the four objectives of the President's Spectrum Policy Initiative as they relate to public safety. The first breakout session will focus on addressing the nation's critical spectrum requirements. The discussion for the second breakout session will concentrate on developing a modernized and improved spectrum management system for state and local public safety agencies. The topic for the third breakout session will be centered on incentives for more efficient and beneficial spectrum use. This session will cover such topics as defining efficiency, balancing efficiency with effectiveness, measuring methods of efficiency, and identifying policies to achieve efficient spectrum use. The fourth breakout session will focus on the development of new and expanded services and technologies that improve efficiency and streamline technology deployment. All sessions will feature participation from representatives of key public safety associations and government agencies.

DATES: The forum will be held from 7 a.m. to 5 p.m. on Tuesday and Wednesday, February 10–11, 2004.

ADDRESSES: The Public Safety Spectrum Management Forum will be held at the Omni Shoreham Hotel, 2500 Calvert Street, NW., Washington, DC 20008; telephone: (202) 234–0700. All events are open to the public. Parking is available on site for a fee. The hotel is located one-half block from the Woodley Park Metrorail stop on the Red line.

FOR FURTHER INFORMATION CONTACT: Rich Orsulak, NTIA Public Safety Division, at (202) 482–9139, or electronic mail: *rorsulak@ntia.doc.gov*. Please direct media inquiries to the Office of Public Affairs, NTIA, at (202) 482–7002.

SUPPLEMENTARY INFORMATION: This forum is one in a series of public meetings to support the President Bush's Spectrum Policy Initiative, which will result in recommendations to the Administration for improving spectrum management policies and procedures. On May 29, 2003, the President signed a Presidential Memorandum outlining the Administration's initiative for spectrum management reform. The President established the "Spectrum Policy Initiative" to promote the development and implementation of a U.S. spectrum policy for the 21st century. He directed the Secretary of Commerce to chair the initiative, which includes two courses of spectrum-related activity, one based on an interagency task force and the other on a series of public meetings. The Department of Commerce will develop recommendations for revising policies and procedures to promote more efficient and beneficial use of spectrum. NTIA will provide additional information about the forum in the near future on its home page at *http://www.ntia.doc.gov*.

Public Participation: The forum will be open to the public on a first-come, first-served basis. Space is limited. The public meeting is physically accessible to people with disabilities. Any member of the public wishing to attend and requiring special services, such as sign language interpretation or other ancillary aids, should contact Rich Orsulak at (202) 482–9139 or at *rorsulak@ntia.doc.gov*, at least three (3) days prior to the meeting.

Dated: January 7, 2004.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 04–603 Filed 1–12–04; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 12, 2004.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Melanie Kadlic, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street NW., Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the Internet address *Melanie_Kadlic@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.*, new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: January 8, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Office of the Undersecretary

Type of Review: New.

Title: Survey for the Study of the Ronald E. McNair Postbaccalaureate Achievement Program Participants.

Frequency: One time.

Affected Public: Individuals or household.

Reporting and Recordkeeping Hour Burden:

Responses: 2,313.

Burden Hours: 579.

Abstract: Follow-up survey data from current and former McNair program participants to determine program completion, employment status.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2368. When you access the information collection, click on "Download Attachments "to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivan.reese@ed.gov*. Requests may also be electronically mailed to the internet address *OCIO_RIMG@ed.gov* or faxed to (202) 708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Shelia Carey at her e-mail address *Shelia.Carey @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. 04–717 Filed 1–12–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before February 12, 2004.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Melanie Kadlic, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street NW., Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the Internet address *Melanie_Kadlic@omb.eop.gov*.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

Dated: January 8, 2004.

Angela C. Arrington,

Leader, Regulatory Information Management Group, Office of the Chief Information Officer.

Office of Special Education and Rehabilitative Services

Type of Review: Extension.

Title: Annual Performance Reporting Forms for NIDRR Grantees (RERCs, RRTCs, FIRs, ARRTs, DBTACs, DRRPs, MSs, D&Us).

Frequency: Annually.

Affected Public: Not-for-profit institutions.

Reporting and Recordkeeping Hour Burden:

Responses: 279.

Burden Hours: 4,464.

Abstract: Information collection to obtain annual program and performance data from NIDRR grantees on their project activities. The information collected will be used for monitoring grantees and for NIDRR program planning, budget development and reporting on Government Performance and Results Act (GPRA) indicators.

Requests for copies of the submission for OMB review; comment request may be accessed from *http://edicsweb.ed.gov*, by selecting the "Browse Pending Collections" link and by clicking on link number 2366. When you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or to the e-mail address *vivan.reese@ed.gov*. Requests may also be electronically mailed to the internet address *OCIO_RIMG@ed.gov* or faxed to (202) 708–9346. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be directed to Shelia Carey at her e-mail address *Shelia.Carey@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. 04–718 Filed 1–12–04; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

RIN 1810–ZA09

Notice of Proposed Priority and Clarification of Eligible Local Activities

AGENCY: Office of Elementary and Secondary Education, Department of Education.

SUMMARY: The Secretary proposes to add a competitive preference priority to the Improving Literacy Through School Libraries Program to reflect the importance of mastering reading skills in grades K–3. In this regard, the Secretary also proposes to clarify the allowable local professional development activities under this program, so that school library media specialists can address not only the reading needs of preschool children but also those of children in grades K–3. The Secretary may use this proposed priority and clarification of professional development activities for competitions in FY 2004 and in later years.

DATES: We must receive your comments on or before February 12, 2004.

ADDRESSES: Address all comments about this notice to Margaret McNeely, U.S. Department of Education, 400 Maryland Avenue, SW., room 5C130, Washington, DC 20202–6200, Fax (202) 260–8969. If you prefer to send your comments through the Internet, use the following address: *LSL@ed.gov*.

You must include the term COMMENTS in the subject line of your electronic message.

FOR FURTHER INFORMATION CONTACT: Margaret McNeely. Telephone: (202) 260–1335 or via the Internet at *LSL@ed.gov*.

If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

Individuals with disabilities may obtain this document in an alternative format (*e.g.*, Braille, large print, audiotape or computer diskette) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT.**

SUPPLEMENTARY INFORMATION:

Invitation to Comment

We invite you to submit written comments regarding this proposed priority and clarification of eligible activities.

We invite you to assist us in complying with the specific requirements of Executive Order 12866 and its overall requirement of reducing regulatory burden that might result from this proposed priority and clarification of eligible activities. Please let us know

of any further opportunities we should take to reduce potential costs or increase potential benefits while preserving the effective and efficient administration of the program.

During and after the public comment period, you may inspect all public comments about these proposed actions in Room 5C130, 400 Maryland Avenue, SW., Washington, DC, between the hours of 8:30 a.m. and 4 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will supply an appropriate aid, such as a reader or print magnifier, to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this proposed priority and expansion of eligible activities. If you want to schedule an appointment for this type of aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Background

The Improving Literacy Through School Libraries Program (LSL), authorized by Title I, Part B, Subpart 4, section 1251 of the Elementary and Secondary Education Act of 1965, (ESEA), as amended by the No Child Left Behind Act of 2001, is a discretionary grant program. Through LSL, the Department provides grants to eligible local educational agencies to improve student literacy skills and academic achievement by providing students with increased access to up-to-date school library materials; a well-equipped, technologically advanced school library media center; and well-trained, professionally certified school library media specialists.

Priority

Proposed Competitive Preference Priority for K–3 Projects

This proposed competitive preference priority would support projects that propose primarily to serve grades K–3. The Department would add five points to an applicant's score if its application meets the priority. This proposed priority is based on the design of a proposed project rather than the enrollment of the school(s) to be served. Therefore, applicants with either K–6, K–8, or K–12 enrollments would be eligible to receive the competitive preference priority if their proposed project primarily serves grades K–3. For purposes of this priority, the term "primarily" means that more than 50 percent of the applicant's proposed budget will be used for grades K–3. The Secretary believes that targeting students in grades K–3 will maximize the impact of LSL on improving student reading achievement.

Proposed Clarification of Eligible Local Activities

The Secretary proposes to allow grantees to conduct professional development activities for school library media specialists that further the purposes of the program, not only as related to preschool education, but also related to education benefiting children in grades K–3. This is consistent with our interpretation of the statute and legislative history. The Secretary believes that allowing professional development for school library media specialists benefiting children from preschool through grade 3 can help link projects under this program with efforts such as those funded under the Early Reading First program authorized by section 1221 *et seq.* of ESEA that benefit teachers of pre-school children, and under the Reading First program authorized by section 1201 *et seq.* of ESEA that benefit teachers of K–3 children. Professional development for school library media specialists that serve children from preschool through grade 3 will assist these specialists and help them better meet the needs of students and fellow educators.

We will announce the final priority and clarification of eligible local activities in the **Federal Register**. We will determine the final priority and eligible activities after considering written responses to this notice and other information available to the Department. This notice does not preclude us from proposing or funding additional priorities, subject to meeting applicable rulemaking requirements.

Note: This notice does *not* solicit applications. In any year in which we choose to use this proposed priority and expanded activities, we invite applications through a notice in the **Federal Register**.

Executive Order 12866

This notice of proposed priority and clarification of eligible local activities for professional development has been reviewed in accordance with Executive Order 12866. Under the terms of the order, we have assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the notice of proposed priority and the clarification of eligible local activities are those resulting from statutory requirements and those we have determined as necessary for administering this program effectively and efficiently.

In assessing the potential costs and benefits—both quantitative and qualitative—of this notice of proposed priority and clarification of eligible local activities, we have determined that the benefits of the proposed priority and clarification of eligible local activities justify the costs.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

This document provides early notification of our specific plans and actions for this program.

Applicable Program Regulations: 34 CFR parts 75, 77, 79, 80, 81, 82, 85, 97, 98 and 99.

Electronic Access to This Document

You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.*

To use PDF you must have Adobe Acrobat Reader, which is available free at this site. If you have questions about using PDF, call the U.S. Government Printing Office (GPO), toll free, at 1–888–293–6498; or in the Washington, DC, area at (202) 512–1530.

You may also view this document in text at the Applicant Information link of the following site: *http://www.ed.gov/programs/lsl.*

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.*

(Catalog of Federal Domestic Assistance Number 84.364A Improving Literacy Through School Libraries Program)

Program Authority: 20 U.S.C. 6383.

Dated: January 7, 2004.

Ronald J. Tomalis,

Acting Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 04–706 Filed 1–12–04; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

[RCRA–2003–0066, FRL–7608–7]

Agency Information Collection Activities: Proposed Collection; Comment Request; Reporting and Recordkeeping Requirements Under EPA's WasteWise Program; EPA ICR Number 1698.05, OMB Control Number 2050–0139

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a continuing Information Collection Request (ICR) to the Office of Management and Budget (OMB). This is a request to renew an existing approved collection. This ICR is scheduled to expire on May 31, 2004. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before March 15, 2004.

ADDRESSES: Submit your comments, referencing Docket ID No. RCRA–2003–0066, to EPA online using EDOCKET (our preferred method), by e-mail to *rcra-docket@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mailcode 5305T, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Follow the detailed instructions as provided in the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Charles Heizenroth, Office of Solid Waste, 5306W, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–0154; fax number: (703) 308–8686; e-mail address: *heizenroth.charles@epa.gov.*

SUPPLEMENTARY INFORMATION:

A. How Can I Get Copies of the ICR Supporting Statement and Other Related Information?

EPA has established a public docket for this ICR under Docket ID No. RCRA–2003–0066. The official public docket is the collection of materials that is available for public viewing at the OSWER Docket in the EPA Docket Center (EPA/DC), EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the OSWER Docket is (202) 566–0270.

You may use EPA Dockets at *http://www.epa.gov/edocket* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified above.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI, and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified above.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the docket will be scanned and placed on EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

B. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Any comments related to this ICR should be submitted to EPA within 60 days of this notice. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments in formulating a final decision.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket,* and follow the online instructions for submitting comments. Once in the system, select "search," and then key in Docket ID No. RCRA–2003–0066. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

Comments may be sent by electronic mail (e-mail) to *rcra-docket@epa.gov,* Attention Docket ID No. RCRA–2003–0066. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official

public docket, and made available in EPA's electronic public docket.

You may submit comments on a disk or CD ROM that you mail to the mailing address identified in the **ADDRESSES** section. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your comments to: OSWER Docket, Environmental Protection Agency, Mailcode: 5305T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. RCRA–2003–0066.

3. *By Hand Delivery or Courier.* Deliver your comments to: EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave. NW., Washington, DC, Attention Docket ID No. RCRA–2003–0066. Such deliveries are only accepted during the Docket's normal hours of operation as identified in Unit A.

C. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at your estimate.

5. Provide specific examples to illustrate your concerns.

6. Offer alternatives.

7. Make sure to submit your comments by the comment period deadline identified.

8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

D. What Information Is EPA Particularly Interested In?

Pursuant to section 3506(c)(2)(A) of the PRA, EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.

2. Evaluate the accuracy of the Agency's estimates of the burdens of the proposed collections of information.

3. Enhance the quality, utility, and clarity of the information to be collected.

4. Minimize the burden of the collections of information on those who are to respond, including through the use of appropriate automated or electronic collection technologies or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Affected entities: Entities potentially affected by this action are those business, institutions, and government agencies that voluntarily sign up to participate in EPA's WasteWise program.

Title: Reporting and Recordkeeping Requirements Under EPA's WasteWise program.

Abstract: EPA's voluntary WasteWise program encourages businesses and other organizations to reduce solid waste through waste prevention, recycling, and the purchase or manufacture of recycled-content products. WasteWise participants include partners, which commit to implementing waste reduction activities of their choice, and endorsers which promote the WasteWise program and waste reduction to their members.

The Partner Registration Form identifies an organization and its facilities registering to participate in WasteWise, and requires the signature of a senior official that can commit the organization to the program. (This form can be submitted either electronically or in hard copy.) Within six months of registering, each partner is asked to conduct a waste assessment and submit baseline data and waste reduction goals to EPA via the Annual Assessment Form. (This form can also be submitted either electronically or in hard copy.) On an annual basis partners are asked to report, via the Annual Assessment Form, on their progress toward achieving their waste reduction goals by estimating amounts of waste prevented and recyclables collected, and describing buying or manufacturing recycled-content products. They can also provide WasteWise with information on total waste prevention revenue, total recycling revenue, total avoided purchasing costs due to waste prevention, and total avoided disposal costs due to recycling and waste prevention. Additionally, they are asked to submit new waste reduction goals.

Endorsers, which are typically trade associations or state/local governments, submit the Endorser Registration Form once during their endorser relationship with WasteWise. (This form can be submitted either electronically or in hard copy.) The Endorser Registration Form identifies the organization, the principal contact, and the activities to which the Endorser commits.

EPA's WasteWise program uses the submitted information to (1) identify and recognize outstanding waste reduction achievements by individual organizations, (2) compile aggregate results that indicate overall accomplishments of WasteWise partners, (3) identify cost-effective waste reduction strategies to share with other organizations, and (4) identify topics on which to develop assistance and information efforts.

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

Burden Statement: The respondent burden for this collection is estimated to average 1 hour per response for the Partner Registration Form, 40 hours per response for the Annual Assessment Form, and 16 hours per response for the Endorser Registration Form. This results in an estimated annual partner respondent burden of 41 hours for new partners, 40 hours for established partners, and a one-time respondent burden of 10 hours for endorsers.

The estimated number of respondents is 1,325 in Year 1; 1,425 in Year 2; and 1,525 in Year 3. Estimated total annual burden on all respondents is 52,350 hours in Year 1; 56,350 hours in Year 2; and 60,350 hours in Year 3.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Dated: January 7, 2004.

Robert Springer,

Director, Office of Solid Waste.

[FR Doc. 04–707 Filed 1–12–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7609–5]

Notice of Proposed Administrative Settlement Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended ("CERCLA"), 42 U.S.C. 6922(h)(1), notice is hereby given of a proposed administrative settlement concerning the Service Waste Inc. Superfund removal site, located two miles outside the city of Mansfield, Johnson County, Texas, with the parties referenced in the **SUPPLEMENTARY INFORMATION** portion of this notice.

The settlement requires the settling parties to pay a total of $181,926.84 for reimbursement of past response costs, plus interest, to the EPA Hazardous Substance Superfund. Within 30 days of the effective date of this agreement, the settling parties shall pay an initial payment of $11,926.84, the settling parties shall pay three yearly installments plus interest on the unpaid balance. The first installment of $50,000 plus interest will be due on or before November 30, 2004. The second installment of $60,000.00 plus interest will be due on or before November 30, 2005. The third and final installment of $60,000.00 plus interest will be due on or before November 30, 2006. EPA will bill the installments annually and payment is due within 30 days of the bill. The initial payment, installments, and any interest shall be deposited in the EPA Hazardous Substance Superfund. The settlement includes a covenant not to sue pursuant to sections 106(b)(2), 107, 111, 112, and 113 of CERCLA, 42 U.S.C. 9606(b)(2), 9607, 9611, 9612, or 9613, any claims arising out of the response actions at the Site for which the past response costs were incurred; and pursuant to sections 107 and 113 of CERCLA, 42 U.S.C. 9607 and 9613, relating to past response costs.

For thirty (30) days following the date of publication of this notice, the Agency will receive written comments relating to the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate. The Agency's response to any comments received will be available for public inspection at 1445 Ross Avenue, Dallas, Texas 75202–2733.

DATES: Comments must be submitted on or before February 12, 2004.

ADDRESSES: The proposed settlement and additional background information relating to the settlement are available for public inspection at 1445 Ross Avenue, Dallas, Texas 75202–2733. A copy of the proposed settlement may be obtained from Janice Bivens, 1445 Ross Avenue, Dallas, Texas 75202–2733 at (214) 665–6717. Comments should reference Service Waste Inc. Superfund Site, Mansfield, Texas, EPA Docket Number 06–02–04 and should be addressed to Janice Bivens at the address listed above.

FOR FURTHER INFORMATION CONTACT: Barbara Nann, 1445 Ross Avenue, Dallas, Texas 75202–2733 at (214) 665–2157.

SUPPLEMENTARY INFORMATION:

List of Settling Parties

1. Service Waste Inc.
2. Pan American Wire, Inc.
3. Southwest Paperstock, Inc.
4. Robert F. Dunlap, Sr.

Dated: December 31, 2003.

Richard E. Greene,

Acting Regional Administrator. Region 6.

[FR Doc. 04–708 Filed 1–12–04; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Agency Information Collection Activities; Announcement of OMB Approval

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice of OMB Approval; ADEA waivers.

SUMMARY: The Equal Employment Opportunity Commission (Commission or EEOC) announces that a collection of information entitled Waivers of Rights and Claims Under the ADEA; Informational Requirements, has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Carol R. Miaskoff, Assistant Legal Counsel, Office of Legal Counsel, at (202) 663–4689 or TTY (202) 663–7026. This notice is also available in the following formats: large print, braille, audio tape and electronic file on computer disk. Requests for this notice in an alternative format should be made to the Publications Center at 1–800–669–3362.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of July 24, 2003, the Commission announced that the proposed information collection had been submitted to OMB for review and clearance under the Paperwork Reduction Act of 1995. 68 FR 43725, July 24, 2003. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 3046–0042. The approval expires on October 31, 2006.

For the Commission.

Dated: December 29, 2003.

Cari M. Dominguez,

Chair.

[FR Doc. 04–691 Filed 1–12–04; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL COMMUNICATIONS COMMISSION

Public Information Collections Approved by Office of Management and Budget

December 30, 2003.

SUMMARY: The Federal Communications Commission (FCC) has received Office of Management and Budget (OMB) approval for the following public information collections pursuant to the Paperwork Reduction Act of 1995, Public Law 104–13. 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.

FOR FURTHER INFORMATION CONTACT: Paul J. Laurenzano, Federal Communications Commission, 445 12th Street, SW., Washington, DC, 20554, (202) 418–1359 or via the Internet at *plaurenz@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0681.

OMB Approval date: 12/01/2003.

Expiration Date: 12/31/2006.

Title: Toll-Free Service Access Codes—CC Docket No. 95–155, 47 CFR Part 52, Subpart D, Sections 52.101–52.111.

Form No.: N/A.

Estimated Annual Burden: 300 responses; 4,500 total annual hours; 15 hours per respondent.

Needs and Uses: Responsible organizations (RespOrgs) who wish to make a specific toll free number unavailable must submit written

requests to DSMI, the toll free data administrator. The request shall include documentation outlining the reason for the request. The information is necessary to hold RespOrgs more accountable and will decrease abuses of lag time process. It will prevent numbers from being held in unavailable status without demonstrated reasons and will make more numbers available for subscribers who need and want them.

OMB Control No.: 3060–0711.
OMB Approval date: 12/19/2003.
Expiration Date: 12/31/2006.
Title: Implementation of section 34(a)(1) of the Public Utility Holding Company Act of 1935, as amended by the Telecommunications Act of 1996, (47 CFR 1.5001–1.5007).
Form No.: N/A.
Estimated Annual Burden: 15 responses; 150 total annual hours; 10 hours per respondent.
Needs and Uses: 47 CFR 1.500–1.5007 implement section 34(a) of the Public Utility Holding Company Act. The rules provide filing requirements and procedures to expedite public utility holding company entry into the telecommunications industry. Persons seekings a determination of ETC status must file in good faith for determination by the Commission. The information will be used by the Commission to determine whether persons satisfy the statutory criteria for exempt telecommunications company status.

OMB Control No.: 3060–0719.
OMB Approval date: 12/22/2003.
Expiration Date: 12/31/2006.
Title: Quarterly Report of IntraLATA Carriers Listing Payphone Automatic Number Identifications (ANIs).
Form No.: N/A.
Estimated Annual Burden: 1,600 responses; 5,600 total annual hours; 3.5 hours per respondent.
Needs and Uses: IntraLATA carriers must submit a quarterly list of payphone ANIs to the interexchange carriers. This will facilitate resolution of disputed ANIs in the par-call compensation context. The report allows IXCs to determine which dial-around calls are made from payphones. The data, which must be maintained for at least 18 months after the close of a compensation period, will facilitate verification of disputed ANIs.

OMB Control No.: 3060–0723.
OMB Approval date: 12/01/2003.
Expiration Date: 12/31/2006.
Title: Public Disclosure of Network Information by Bell Operating Companies.
Form No.: N/A.
Estimated Annual Burden: 7 responses; 350 total annual hours; 50 hours per respondent.
Needs and Uses: Bell Operating Companies must make public disclosure of network information. This will prevent them from designing new network services or changing network technical specifications to the advantage of their own payphones.

OMB Control No.: 3060–0745.
OMB Approval date: 12/19/2003.
Expiration Date: 12/31/2006.
Title: Implementation of the Local Exchange Carrier Tariff Streamlining Provisions in the Telecommunications Act of 1996, CC Docket No. 96–187.
Form No.: N/A.
Estimated Annual Burden: 1,520 responses; 1,130 total annual hours; 1–2 average hours per respondent.
Needs and Uses: In CC Docket No. 96–187, the Commission adopted measures to streamline tariff filing requirements for local exchange carriers (LECs) of the Telecommunications Act of 1996. In order to achieve a stramlined and deregulatory enviornement for local exchanged carrier tariff filings, local exchange carriers are required to file tariffs electronically. Other carriers are permitted to file their tariffs electronically.

OMB Control No.: 3060–0775.
OMB Approval date: 12/01/2003.
Expiration Date: 12/31/2006.
Title: Separate Affiliate Requirement for Independent Local Exchange Carrier (LEC) Provision of International, Interexchange Services (47 CFR 64.1901—64.1903.
Form No.: N/A.
Estimated Annual Burden: 10 responses; 60,563 total annual hours; 6,056 hours per respondent.
Needs and Uses: The commission imposes the recordkeeping collection to ensure that independent LECs providing international, interexchange services through a separate affiliate are in compliance with the Communications Act of 1934, as amended, and with Commission policies and regulations.

OMB Control No.: 3060–0790.
OMB Approval date: 11/25/2003.
Expiration Date: 11/30/2006.
Title: Section 68.110(c)—Availability of Inside Wiring Information.
Form No.: N/A.
Estimated Annual Burden: 1,200 responses; 1,200 total annual hours; 1 hour per respondent.
Needs and Uses: 47 CFR 68.110(c) requires telephone companies to provide building owners with all available information regarding carrier installed wiring on the customer's side of the demarcation point, including copies of existing schematic diagrams and service records. The information must be provided by the telephone company upon request of the building owner or agent thereof. The information is needed so that building owners may be able to contract with an installer of their choice for maintenance and installation service, or elect to contract with the telephone company to modify existing wiring or assist with the installation of additional inside wiring.

OMB Control No.: 3060–0791.
OMB Approval date: 11/19/2003.
Expiration Date: 11/30/2006.
Title: Accounting for Judgements and Other Costs Associated with Litigation, CC Docket No. 93–240.
Form No.: N/A.
Estimated Annual Burden: 1 response; 36 total annual hours; 36 hours per respondent.
Needs and Uses: In CC Docket No. 93–240, the Commission considered the issue of the accounting rules and ratemaking policies that should apply to litigation costs incurred by carriers subject to part 32 of its rules and regulations. The Commission concluded that there should be special rules to govern the accounting treatment of federal antitrust judgements and settlements, in excess of the avoided costs of litigation, but not for litigation expenses. The Commission further concluded that these special rules should not apply to costs arising in other kinds of litigation A carrier must make a showing to receive recognition of its avoided costs of litigation.

OMB Control No.: 3060–0819.
OMB Approval date: 12/01/2003.
Expiration Date: 12/31/2006.
Title: Lifeline Assistance (Lifeline) Connection Assistance (Link-Up) Reporting Worksheet and Instructions (47 CFR 54.400–54.417).
Form No.: FCC Form 497.
Estimated Annual Burden: 18,000 responses; 63,000 total annual hours; 3–4 hours per respondent.
Needs and Uses: Eligible Telecommunications carriers are permitted to receive universal service support reimbursement for offering certain services to qualifying low-income customers. The telecommunciations carriers must file FCC Form 497 to solicit reimbursement. Collection of this data is necessary for the administor to accurately provide settlements for the low-income programs according to Commission rules.

OMB Control No.: 3060–0933.
OMB Approval date: 11/19/2003.
Expiration Date: 11/30/2006.
Title: Community Broadband Deployment Database Reporting Form.

Form No.: FCC Form 460.

Estimated Annual Burden: 150 responses; 37 total annual hours; .25 hours per respondent.

Needs and Uses: Pursuant to section 410(b) of the Communications Act of 1934, as amended, on October 8, 1999, the FCC convened a Federal-State Joint Conference on Advanced Telecommunications Services to provide a forum for cooperaticve dialogue and information exchange between and among state and federal jurisdications regarding the deployment of advanced telecommunications services. As part of this ongoing effort, a searchable on-line database of community bradband demand aggregation and deployment efforts is being established. The Collection of information from respondents is entirely voluntary.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–660 Filed 1–12–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission for Extension Under Delegated Authority

December 29, 2003.

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, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (PRA) that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction (PRA) comments should be submitted on or before March 15, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Leslie.Smith@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Les Smith at 202–418–0217 or via the Internet at *Leslie.Smith@fcc.gov.*

SUPPLEMENTARY INFORMATION:

OMB Control Number 3060–0187.

Title: Section 73.3594, Local public notice of designation for hearing.

Form Number: N/A.

Type of Review: Extension of currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents: 1.

Estimated Hours per Response: 2 hours.

Frequency of Response: On occasion reporting requirements.

Total Annual Burden: 2 hours.

Total Annual Costs: $1,450.

Needs and Uses: 47 CFR Section 73.3594 requires that applicants of any AM, FM, or TV broadcast station designated for hearing must give notice of such designation. 47 CFR Section 73.3594(a) requires that this notice must be published twice a week for two consecutive weeks in a general circulation daily newspaper in the community in which the station is or will be located. 47 CFR Section 73.3594(b) requires applicants for modification, assignment, transfer or renewal of an operating broadcast station to give notice over the broadcast station in addition to publishing the notice in a daily newspaper. 47 CFR Section 73.3594(g) requires that applicant file a statement with the FCC setting forth information regarding the publication or broadcast. This notice gives interested parties an opportunity to respond.

OMB Control Number: 3060–0190.

Title: Section 73.3544, Application to Obtain a Modified Station License.

Form Number: N/A.

Type of Review: Extension of currently approved collection.

Respondents: Business or other for-profit entities; not-for-profit institutions.

Number of Respondents: 325.

Estimated Time per Response: 0.25—2 hours.

Frequency of Response: On occasion reporting requirements.

Total Annual Burden: 306 hours.

Total Annual Costs: $45,000.

Needs and Uses: 47 CFR Section 73.3544(b) sets forth the filing procedures for broadcast licensees to obtain a modified station license when prior authority is not required to make changes to the station. Licensees are required to notify the FCC in writing when there is a change in the name of the licensee where there is no change in ownership or control. An informal application (written request) may be filed by licensees: (1) Correcting the routing instructions to and description of an AM station directional antenna system field monitoring point, when that point is not changed; (2) changing the type of AM station directional antenna monitor; (3) changing the location of the station main studio; or (4) changing the location of a remote control point of an AM or FM station. TV or FM licensees changing the type of transmitting antenna or output power of their transmitter must file the appropriate license application form (FCC Form 302–FM/302–TV, 3060–0506/0029) with the FCC. 47 CFR Section 73.3544(c) allows licensees to provide written notification when a change in the name of the licensee occurs where no change in ownership or control is involved.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–663 Filed 1–12–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested

December 22, 2003.

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, Pub. L. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with

a collection of information subject to the Paperwork Reduction Act that does not display a valid control number. Comments are requested concerning (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimate; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

DATES: Written Paperwork Reduction Act (PRA) comments should be submitted on or before March 15, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all Paperwork Reduction Act (PRA) comments to Les Smith, Federal Communications Commission, Room 1–A804, 445 12th Street, SW., Washington, DC 20554 or via the Internet to *Leslie.Smith@fcc.gov*.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection(s), contact Les Smith at (202) 418–0217 or via the Internet at *Leslie.Smith@fcc.gov*.

SUPPLEMENTARY INFORMATION:

OMB *Control Number:* 3060–0034.

Title: Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station.

Form Number: FCC 340.

Type of Review: Extension of a currently approved collection.

Respondents: Businesses or other for-profit entities.

Number of Respondents: 672.

Estimated Time per Response: 2–4 hours.

Frequency of Response: On occasion reporting requirements; Third party disclosure.

Total Annual Burden: 2,158 hours.

Total Annual Costs: $7,084,430.

Needs and Uses: FCC Form 340 is used to apply for authority to construct a new noncommercial educational (NCE) FM, TV, DTV broadcast station, or to make changes in the existing facilities of such a station. 47 CFR 73.3580 requires third party notification—public notice in a newspaper of general circulation—when applications are filed for new facilities or major changes in existing facilities. The Commission uses a point system to compare objective characteristics of applicants for full-service radio or television stations on channels reserved for NCE use and also on non-reserved channels if the only applicants competing propose to build NCE stations. The Commission uses the auction procedures to select among mutually exclusive commercial applications on non-reserved (commercial) channels.

OMB Control Number: 3060–0948.

Title: Noncommercial Educational Applicants.

Form Number: None.

Type of Review: Extension of currently approved collection.

Respondents: Not-for-profit institutions.

Number of Respondents: 630.

Estimated Time per Response: 0.25–2 hours.

Frequency of Response: Recordkeeping; On occasion reporting requirements.

Total Annual Burden: 534.

Total Annual Cost: $92,000.

Needs and Uses: On April 4, 2000, the Commission adopted a Report and Order in MM Docket No. 95–31, *In the Matter of Reexamination of the Comparative Standards for Noncommercial Educational Applicants*. This Report and Order adopted procedures to select among competing applicants for noncommercial educational (NCE) broadcast channels, including a point system to select among mutually exclusive applicants on reserved channels and filing windows for new and major changes to NCE stations. 47 CFR Section 73.202 provides that entities eligible to operate an NCE broadcast station can request that a non-reserved FM channel be allotted as reserved only for NCE broadcasting. This request must include a demonstration as specified in (a)(1)(i) and (ii) of this rule section. 47 CFR Section 73.3527 requires that documentation of any points claimed in an application for a NCE broadcast station in the reserved band must be kept in the public inspection file. 47 CFR Section 73.3572 requires an applicant for a NCE broadcast station on a reserved channel to submit supporting documentation of the points claimed on the application form. The FCC staff use this documentation to determine whether there is a greater need for a noncommercial channel versus a commercial channel and to perform random audits of the application point certifications. This supporting documentation also enables competing applicants to verify and/or dispute other applicants' claims.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–664 Filed 1–12–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission

December 29, 2003.

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, Pub. L. No. 104–13. An agency may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the Paperwork Reduction Act (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 February 12, 2004. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all comments regarding this Paperwork Reduction Act submission to Judith B. Herman, Federal Communications Commission, Room 1–C804, 445 12th Street, SW., DC 20554 or via the Internet to *Judith-B.Herman@fcc.gov*.

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 No.: 3060–1044.

Title: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01–388, 96–98, and 98–147, Report and Order and Order on Remand and Further NPRM.

Form No: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local or tribal government.

Number of Respondents: 2,369.

Estimated Time Per Response: 8–40 hours.

Frequency of Response: On occasion reporting requirement, recordkeeping requirement, and third party disclosure requirement.

Total Annual Burden: 74,120 hours.

Total Annual Cost: $5,275,200.

Needs and Uses: In the above-referenced docketed proceedings, the Commission adopted rules to govern the availability of unbundled network elements to competitive local exchange carriers from incumbent local exchange carriers. The Commission amends its standard for determining which network elements must be provided on an unbundled basis and determines which network elements meet this standard. The Commission established eligibility criteria for certain combinations of unbundled network elements. The Commission allows state regulatory commissions to initiate proceedings to make additional determinations consistent with specific Commission guidance.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

[FR Doc. 04–665 Filed 1–12–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[WC Docket No. 03–266; DA 04–1]

Level 3 Petition for Forbearance From Assessment of Access Charges on Voice-Embedded IP Communications

AGENCY: Federal Communications Commission.

ACTION: Notice of comment dates.

SUMMARY: This document requests comment on Level 3's petition for forbearance from assessment of access charges on voice-embedded IP communications. To assist the agency in determining whether to grant or deny Level 3's petition, comments from interested parties are being sought. This document provides the dates by which interested parties may file comments and reply comments.

DATES: The agency must receive comments on or before March 1, 2004, and reply comments on or before March 31, 2004.

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., Washington, DC, 20554. *See* **SUPPLEMENTARY INFORMATION** for further filing instructions.

FOR FURTHER INFORMATION CONTACT: Jennifer McKee, Wireline Competition Bureau, Pricing Policy Division, (202) 418–1530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Public Notice, WC Docket No. 03–266, released January 2, 2004. On December 23, 2003, Level 3 Communications LLC (Level 3) filed a petition for forbearance pursuant to section 10 of the Communications Act of 1934, as amended (the Act), requesting the Commission to forbear from application of section 251(g) of the Act, 47 U.S.C. 251(g), the exception clause of section 51.701(b)(1) of the Commission's rules, 47 CFR 51.701(b), and section 69.5(b) of the Commission's rules, 47 CFR 69.5(b), to the extent those provisions could be interpreted to permit local exchange carrier (LECs) to impose interstate or intrastate access charges on Internet protocol (IP) traffic that originates or terminates on the public switched telephone network (PSTN), or on PSTN–PSTN traffic that is incidental thereto. Level 3 excludes from its forbearance request geographic service areas of incumbent LECs that currently are exempt from section 251(c) pursuant to section 251(f)(1)'s rural exemption. 47 U.S.C. 251(c) and (f)(1). Level 3 argues that grant of this forbearance request while the Commission completes its reform of intercarrier compensation will allow IP communications that embed voice applications (voice-embedded IP) to develop with the cleanest regulatory slate possible, and will result in needed regulatory certainty, increased investment, product and technology innovation, and increased deployment of advanced services. Upon grant of its petition, Level 3 asserts that voice-embedded IP–PSTN traffic would be exchanged between a LEC and a telecommunications carrier serving a voice-embedded IP service provider pursuant to section 251(b)(5) of the Act and Subpart H of part 51 of the Commission's rules. 47 U.S.C. 251(b)(5); 47 CFR part 51 Subpart H.

Interested parties may file comments on or before March 1, 2004, and reply comments on or before March 31, 2004. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121, May 1, 1998.

Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/cgb/ecfs/.* Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of a proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of a proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

All filings must be addressed to the Commission's Secretary, Office of the

Secretary, Federal Communications Commission.

Parties are strongly encouraged to file comments electronically using the Commission's Electronic Comment Filing System (ECFS). Parties are also requested to send a courtesy copy of their comments via email to *jennifer.mckee@fcc.gov.*

Two (2) copies of the comments and reply comments should also be sent to Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW., Room 5–A221, Washington, DC 20554. Parties shall also serve one copy with Qualex International, Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, (202) 863–2893, or via email to <*qualexint@aol.com*>.

Documents in WC Docket No. 03–266, including the Level 3 Petition, are 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 Qualex International, telephone (202) 863–2893, facsimile (202) 863–2898.

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. *See* 47 CFR 1.1200, 1.1206. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required. *See* 47 CFR 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules.

Federal Communications Commission.

William F. Maher, Jr.,

Chief, Wireline Competition Bureau.

[FR Doc. 04–666 Filed 1–12–04; 8:45 am]

BILLING CODE 6712–01–U

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0187]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Postmarket Surveillence of Medical Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Postmarket Surveillence of Medical Devices" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of August 20, 2003 (68 FR 58690), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0449. The approval expires on December 31, 2006. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets.*

Dated: January 6, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–599 Filed 1–12–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0318]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of November 24, 2003 (68 FR 65937), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0354. The approval expires on December 31, 2006. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets.*

Dated: January 6, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–602 Filed 1–12–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0213]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Reporting and Recordkeeping Requirements and Availability of Sample Electronic Products for Manufacturers and Distributors of Electronic Products

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Reporting and Recordkeeping Requirements and Availability of Sample Electronic Products for Manufacturers and Distributors of Electronic Products" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 7, 2003 (68 FR 57909), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0025. The approval expires on December 31, 2006. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets.*

Dated: January 6, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–668 Filed 1–12–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0269]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Infectious Disease Issues in Xenotransplantation

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Infectious Disease Issues in Xenotransplantation" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: JonnaLynn P. Capezzuto, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 23, 2003 (68 FR 60697), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0456. The approval expires on December 31, 2006. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets.*

Dated: January 6, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–669 Filed 1–12–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0463]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Infant Formula Requirements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by February 12, 2004.

ADDRESSES: The Office of Management and Budget (OMB) is still experiencing significant delays in the regular mail, including first class and express mail, and messenger deliveries are not being accepted. To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: Fumie Yokota, Desk Officer for FDA, FAX: 202–395–6974.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Infant Formula Requirements—21 CFR Parts 106 and 107 (OMB Control Number 0910–0256)—Extension

Statutory requirements for infant formula under the Federal Food, Drug, and Cosmetic Act (the act) are intended to protect the health of infants and include a number of reporting and recordkeeping requirements. Among other things, section 412 of the act (21 U.S.C. 350a) requires manufacturers of infant formula to establish and adhere to quality control procedures, notify FDA when a batch of infant formula that has left the manufacturers' control may be adulterated or misbranded, and keep records of distribution. FDA has issued regulations to implement the act's requirements for infant formula in 21

CFR part 106 and part 107 (21 CFR part 107). FDA also regulates the labeling of infant formula under the authority of section 403 of the act (21 U.S.C. 343). Under the labeling regulations for infant formula in part 107, the label of an infant formula must include nutrient information and directions for use. The purpose of these labeling requirements is to ensure that consumers have the information they need to prepare and use infant formula appropriately. In a notice of proposed rulemaking that published in the **Federal Register** of July 9, 1996 (61 FR 36154), FDA proposed changes in the infant formula regulations, including some of those listed in tables 1 and 2 of this document. The document included revised burden estimates for the proposed changes and solicited public comment. In the interim, however, FDA is seeking an extension of OMB approval for the current regulations so that it can continue to collect information while the proposal is pending.

In the **Federal Register** of October 17, 2003 (68 FR 59793) FDA published a 60-day notice requesting public comment on the information collection provisions. No comments were received.

FDA estimates the burden for this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

Federal Food, Drug, and Cosmetic Act or 21 CFR Section	No. of Respondents	Annual Frequency per Response	Total Annual Responses[2]	Hours per Response	Total Hours
Section 412(d) of the act	4	13	52	10	520
106.120(b)	4	0.25	1	4	4
107.10(a) and 107.20	4	13	52	8	416
107.50(b)(3) and (b)(4)	3	2	6	4	24
107.50(e)(2)	3	0.33	1	4	4
Total					968

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Manufacturers may submit infant formula notifications in electronic format.

TABLE 2.—ESTIMATED ANNUAL RECORDKEEPING BURDEN[1]

21 CFR Section	No. of Recordkeepers	Annual Frequency of Recordkeeping	Total Annual Records	Hours per Recordkeeper	Total Hours
106.100	4	10	40	4,000	160,000
107.50(c)(3)	3	10	30	3,000	90,000
Total					250,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

In compiling these estimates, FDA consulted its records of the number of infant formula submissions received in the past. The figures for hours per response are based on estimates from experienced persons in the agency and in industry.

Dated: January 6, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–670 Filed 1–12–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0314]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Food Labeling; Notification Procedures for Statements on Dietary Supplements

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Food Labeling; Notification Procedures for Statements on Dietary Supplements" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Peggy Robbins, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–1223.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 14, 2003 (68 FR 59189), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0331. The approval expires on December 31, 2006.

A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets*.

Dated: January 6, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–671 Filed 1–12–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2003N–0286]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; User Fee Cover Sheet; Form FDA 3397

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "User Fee Cover Sheet; Form FDA 3397" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: JonnaLynn P. Capezzuto, Office of Management Programs (HFA–250), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–4659.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of October 3, 2003 (68 FR 57469), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0297. The approval expires on December 31, 2006. A copy of the supporting statement for this information collection is available on the Internet at *http://www.fda.gov/ohrms/dockets*.

Dated: January 6, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–672 Filed 1–12–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Neurological Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Neurological Devices Panel of the Medical Devices Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on February 23, 2004, from 9:30 a.m. to 5 p.m.

Location: Hilton Washington, DC North/Gaithersburg, Ballroom Salons A, B, C, and D, 620 Perry Pkwy., Gaithersburg, MD.

Contact Person: Janet L. Scudiero, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–1184, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512513. Please call the Information Line for up-to-date information on this meeting.

Agenda: The committee will discuss and make recommendations on a premarket notification submission for a thrombectomy device. Background information for the topic, including the agenda and questions for the committee, will be available to the public 1 business day before the meeting on the Internet at *http://www.fda.gov/cdrh/panelmtg.html*.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by February 9, 2004. Oral presentations from the public will be scheduled between approximately 9:45 a.m. and 10:45 a.m. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before February 9, 2004, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Shirley Meeks, Conference Management Staff, at 301–594–1283, ext. 105, at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: January 5, 2004.

Peter J. Pitts,

Associate Commissioner for External Relations.

[FR Doc. 04–600 Filed 1–12–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Ophthalmic Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). At least one portion of the meeting will be closed to the public.

Name of Committee: Ophthalmic Devices Panel of the Medical Devices Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the agency on FDA's regulatory issues.

Date and Time: The meeting will be held on February 5, 2004, from 9 a.m. to 5 p.m., and February 6, 2004, from 8 a.m. to 4:30 p.m.

Location: Gaithersburg Marriott, Salons A, B, C, and D, 9751 Washingtonian Blvd., Gaithersburg, MD.

Contact Person: Sara M. Thornton, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–2053, ext. 127, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), code 3014512396. Please call the

Information Line for up-to-date information on this meeting.

Agenda: On February 5, 2004, the committee will discuss, make recommendations, and vote on a premarket approval application (PMA) for a phakic intraocular lens for the reduction or elimination of myopia in adults.

On February 6, 2004, the committee will discuss, make recommendations and vote on a PMA for a radiofrequency electrosurgical corneal shaping device for the temporary treatment of presbyopia. Background information for each day's topic, including the attendee list, agenda, and questions for the committee, will be available to the public 1 business day before the meeting, on the Internet at *http://www.fda.gov/cdrh/panelmtg.html*. Material for the February 5, 2004, session will be posted on February 4, 2004; material for the February 6, 2004, session will be posted on February 5, 2004.

Procedure: On February 5, 2004, from 9 a.m. to 5 p.m., and on February 6, 2004, from 9:30 a.m. to 4:30 p.m., the meeting is open to the public. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person by January 26, 2004. On February 5, 2004, formal oral presentations from the public will be scheduled between approximately 9:15 a.m. and 9:45 a.m. Near the end of the committee deliberations on the PMA, a 30-minute open public session will be conducted for interested persons to address issues specific to the submission before the committee. On February 6, 2004, oral presentations from the public will be scheduled between approximately 9:45 a.m. and 10:15 a.m. Near the end of committee deliberations on the PMA, a 30-minute open public session will be conducted for interested persons to address issues specific to the submission before the committee. Time allotted for each presentation may be limited. Those desiring to make formal oral presentations should notify the contact person before January 26, 2004, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation.

Closed Committee Deliberations: On February 6, 2004, from 8 a.m. to 9:30 a.m., the meeting will be closed to permit FDA staff to present to the committee trade secret and/or confidential commercial information relevant to pending and future device submissions for vitreoretinal, surgical and diagnostic devices, intraocular and corneal implants, and contact lenses. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Persons attending FDA's advisory committee meetings are advised that the agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact AnnMarie Williams, Conference Management Staff, at 301–594–1283, ext. 113, at least 7 days in advance of the meeting.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: January 5, 2004.

Peter J. Pitts,

Associate Commissioner for External Relations.

[FR Doc. 04–601 Filed 1–12–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 2004D–0002]

Draft Guidance for Industry and FDA Staff; Saline, Silicone Gel, and Alternative Breast Implants; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the draft guidance document entitled "Saline, Silicone Gel, and Alternative Breast Implants." This version of the draft guidance document updates preclinical, clinical, and labeling recommendations described in "Guidance for Saline, Silicone Gel, and Alternative Breast Implants" dated February 11, 2003. The update is based on the latest scientific and medical information on breast implants, and clarifies the type and amount of scientific data that should be submitted to allow FDA to evaluate whether these devices are safe and effective. The draft guidance document contains new recommendations for manufacturers submitting applications for premarket approval of breast implants. Some of the recommendations apply to all premarket approval applications for breast implants, while others are specific to the type of implant. The draft guidance document is not final nor is it in effect at this time.

DATES: Submit written or electronic comments on this draft guidance by April 12, 2004.

ADDRESSES: Submit written requests for single copies on a 3.5" diskette of the guidance document entitled "Saline, Silicone Gel, and Alternative Breast Implants" to the Division of Small Manufacturers, International, and Consumer Assistance (HFZ–220), Center for Devices and Radiological Health (CDRH), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850. Send one self-addressed adhesive label to assist that office in processing your request, or fax your request to 301–443–8818. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance.

Submit written comments concerning this draft guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.fda.gov/dockets/ecomments*. Identify comments with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Samie Allen, Center for Devices and Radiological Health (HFZ–410), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–594–3090, ext. 139.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is revising the guidance document entitled "Saline, Silicone Gel, and Alternative Breast Implants" to clarify the type and amount of scientific data that should be submitted to allow FDA to evaluate whether these devices are safe and effective. The draft guidance document provides updated information based on the latest scientific and medical information on breast implants. The draft guidance document contains new recommendations for manufacturers submitting applications for premarket approval of breast implants. Some of the recommendations apply to all premarket approval applications for these devices, while others are specific to silicone gel-filled, saline-filled, or alternative implants. The proposed changes are primarily to the mechanical data, clinical data, and labeling sections of the draft guidance document. In addition, a new section entitled "Modes and Causes of Rupture" has been added

that describes the type of data FDA recommends a manufacturer provide to address this issue (this section replaces the previous Retrieval Study section). When final, this draft guidance document will supersede "Guidance for Saline, Silicone Gel, and Alternative Breast Implants," dated February 11, 2003.

II. Significance of Guidance

This draft guidance is being issued consistent with FDA's good guidance practices (GGPs) regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the agency's current thinking on "Saline, Silicone Gel, and Alternative Breast Implants." It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

III. Electronic Access

To receive "Saline, Silicone Gel, and Alternative Breast Implants," you may either send a fax request to 301–443–8818 to receive a paper copy of the document, or send an e-mail request to *GWA@CDRH.FDA.GOV* to receive a paper copy or an electronic copy. Please use the document number (1239) to identify the guidance you are requesting.

Persons interested in obtaining a copy of the draft guidance may also do so by using the Internet. CDRH maintains an entry on the Internet for easy access to information including text, graphics, and files that may be downloaded to a personal computer with Internet access. Updated on a regular basis, the CDRH home page includes device safety alerts, **Federal Register** reprints, information on premarket submissions (including lists of cleared submissions, approved applications, and manufacturers' addresses), small manufacturer's assistance, information on video conferencing and electronic submissions, Mammography Matters, and other device-oriented information. The CDRH Web site may be accessed at *http://www.fda.gov/cdrh*. A search capability for all CDRH guidance documents is available at *http://www.fda.gov/cdrh/guidance.html*. Guidance documents are also available on the Division of Dockets Management Internet site at *http://www.fda.gov/ohrms/dockets*.

IV. Paperwork Reduction Act of 1995

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 USC 3501–3520) (the PRA). The collections of information addressed in Sections 3 through 10 of the guidance document have been approved by OMB in accordance with the PRA under the regulations governing premarket approval applications (21 CFR part 814, OMB No. 0910–0231). The labeling provisions addressed in Section 11 of the guidance document have been approved under OMB No. 0910–0485.

V. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**), written or electronic comments regarding this document on or before April 12, 2004. Submit a single copy of electronic comments to *http://www.fda.gov/dockets/ecomments*. Submit two paper copies of any mailed comments, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Comments received may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 7, 2004.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–658 Filed 1–12–04; 12:00 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Bureau of Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-Day Notice of Information Collection Under Review; National Interest Waivers; Supplemental Evidence to I–140 and I–485.

The Department of Homeland Security, Bureau of Citizenship and Immigrations Services (CIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty day until March 15, 2004.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques of other forms of information technology, *e.g.*, permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* National Interest Waivers; Supplemental Evidence to I–140 and I–485.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No Agency Form Number; File No. OMB–22 Bureau or Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individual or Households. The information collected via the submitted supplemental documentation will be used by the Bureau of Citizenship and Immigration Services to determine eligibility for the request national interest waiver and to finalize the request for adjustment to lawful permanent resident status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 8,000 responses at one (1) hour per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 8,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or a additional information, please contact Richard A. Sloan (202) 514–3291, Director, Regulations and Forms Services Division, Department of Homeland Security, 425 I Street, NW., Room 4304, Washington, DC 20536. Additionally, comments and/or

suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

If additional information is required contact: Mr. Steve Cooper, PRA Clearance Officer, Department of Homeland Security, Office of the Chief Information Officer, Regional Office Building 3, 7th and D Streets, SW., Suite 4636–26, Washington, DC 20202.

Dated: December 12, 2003.

Richard A. Sloan,

Department Clearance Officer, Department of Homeland Security, Bureau of Citizenship and Immigration Services.

[FR Doc. 04–283 Filed 1–12–04; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Bureau of Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-Day Notice of Information Collection Under Review; Application for Issuance or Replacement of Northern Mariana Card; Form I–777.

The Department of Homeland Security (DHS) and the Bureau of Citizenship and Immigration Services (CIS), has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until March 15, 2004.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the 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.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Issuance or Replacement of Northern Mariana Card.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I-777. Bureau of Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. This information collection is used by applicants to apply for a Northern Mariana identification card if they received United States citizenship pursuant to Pub. L. 94–241 (Covenant to Establish a Commonwealth of the Northern Mariana Island).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 100 responses at 30 minutes (.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 50 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan (202) 514–3291, Director, Regulations and Forms Services Division, Department of Homeland Security, Room 4034, 425 I Street, NW., Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

If additional information is required contact: Mr. Steve Cooper, PRA Clearance Officer, Department of Homeland Security, Office of the Chief Information Officer, Regional Office Building 3, 7th and D Streets, SW., Suite 4636–26, Washington, DC 20202.

Dated: December 12, 2003.

Richard A. Sloan,

Department Clearance Officer, Department of Homeland Security, Bureau of Citizenship and Immigration Services.

[FR Doc. 04–284 Filed 1–12–04; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Bureau of Citizenship and Immigration Services

Agency Information Collection Activities: Extension of Existing Collection; Comment Request

ACTION: 60-Day Notice of Information Collection Under Review; Generic Clearance of Customer Service Surveys.

The Department of Homeland Security, Bureau of Citizenship and Immigration Services (CIS), has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until March 15, 2004.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the 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.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Generic Clearance of Customer Service Surveys.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* No Agency Form Number; (File No. OMB–09). Bureau of Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals and Households. This information will be used to assess individual and agency needs, identify problems, and plan for programmatic improvements in the delivery of immigration services.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 150,000 responses at 30 minutes per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 75,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan (202) 514–3291, Director, Regulations and Forms Services Division, Department of Homeland Security, Room 4304, 425 I Street, NW., Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

If additional information is required contact: Mr. Steve Cooper, PRA Clearance Officer, Department of Homeland Security, Office of the Chief Information Officer, Regional Office Building 3, 7th and D Streets, SW., Suite 4636–26, Washington, DC 20202.

Dated: December 12, 2003.

Richard A. Sloan,

Department Clearance Officer, Department of Homeland Security, Bureau of Citizenship and Immigration Services.

[FR Doc. 04–285 Filed 1–12–04; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Bureau of Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-Day Notice of Information Collection Under Review; Application for Travel Document, Form I–131.

The Department of Homeland Security, Bureau of Citizenship and Immigration Services (CIS), has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until March 15, 2004.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Application for Travel Document.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–131. Bureau of Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: individuals or households. This form is used by permanent or conditional residents, refugees or asylees and aliens abroad seeking to apply for a travel document to lawfully reenter the United States or be paroled for humanitarian purposes into the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 453,318 responses at 55 minutes (.90 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 407,986 annual burden hours.

If additional information is required contact: Mr. Steve Cooper, PRA Clearance Officer, Department of Homeland Security, Office of the Chief Information Officer, Regional Office Building 3, 7th and D Streets, SW., Suite 4636–26, Washington, DC 20202.

Dated: December 12, 2003.

Richard A. Sloan,

Department Clearance Officer, Department of Homeland Security, Bureau of Citizenship and Immigration Services.

[FR Doc. 04–286 Filed 1–12–04; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Bureau of Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-Day Notice of Information Collection Under Review; Application for Action on an Approved Application or Petition; Form I–824.

The Department of Homeland Security, Bureau of Citizenship and Immigration Services (CIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until March 15, 2004.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the 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.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Action on an Approved Application or Petition.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–824, Bureau of Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. This information collection is used to request a duplicate approval notice, to notify and to verify to the U.S. Consulate that a petition has been approved or that a person has been adjusted to permanent resident status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 43,772 responses at 25 minutes (.416 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 18,209 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan (202) 514–3291, Director, Regulations and Forms Services Division, Department of Homeland Security, 425 I Street, NW., Room 4304, Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

If additional information is required contact: Mr. Steve Cooper, PRA Clearance Officer, Department of Homeland Security, Office of the Chief Information Officer, Regional Office Building 3, 7th and D Streets, SW., Suite 4636–26, Washington, DC 20202.

Dated: December 11, 2003.

Richard A. Sloan,

Department Clearance Officer, Department of Homeland Security, Bureau of Citizenship and Immigration Services.

[FR Doc. 04–287 Filed 1–12–04; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Bureau of Citizenship and Immigration Services

Agency Information Collection Activities: Comment Request

ACTION: 60-Day Notice of Information Collection Under Review; Application for Temporary Protected Status; Forms I–821 and I–821A.

The Department of Homeland Security (DHS) and the Bureau of Citizenship and Immigration Services (CIS) has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until March 15, 2004.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the 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.

Overview of This Information Collection

(1) *Type of Information Collection:* Extension of a currently approved collection.

(2) *Title of the Form/Collection:* Application for Temporary Protected Status.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–821. Bureau of Citizenship and Immigration Services.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: individuals or households. The information provided on this collection is used by the DHS to determine whether an applicant for Temporary Protected Status (TPS) meets the eligibility requirements. Such TPS benefits include employment authorization and relief from the threat of removal or deportation from the U.S. while in such status.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 176,000 responses at 30 minutes (.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 88,000 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan (202) 514–3291, Director, Regulations and Forms Services Division, Department of Homeland Security, 425 I Street, NW., Room 4304, Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

If additional information is required contact: Mr. Steve Cooper, PRA Clearance Officer, Department of Homeland Security, Office of the Chief Information Officer, Regional Office Building, 37th and D Street, SW., Suite 4636–26, Washington, DC 20202.

Dated: December 11, 2003.

Richard A. Sloan,

Department Clearance Officer, Department of Homeland Security, Bureau of Citizenship and Immigration Services.

[FR Doc. 04–288 Filed 1–12–04; 8:45 am]

BILLING CODE 4410–10–M

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[CGD08–03–051]

Houston/Galveston Navigation Safety Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Request for applications.

SUMMARY: The U.S. Coast Guard is seeking applications for appointment to membership on the Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC). HOGANSAC provides

advice and makes recommendations to the Coast Guard on matters relating to the safe navigation of vessels to and from the Ports of Galveston, Houston, and Texas City, and throughout Galveston Bay, Texas.

DATES: Applications must be completed and postmarked no later than April 30, 2004.

ADDRESSES: You may request an application form by writing to Commanding Officer, USCG VTS Houston/Galveston, 9640 Clinton Drive, Houston, TX 77029; by calling Lieutenant (LT) Sean Komatinsky at (713–671–5103); by submitting a faxed request to 713–671–5159; or by visiting HOGANSAC's Web site at *http://www.uscg.mil/hq/g-m/advisory/hogansac/hogan.htm*. All application forms must be returned to the following address: Commanding Officer, Attn: HOGANSAC Executive Secretary, USCG VTS Houston/Galveston, 9640 Clinton Drive, Houston, TX 77029.

FOR FURTHER INFORMATION CONTACT: Commander (CDR) Thomas Marian, Executive Secretary of HOGANSAC at (713–671–5160) or LT Sean Komatinsky, Assistant to the Executive Secretary of HOGANSAC at (713–671–5103).

SUPPLEMENTARY INFORMATION: HOGANSAC is a Federal advisory committee subject to the provisions of 5 U.S.C. App. 2. This committee provides local expertise to the Secretary of Homeland Security and the Coast Guard on such matters as communications, surveillance, traffic control, anchorages, aids to navigation, and other related topics dealing with navigation safety in the Houston/Galveston area. The committee normally meets at least three times a year at various locations in the Houston/Galveston area. Members serve voluntarily, without compensation from the Federal Government for salary, travel, or per diem. Term of membership is for two years. Individuals appointed by the Secretary based on applications submitted in response to this solicitation will serve from November 21, 2004 until November 21, 2006.

By law, the Committee consists of eighteen members who have particular expertise, knowledge, and experience regarding the transportation, equipment, and techniques that are used to ship cargo and to navigate vessels in the inshore and the offshore waters of the Gulf of Mexico. Committee members represent a wide range of constituencies. There are eleven membership categories: (1) Two members who are employed by the Port of Houston Authority or have been selected by that entity to represent them; (2) two members who are employed by the Port of Galveston or the Texas City Port Complex or have been selected by those entities to represent them; (3) two members from organizations that represent shipowners, stevedores, shipyards, or shipping organizations domiciled in the State of Texas; (4) two members representing organizations that operate tugs or barges that utilize the port facilities at Galveston, Houston, and Texas City; (5) two members representing shipping companies that transport cargo from the ports of Galveston and Houston on liners, break bulk, or tramp steamer vessels; (6) two members representing those who pilot or command vessels that utilize the ports of Galveston, Houston and Texas City; (7) two at-large members who may represent a particular interest group but who use the port facilities at Galveston, Houston or Texas City; (8) one member representing labor organizations involved in the loading and unloading of cargo at the ports of Galveston or Houston; (9) one member representing licensed merchant mariners other than pilots, who perform shipboard duties on vessels which utilize the port facilities of Galveston, Houston or Texas City; (10) one member representing environmental interests; and (11) one member representing the general public. In support of the policy of the Department of Homeland Security on gender and ethnic diversity, the Coast Guard encourages applications from qualified women and members of minority groups. Individuals nominated to represent the general public will be required to complete a Confidential Financial Disclosure Report (OGE Form 450). Neither the report nor the information it contains may be released to the public, except under an order issued by a Federal court or as otherwise provided under the Privacy Act (5 U.S.C. 552a).

Dated: December 30, 2003.

J.W. Stark,

Captain, U.S. Coast Guard, Acting Commander, 8th Coast Guard Dist.

[FR Doc. 04–587 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2004–16851]

Towing Safety Advisory Committee; Vacancies

AGENCY: Coast Guard, DHS.

ACTION: Request for applications.

SUMMARY: The Coast Guard seeks applications for membership on the Towing Safety Advisory Committee (TSAC). TSAC advises the Coast Guard on matters relating to shallow-draft inland and coastal waterway navigation and towing safety.

DATES: Application forms should reach us on or before March 15, 2004.

ADDRESSES: You may request an application form by writing to Commandant (G–MSO–1), U.S. Coast Guard, 2100 Second Street SW., Washington, DC 20593–0001; by calling 202–267–0214; or by faxing 202–267–4570. Send your original completed and signed application in written form to the above street address. This notice is available on the Internet at *http://dms.dot.gov* in docket USCG–2004–16851 and the application form is available at *http://www.uscg.mil/hq/g-m/advisory/index.htm* (Click on "ACM Application".)

FOR FURTHER INFORMATION CONTACT: Mr. Gerald Miante; Assistant Executive Director of TSAC, telephone 202–267–0214, fax 202–267–4570, or e-mail *gmiante@comdt.uscg.mil*.

SUPPLEMENTARY INFORMATION: The Towing Safety Advisory Committee (TSAC) is a Federal advisory committee mandated by Congress and operates under 5 U.S.C. App. 2, (Pub. L. 92–463, 86 Stat. 770, as amended). It advises the Secretary of Homeland Security on matters relating to shallow-draft inland and coastal waterway navigation and towing safety. This advice also assists the Coast Guard in formulating the position of the United States in advance of meetings of the International Maritime Organization.

TSAC meets at least once a year at Coast Guard Headquarters, Washington, DC, or another location selected by the Coast Guard. It may also meet for extraordinary purposes. Its working groups may meet to consider specific issues as required. The 16-person membership includes 7 representatives of the barge and towing industry (reflecting a regional geographical balance); 1 member from the offshore mineral and oil supply vessel industry; and 2 members from each of the following areas: Maritime labor; shippers (of whom at least one shall be engaged in the shipment of oil or hazardous materials by barge); port districts, authorities, or terminal operators; and the general public.

We are currently considering applications for three positions from the Barge and Towing Industry reflecting a geographical balance, one position from Port Districts, Authorities, or Terminal

Operators, one position from Labor, and one position from Shippers. To be eligible, applicants should have particular expertise, knowledge, and experience relative to the position in towing operations, marine transportation, or business operations associated with shallow-draft inland and coastal waterway navigation and towing safety. Each member serves for a term of up to 4 years. A few members may serve consecutive terms. All members serve at their own expense and receive no salary, reimbursement of travel expenses, or other compensation from the Federal Government.

In support of the policy of the Department of Homeland Security on gender and ethnic diversity, we encourage qualified women and members of minority groups to apply.

Dated: January 7, 2004.

Joseph J. Angelo,

Director of Standards, Marine Safety, Security, & Environmental Protection.

[FR Doc. 04–636 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2003–16814]

Discharge of Dry Cargo Residues in the Great Lakes

AGENCY: Coast Guard, DHS.

ACTION: Notice.

SUMMARY: The Coast Guard gives notice that Congressional authorization of the United States 1997 enforcement policy (enforcement policy) relating to the incidental discharge of dry cargo residue on the Great Lakes expires on September 30, 2004, and that the study of that policy mandated by Congress has been completed. If new regulations are not in place by September 30, 2004, the enforcement policy will expire, and the current statute, which prohibits such discharges, will become effective October 1, 2004, and will be enforced by the Coast Guard. Although the Coast Guard is initiating a rulemaking regarding the discharge of dry cargo residue on the Great Lakes, it is improbable that any such rulemaking would be completed before the expiration of the enforcement policy.

DATES: The interim enforcement policy discussed in this notice expires September 30, 2004. Enforcement in accordance with current statutes will begin October 1, 2004.

ADDRESSES: Any comments or material received from the public in regard to this notice, as well as documents mentioned in the notice as being available in the public docket, are part of docket USCG–2003–16814 and may be viewed online at *http://dms.dot.gov* or at the Docket Management Facility, U.S. Department of Transportation, room PL–401, 400 Seventh Street SW., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions relating to the substance of this notice call LCDR Mary Sohlberg, U.S. Coast Guard, telephone 202–267–0713. If you have questions on viewing the docket, call Andrea M. Jenkins, Program Manager, Docket Operations, Department of Transportation, telephone 202–366–0271.

SUPPLEMENTARY INFORMATION: The historical practice of bulk dry cargo vessels on the Great Lakes is to wash non-hazardous and non-toxic cargo residues ("dry cargo residue" or "cargo sweepings") overboard. In 1987, Congress amended the Act to Prevent Pollution from Ships (APPS; see Pub. L. 100–220, sec. 2002; see also 33 U.S.C. 1901 *et seq.*), adopting Annex V to the International Convention for the Prevention of Pollution from Ships (MARPOL), 1973. Under MARPOL interpretive guidelines, dry cargo residues and cargo sweepings are considered to be garbage. Strict application of the MARPOL interpretive guideline adopted the following year (33 CFR part 151) banned the discharge of dry cargo residue and cargo sweepings in the Great Lakes.

To ease the difficult implementation issues that application of the MARPOL guidelines would create within the unique legal, environmental, and economic framework of the Great Lakes, the Ninth Coast Guard District implemented in 1993 an "enforcement policy" (CCGD9INST 16460.1) that has been revised over the years and reissued in 1995 and in 1997. The 1997 policy is the current practice in place in the Great Lakes. The Coast Guard was directed by Congress in the 1998 Coast Guard Authorization Bill to continue its current policy regarding dry cargo residues on the Great Lakes until 2002. This authorization was subsequently extended until September 30, 2004, in Public Law 106–554, sec. 1117, pending completion of a study and formulation of a specific regulatory solution to the issue. Unless new regulations adopt elements of the enforcement policy, the Coast Guard has concluded that we have no authority to extend the enforcement policy on our own, beyond the September 2004 deadline. The Coast Guard contracted the completion of the study and has received the study report on discharge of vessel dry cargo residues mandated by Congress in Public Law 106–554. The study is available at *http://dms.dot.gov.*

Because of the effects on U.S. flag commercial shipping on the Great Lakes of a ban on dry cargo residues discharges, that study, among other things, recommended that the current practice of allowing vessels to discharge their incidental cargo residues into certain portions of the Great Lakes be continued, but, citing the lack of available data, also recommended that an Environmental Assessment be performed of the long term effects of continuing that practice. We intend to initiate a rulemaking and, as part of the rulemaking process, perform an Environmental Assessment in conjunction with other regulatory assessments. The analyses would assist in determining whether the regulations regarding the discharge of dry cargo residues in the Great Lakes should reflect past practice, prohibit discharges altogether, or allow for some other course of action, taking into account all the circumstances and stakeholder interests. If new regulations are not in effect by September 30, 2004, the Coast Guard will enforce the existing statutes commencing October 1, 2004.

Dated: January 7, 2004.

Joseph J. Angelo,

Director of Standards, Marine Safety, Security & Environmental Protection.

[FR Doc. 04–590 Filed 1–8–04; 4:56 pm]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2004–16859]

Chemical Transportation Advisory Committee and Towing Safety Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Notice of open teleconference meetings.

SUMMARY: This notice announces a teleconference of the Chemical Transportation Advisory Committee (CTAC) and a teleconference of the Towing Safety Advisory Committee (TSAC). The purpose of these teleconferences is for CTAC and TSAC to review the findings of the joint CTAC/TSAC Working Group on

ammonium nitrate and to vote on the proposed final report as recommendations to the Coast Guard.

DATES: The CTAC teleconference will take place on Wednesday, January 28, 2004, from 10 a.m. until 12 a.m. (noon), EST. The TSAC teleconference will take place on Wednesday, January 28, 2004, from 1 p.m. until 3 p.m., EST. These teleconferences may close early if all business is finished. Comments and related material must reach the Coast Guard before the public comment period at the teleconferences.

ADDRESSES: Members of the public may participate in these teleconferences by dialing 1–202–366–3920, pass code: 3199. Public participation is welcomed; however, the number of teleconference lines is limited and available on a first-come, first-served basis. Members of the public may also participate by coming to Room 1303, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593–0001. We request that members of the public who plan to attend this meeting notify LT Michael McKean at 202–267–0087 so that he may notify building security officials. Written comments should be sent to CDR Robert J. Hennessy, Executive Director, CTAC, or Mr. Gerald Miante, Assistant Executive Director, TSAC, Commandant (G-MSO), 2100 Second Street, SW., Washington DC 20593–0001 or Fax 202–267–4570. This notice is available on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Executive Director of CTAC, at telephone 202–267–1217, fax 202–267–4570, Assistant Executive Director of TSAC, at telephone 202–267–0221, fax 202–267–4570, or LT Michael McKean at telephone 202–267–0087, fax 202–267–4570.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2, (Pub. L. 92–463, 86 Stat. 770, as amended).

Agenda of Teleconferences

(1) Introductions and opening remarks.

(2) Discussion of CTAC/TSAC working group findings regarding the potential addition of ammonium nitrate and ammonium nitrate fertilizers that are classified as oxidizers to the Coast Guard Certain Dangerous Cargo (CDC) definition.

(3) Review proposed final report.

(4) Public comment period.

(5) Vote.

(6) Closing remarks.

Procedural

The Chairpersons of CTAC and TSAC shall conduct the teleconferences in a way that will, in their judgment, facilitate the orderly conduct of business. During the teleconferences, the committees welcome public comment. Members of the public will be heard during the public comment period. The committees will make every effort to hear the views of all interested parties. Please note that the teleconferences may close early if all business is finished. Written comments must be submitted before the public comment period at the teleconferences to the Executive Director of CTAC or the Assistant Executive Director of TSAC (see **ADDRESSES**).

The teleconferences will be recorded and a summary will be available for public review upon request approximately 30 days following the teleconference meetings.

Dated: January 7, 2004.

Joseph J. Angelo,

Director of Standards, Marine Safety, Security, and Environmental Protection.

[FR Doc. 04–635 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[CGD08–03–052]

Houston/Galveston Navigation Safety Advisory Committee

AGENCY: Coast Guard, DHS.

ACTION: Notice of meetings.

SUMMARY: The Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC) and its working groups will meet to discuss waterway improvements, aids to navigation, area projects impacting safety on the Houston Ship Channel, and various other navigation safety matters in the Galveston Bay area. All meetings will be open to the public.

DATES: The next meeting of HOGANSAC will be held on Thursday, February 5, 2004 at 9 a.m. An advance meeting of the Committee's working groups will be held on Thursday, January 22, 2004 at 9 a.m. The meetings may adjourn early if all business is finished. Members of the public may present written or oral statements at either meeting. Requests to make oral presentations or distribute written materials should reach the Coast Guard 5 working days before the meeting at which the presentation will be made. Requests to have written materials distributed to each member of the committee in advance of the meeting should reach the Coast Guard at least 10 working days before the meeting at which the presentation will be made.

ADDRESSES: The full Committee meeting will be held at the Houston Pilot Association Office, 8150 South Loop East, Houston, Texas (713–645–9620). The working groups meeting will be held at the Galveston-Texas City Pilots Association Office, 1301 Pelican Island #1, Galveston, Texas (409–740–3336). This notice is available on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Captain (CAPT) Richard Kaser, Executive Director of HOGANSAC, telephone (713) 671–5199, Commander (CDR) Tom Marian, Executive Secretary of HOGANSAC, telephone (713) 671–5164, or Lieutenant (LT) Sean Komatinsky, assistant to the Executive Secretary of HOGANSAC, telephone (713) 671–5103, e-mail *skomatinsky@vtshouston.uscg.mil.* Written materials and requests to make presentations should be sent to Commanding Officer, VTS Houston-Galveston, Attn: LT Komatinsky, 9640 Clinton Drive, Floor 2, Houston, TX 77029.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Agendas of the Meetings

Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC). The tentative agenda includes the following:

(1) Opening remarks by the Committee Sponsor (RADM Robert Duncan) (or the Committee Sponsor's representative), Executive Director (CAPT Richard Kaser) and Chairman (Mr. Tim Leitzell).

(2) Approval of the October 9, 2003 minutes.

(3) Old Business:

(a) Dredging projects.

(b) AtoN Knockdown Working Group and pending AtoN projects.

(c) Mooring subcommittee report.

(d) Education and Outreach subcommittee report.

(e) Area Maritime Security Committee Liaison's report.

(f) Bridge Allision Prevention Working Group.

(g) Swimmers Near Lynchburg.

(h) Electronic Navigation.

(i) Safe Harbor Working Group

(j) Maritime Incident Review Working Group

(k) Deepdraft Entry Facilitation Working Group

(l) Galveston Causeway Construction Working Group

(4) New Business.

Working Groups Meeting. The tentative agenda for the working groups meeting includes the following:

(1) Presentation by each working group of its accomplishments and plans for the future.

(2) Review and discuss the work completed by each working group.

Procedural

Working groups have been formed to examine the following issues: dredging and related issues, electronic navigation systems, AtoN knockdowns, impact of passing vessels on moored ships, boater education issues, facilitating deep draft movements and mooring infrastructure. Not all working groups will provide a report at this session. Further, working group reports may not necessarily include discussions on all issues within the particular working group's area of responsibility. All meetings are open to the public. Please note that the meetings may adjourn early if all business is finished. Members of the public may make presentations, oral or written, at either meeting. Requests to make oral or written presentations should reach the Coast Guard 5 working days before the meeting at which the presentation will be made. If you would like to have written materials distributed to each member of the committee in advance of the meeting, you should send your request along with 15 copies of the materials to the Coast Guard at least 10 working days before the meeting at which the presentation will be made.

Information on Services for the Handicapped

For information on facilities or services for the handicapped or to request special assistance at the meetings, contact the Executive Director, Executive Secretary, or assistant to the Executive Secretary as soon as possible.

Dated: December 30, 2003.

J.W. Stark,

Captain, U.S. Coast Guard, Acting Commander, 8th Coast Guard Dist.

[FR Doc. 04–588 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[USCG–2003–16575]

Protection of Migratory Birds; Memorandum of Understanding

AGENCY: Coast Guard, DHS.

ACTION: Notice of availability.

SUMMARY: As required by Executive Order 13186, the Coast Guard gives notice that it has entered into a Memorandum of Understanding (MOU) with the U.S. Fish and Wildlife Service to promote the conservation of migratory bird populations in the context of the Rescue 21 Program on May 22, 2003. The MOU obligates the Coast Guard to consider its actions that might have substantial adverse impact on migratory birds and it requires the Coast Guard to incorporate certain specific concerns for migratory birds into its day-to-day decision-making.

DATES: The memorandum of understanding was signed by the Coast Guard on May 22, 2003.

ADDRESSES: A copy of the Memorandum of Understanding and Executive Order 13186 are available in the docket for this notice, USCG–2003–16575, in the Docket Management Facility, U.S. Department of Transportation, Room PL–401, 400 Seventh Street SW., Washington, DC 20590–0001, and online at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call LT Curtis Borland, Office of Environmental Law, Coast Guard, telephone (202) 267–6000. If you have questions about viewing material in the docket, call Andrea M. Jenkins, Program Manager, Docket Operations, telephone (202) 366–0271.

SUPPLEMENTARY INFORMATION: A copy of Executive Order 13186 of January 10, 2001, Responsibilities of Federal Agencies to Protect Migratory Birds, and the Memorandum of Understanding the Coast Guard has developed and implemented with the Fish and Wildlife Service of the Department of Interior in the context of the Rescue 21 Program in response to this Order are available in the docket where indicated under **ADDRESSES**.

Rescue 21 is the name of the Coast Guard program to modernize the current National Distress System (NDS) which includes installing state-of-the-art, dual mode VHF/UHF telecommunications technology and deploying it at either existing NDS antenna tower sites, leased space on existing commercial tower sites, or new antenna tower sites. The NDS is the nation's maritime search and rescue "911" system and forms the backbone of the Coast Guard's Short Range Communication System. The NDS incorporates the use of very high frequency-frequency modulation (VHF–FM) radios to provide two-way voice communications coverage for the majority of USCG missions in coastal areas and navigable waterways where commercial and recreational traffic exists. The current NDS system is outdated and suffers from technological obsolesce. The system was intended to provide coverage extending out approximately 20 nautical miles from the shore of the United States. Currently, there are more than 65 verified communications gaps and numerous localized coverage deficiencies.

Rescue 21 is an advanced search and rescue communications system that helps the Coast Guard to more effectively locate and assist boaters in distress. Rescue 21 will greatly improve the Coast Guard's ability to detect and locate the source of distress calls, eliminate known radio coverage gaps, and enhance Coast Guard command and control capabilities across all other missions, such as homeland security, environmental protection and law enforcement. Rescue 21 is designed to save lives in the 21st century.

Dated: December 10, 2003.

Erroll Brown,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Systems.

[FR Doc. 04–591 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4909–N–01]

Notice of Proposed Information Collection for Public Comment on the Evaluation of the Welfare to Work Voucher Program, Follow-on Survey Data Collection

AGENCY: Office of Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: Comments Due Date: March 15, 2004.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 7th Street, SW., Room 8226, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Paul Dornan at 202–708–0614 ext. 4486 for copies of the proposed data collection instruments and other available documents.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

The Notice is soliciting comments from members of the public and affecting agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Mininize the burden of the collection of information on those who are to respond; including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Evaluation of the Welfare to Work Voucher Program, Follow-on Survey Data Collection.

Description of the need for the information and proposed use: The fundamental goal of this evaluation is to assess the impacts of receiving a Welfare to Work voucher on improving the housing locations of families with children, on their obtaining and retaining employment, on their levels of welfare dependency, and on the well-being of their children. To assess these program impacts, a large body of data has been collected from a variety of administrative sources, and additional information will be collected using the follow-on survey.

The evaluation assesses impacts in five primary areas that may be affected by receiving a housing voucher:

- Housing assistance and services;
- Employment and earnings;
- Income, benefits, and food security;
- Housing mobility and neighborhood environment; and
- Household composition, family, and child well being.

It is important to distinguish between the analysis that will be conducted using administrative files and Census data and the analysis that requires follow-on survey data. Many of the outcomes of interest can be measured only through participant surveys. These survey-measured outcomes include important dimensions of adult and child well-being, such as receipt of education and training, family health, children's educational outcomes, household composition and family formation, and families' satisfaction with their neighborhoods. Participant surveys also allow researchers to investigate details about the employment experience not available from administrative records including job quality (hours worked per week, hourly wages, fringe benefits); job location; methods of job search; and barriers to employment.

The proposed survey data collection will offer powerful new evidence concerning the effects of tenant-based rental assistance on the self-sufficiency and well being of low-income families.

The experimental design used in the evaluation enables one to draw rigorous inferences about the effects of housing vouchers on family well-being, independent of all other factors affecting the lives of program participants. Random assignment serves to assure that the treatment and control groups are well matched on both observed and unobserved characteristics at the time of their entry into the study. It thus establishes the strongest possible foundation for understanding whether housing vouchers can assist welfare families in achieving greater financial independence or otherwise improving their lives.

This study and its survey component are especially timely in light of federal and state changes in welfare policies over the past decade, reducing the numbers of families eligible for public assistance and limiting the time period over which they can receive benefits. Housing vouchers may help low-income families become employed and may also help them meet financial needs as they transition from welfare.

The planned follow-on survey, in conjunction with an analysis of outcomes derived from Census data and administrative sources, will capture the experiences of treatment and control group members over a period of approximately four years. A follow-up interval of this length is important to measuring the impact of vouchers, as the typical length of stay in vouchers is three years, and the effects of a voucher on family well-being may take time to emerge.

Members of affected public: Individuals and households that applied to participate in the Welfare-to-Work voucher program in the six evaluation sites (Atlanta and Augusta, Georgia; Fresno and Los Angeles, California: Houston, Texas; and Spokane, Washington) will be interviewed as part of this data collection effort.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response:

Interview respondent	Number of respondents	Time to complete (minutes)	Frequency (per respondent)	Total burden (hours)
Adult head of core household	3,900	30	1	1,950
Adult head of core household, responses regarding 2 children	2,613	7	2	610
Adult head of core household, responses regarding 1 children	1,170	7	1	137
Total	3,900	41	1	2,697

States of the proposed information collection: Pending OMB approval.

Authority: Section 3506 of the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, as amended.

Dated: January 2, 2004.

Darlene F. Williams,

General Deputy, Assistant Secretary for Policy Development and Research.

[FR Doc. 04–606 Filed 1–12–04; 8:45 am]

BILLING CODE 4210–62–M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Issuance of Permit for Incidental Take of Threatened Species for the Struthers Ranch Property, El Paso County, Colorado

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of issuance of permit for incidental take of threatened species.

SUMMARY: On July 3, 2003, notice was published in the **Federal Register** (68 FR 39962) that an application had been filed with the Fish and Wildlife Service (Service) by the Struthers Ranch Development, LLC, for a permit to incidentally take Preble's meadow jumping mouse (*Zapus hudsonius preblei*), pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973 (Act) (16 U.S.C. 1539), as amended. The "Environmental Assessment/Habitat Conservation Plan for Issuance of an Endangered Species Section 10(a)(1)(B) Permit for the Incidental Take of the Preble's Meadow Jumping Mouse (*Zapus hudsonius preblei*) for the Struthers Ranch Property in El Paso County, Colorado" accompanied the permit application.

Notice is hereby given that on December 12, 2003, as authorized by the provisions of the Act, the Service issued a permit (TE–073390–0) to the above named party subject to certain conditions set forth therein. The permit was granted only after the Service determined that it was applied for in good faith, that granting the permit will not be to the disadvantage of the threatened species, and that it will be consistent with the purposes and policy set forth in the Act.

Additional information on this permit action may be requested by contacting the Colorado Field Office, 755 Parfet Street, Suite 361, Lakewood, Colorado 80215, telephone (303) 275–2370, between the hours of 8 a.m. and 4:30 p.m. weekdays.

Dated: December 29, 2003.

Ralph O. Morgenweck,

Regional Director, Region 6.

[FR Doc. 04–630 Filed 1–12–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Draft Environmental Assessment and Habitat Conservation Plan and Receipt of Application for an Incidental Take Permit for Livermore Area In Larimer County, CO

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability and receipt of application.

SUMMARY: This notice advises the public that the Livermore Area Landowners Group, The Nature Conservancy and the State of Colorado (Applicants) have applied to the U.S. 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. The proposed permit would authorize the incidental take of the Preble's meadow jumping mouse (Zapus hudsonius preblei) (Preble's), federally listed as threatened, through loss and modification of its habitat associated with development of new agricultural and residential structures and ongoing agricultural activities in the Livermore Area of northern Larimer County, Colorado. The duration of the permit would be 30 years from the date of issuance.

We announce the receipt of the Applicant's incidental take permit application, which includes an Environmental Assessment (EA) and the Livermore Area Habitat Conservation Plan (LAHCP) for the Preble's in the Livermore Area of Larimer County, Colorado. The proposed EA and LAHCP are available for public review and comment. They fully describe the proposed project and the measures the Applicants would undertake to minimize and mitigate project impacts to the Preble's.

The Service requests comments on the EA and LAHCP and associated documents for the proposed issuance of the incidental take permit. All comments on the EA and permit application will become part of the administrative record and will be available to the public. We provide this notice pursuant to section 10(a) of the Act and National Environmental Policy Act regulations (40 CFR 1506.6).

DATES: Written comments on the permit application, EA and LAHCP should be received on or before March 15, 2004.

ADDRESSES: Comments regarding the permit application, EA, and LAHCP should be addressed to Mary Henry, Assistant Regional Director, Ecological Services, U.S. Fish and Wildlife Service, P.O. Box 25486, Denver Federal Center, Denver, Colorado 80225–0486. (Street location is 134 Union Boulevard, Lakewood, Colorado 80228–1807). Comments also may be submitted by facsimile to (303) 236–0027.

FOR FURTHER INFORMATION CONTACT: Bob McCue, Ecological Services Program Supervisor (South), telephone (303) 236–7400, extension 252.

SUPPLEMENTARY INFORMATION:

Document Availability

Individuals wishing copies of the EA and LAHCP and associated documents for review should immediately contact 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 a species listed as endangered or threatened. Take is defined under the Act, in part, as to kill, harm, or harass a federally listed species. However, the Service may issue permits to authorize "incidental take" of listed species under limited circumstances. Incidental take is defined under the Act as take of a listed species that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity under limited circumstances. Regulations governing permits for threatened species are promulgated in 50 CFR 17.32.

The Livermore Planning Area encompasses 114,634 hectares (283,266 acres) of land utilized primarily for agricultural purposes with a limited amount proposed for development. The applicants are making participation in the LAHCP available to all landowners within the Livermore Planning Area who voluntarily agree to participate. Within the planning area, the LAHCP proposes a 8,626.3-hectare (21,316-acre) conservation zone (CZ) consisting of corridors along 323.5 kilometers (201 miles) of streams.

The applicants have determined that the activities covered by the LAHCP could impact 1,358.4 hectares (3,356.7 acres) of Preble's habitat along 46.3 stream kilometers (28.8 stream miles), if all lands containing potential Preble's habitat within the CZ of the planning area are enrolled in the LAHCP. The

maximum level of permanent impacts allowable under the LAHCP within the portion of the CZ owned by private landowners would be 20 percent (3 percent not requiring mitigation and 17 percent requiring mitigation) and 1 percent on lands owned by The Nature Conservancy (TNC), Colorado Division of Wildlife (CDOW), and the State Land Board (SLB) (not requiring mitigation). In all cases habitat connectivity would be maintained.

In addition to the proposed action, alternatives considered included—(a) no action, (b) development of individual conservation easements, and (c) waiting for Larimer County to develop and gain approval of a county-wide HCP. The draft EA analyzes the direct, indirect, and cumulative impacts of the proposed activities and mitigation on the Preble's, and also on other threatened or endangered species, vegetation, wildlife, wetlands, geology/soils, land use, cultural resources, air quality, and water resources and quality.

Two federally listed species, the threatened Preble's and the threatened bald eagle *(Haliaeetus leucocephalus)*, occur onsite. However, only the Preble's has the potential to be adversely affected by the activities covered in the LAHCP. To mitigate impacts that may result from incidental take (exceeding the limit of 3 percent on private land and 1 percent on the TNC, CDOW, and SLB land), the LAHCP provides for mitigation in the form of either (1) conservation of existing habitat at a ratio of 4:1 (4 acres conserved for every 1 acre of habitat in the CZ impacted), or (2) habitat improvement or creation at a ratio of 2:1. Additionally, the LAHCP calls for mitigation of temporary impacts to the CZ at a 1:1 ratio and identifies methods for and timing of reseeding of temporarily disturbed areas. A monitoring program would be implemented to determine whether the LAHCP is achieving the biological goals and objectives outlined in the plan.

This notice is provided pursuant to section 10(c) of the Act. We will evaluate the permit application, the EA/LAHCP, and comments submitted therein to determine whether the application meets the requirements of section 10(a) of the Act. If it is determined that those requirements are met, a permit will be issued for the incidental take of the Preble's in conjunction with the development of new agricultural and residential structures and ongoing agricultural activities in the Livermore Area of northern Larimer County, Colorado. The final permit decision will be made no sooner than 60 days after the date of this notice.

Dated: December 29, 2003.

Ralph O. Morgenweck,

Regional Director, Denver, Colorado.

[FR Doc. 04–631 Filed 1–12–04; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM–030–1430–ES; NMNM13030]

Termination of A Recreation and Public Purposes (R&PP) Classification and An Order Providing for Opening of Land; NM

AGENCY: Bureau of Land Management (BLM), Interior.

ACTION: Notice.

SUMMARY: This order terminates a BLM R&PP classification affecting 506.57 acres of public land near Las Cruces, New Mexico. This land will be opened to the public land laws generally, including the mining laws. The land has been and remains open to mineral leasing.

The land is described as follows:

New Mexico Principal Meridian

T. 23 S., R. 1 E.,
Sec. 29: Lots 6 to 10, inclusive, S½NE¼ and S½.

The area described contains 506.57 acres in Dona Ana County.

DATES: The termination/opening order is effective February 12, 2004.

ADDRESSES: Bureau of Land Management, Las Cruces Field Office, 1800 Marquess, Las Cruces, New Mexico 88005.

FOR FURTHER INFORMATION CONTACT: Angel Mayes, Realty Specialist, at the address above or by telephone at (505) 525–4376.

SUPPLEMENTARY INFORMATION: By virtue of the authority vested in the Secretary of the Interior by the R&PP Act of June 14, 1926, as amended (43 U.S.C. 869 *et seq.*), it is ordered as follows:

1. Pursuant to the regulations in 43 CFR 2091.7–1(b)(1) and the authority delegated by BLM Manual Section 1203 (43 FR 85), the classification decision of March 2,1985, which classified 506.57 acres of public land as suitable for recreation and public purposes under the Act of June 14, 1926, as amended (43 U.S.C. 869 *et seq.*), under Serial Number NMNM13030, is hereby revoked.

2. At 8 a.m. on February 12, 2004, the land will be opened to the operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, other segregations of record, and the requirements of applicable law. All valid application received at or prior to 8 am on February 12, 2004, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. At 8 a.m. on February 12, 2004, the land will be opened to location and entry under the United States mining laws, subject to valid existing rights; the provisions of existing withdrawals; other segregations of record; and the requirements of applicable law. Appropriation of any of the land described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38 (1988), shall vest no rights against the United States. State law governs acts required to establish a location and to initiate a right of possession where not in conflict with Federal law. BLM will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Dated: August 28, 2003.

Amy L. Lueders,

Field Manager, Las Cruces.

[FR Doc. 04–620 Filed 1–12–04; 8:45 am]

BILLING CODE 4310–VC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–050–7122ES F666; N–76468–01]

Notice of Realty Action: Lease/Conveyance for Recreation and Public Purposes

AGENCY: Bureau of Land Management, Interior.

ACTION: Recreation and public purpose lease/conveyance.

SUMMARY: The lands described below are currently withdrawn from location and entry under the mining laws and from operation under the mineral leasing and geothermal leasing laws under Sec. 4(c) of the Southern Nevada Public Lands Management Act (Pub. L. 105–263), BLM serial number N–66364. The land has been examined and found suitable for lease/conveyance for recreation or public purposes under the provisions of the Recreation and Public Purposes Act, as amended (43 U.S.C. 869 *et seq.*). The State of Nevada proposes to use the land for a Cooperative Extension Office.

Mount Diablo Meridian, Nevada

Sec. 11, N½NW¼SW¼SW¼, SW¼NW¼SW¼SW¼, SW¼SW¼SW¼.
T. 22 S., R. 61 E., M.D.M.

Containing 17.5 acres, more or less, located at Windmill Road and Maryland Parkway.

The land is not required for any Federal purpose. The lease/conveyance is consistent with current Bureau planning for this area and is in the public interest. The lease/patent, when issued, will be subject to the provisions of the Recreation and Public Purposes Act and applicable regulations of the Secretary of the Interior, and will contain the following reservations to the United States:

1. A right-of-way thereon for ditches or canals constructed by the authority of the United States, Act of August 30, 1890 (43 U.S.C. 945).

2. All minerals shall be reserved to the United States, together with the right to prospect for, mine and remove such deposits from the same under applicable law and such regulations as the Secretary of the Interior may prescribe and will be subject to:

1. Easements in accordance with the Clark County Transportation Plan.

2. Those rights for roadway purposes which have been granted to Clark County by Permit N–42999 under the Act of October 21, 1976 (43 U.S.C. 1761).

3. Those rights for roadway purposes which have been granted to Clark County by Permit No. N–57458 under the Act of October 21, 1976 (43 U.S.C. 1761).

Detailed information concerning this action is available for review at the office of the Bureau of Land Management, Las Vegas Field Office, 4701 N. Torrey Pines Drive, Las Vegas, Nevada. Upon publication of this notice in the **Federal Register**, the above described land will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for lease/conveyance under the Recreation and Public Purposes Act, leasing under the mineral leasing laws, and disposal under the mineral material disposal laws. For a period of 45 days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments regarding the proposed lease/conveyance for classification of the lands to the Las Vegas Field Manager, Las Vegas Field Office, 4701 N. Torrey Pines Drive, Las Vegas, Nevada 89130–2301.

Classification Comments

Interested parties may submit comments involving the suitability of the land for a Cooperative Extension Office. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

Application Comments

Interested parties may submit comments regarding the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability of the land for a Cooperative Extension Office. Any adverse comments will be reviewed by the State Director who may sustain, vacate, or modify this realty action. In the absence of any adverse comments, this realty action will become the final determination of the Department of the Interior. The classification of the land described in this Notice will become effective 60 days from the date of publication in the **Federal Register**. The lands will not be offered for lease/conveyance until after the classification becomes effective.

Dated: November 13, 2003.

Sharon DiPinto,

Acting Assistant Field Manager, Division of Lands, Las Vegas, NV.

[FR Doc. 04–622 Filed 1–12–04; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NM–080–1430–EU; Serial No. NMNM–108401]

Noncompetitive Sale of Public Lands in Eddy County

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action.

SUMMARY: The following land has been found suitable for direct sale under section 203 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2750, 43 U.S.C. 1713) and the regulations at 43 CFR 2710.0–3(a)(3).

T. 21 S., R. 23 E., NMPM
Sec. 7: E½SE¼NE¼SW¼.

Containing approximately 5 acres.

FOR FURTHER INFORMATION CONTACT: Mary Jo Rugwell at (505) 234–5907.

SUPPLEMENTARY INFORMATION: The land is hereby segregated from appropriation under the public land laws, including the mining laws. This segregative effect shall terminate upon issuance of patent or other document of conveyance for these lands, upon publication in the **Federal Register** of a termination of the segregation, or 270 days from date of publication, whichever occurs first.

In accordance with section 7 of the Taylor Grazing Act, 43 U.S.C. 315f, and Executive Order No. 6910, the described land is hereby classified for disposal by sale.

The disposal of this land is in conformance with the Carlsbad Resource Management Plan and meets the criteria contained in 43 CFR 2711.3–3(a)(5) because it is unmanageable as a part of the other BLM lands in that area. The subject land is not required for any other Federal purpose.

The land is to be offered for direct sale to Joe and Janet Cox to resolve the inadvertent unauthorized use of public land for their residence. This unauthorized use occurred many years ago prior to their ownership of the adjacent private property. The land will be offered at $2000, the appraised fair market value determined by an approved BLM appraisal.

The appraisal report for this disposal action can be reviewed at the address provided below. The patent, when issued, will reserve all minerals to the United States and will be subject to valid existing rights. Detailed information concerning the mineral reservation, as well as specific conditions of the sale, are available for review at the Carlsbad Field Office, Bureau of Land Management, 620 East Greene Street, Carlsbad, New Mexico 88220. For a period of 45 days from January 13, 2004, interested parties may submit comments to Russell Sorensen, Lead Realty Specialist, 620 East Greene Street, Carlsbad, NM 88220. Any adverse comments will be evaluated by the Field Manager, who may vacate or modify this realty action and issue a final determination. In the absence of objections, this realty action will become the final determination of the Department of the Interior.

Mary Jo Rugwell,

Assistant Field Manager for Lands and Minerals.

[FR Doc. 04–693 Filed 1–12–04; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[WY–040–1430–EU; WYW–148587]

Realty Action; Direct Sale of Public Lands; Wyoming

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action; direct sale of public lands in Sweetwater County.

SUMMARY: The Bureau of Land Management has determined that the lands described below are suitable for public sale under Section 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1713:

Sixth Principal Meridian, Wyoming

T. 21 N., R. 101 W.,
Section 24, NE¼NE¼SW¼, E½NW¼NE¼SW¼, E½SW¼NE¼SW¼, SE¼NE¼SW¼.
Section 26, S½NE¼, SE¼NW¼, E½SW¼, SE¼.
Section 36, W½NE¼, NW¼, N½NE¼SW¼, E½SW¼NE¼SW¼, SE¼NE¼SW¼, NE¼NW¼SW¼, N½NW¼NW¼SW¼, SE¼NW¼NW¼SW¼, NW¼SE¼.

The lands described above contain 722.5 acres.

FOR FURTHER INFORMATION CONTACT: Jennifer Bates, Realty Specialist, Bureau of Land Management, Rock Springs Field Office, 280 Highway 191 North, Rock Springs, Wyoming 82901, 307–352–0344.

SUPPLEMENTARY INFORMATION: The Bureau of Land Management proposes to sell the surface estate of the above-described land to PacifiCorp, an adjacent landowner and current right-of-way holder, via direct sale, pursuant to Section 203 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1713. PacifiCorp wishes to acquire the land to protect its existing equities in the land. The lands are currently developed to contain two flue-gas desulphurization ponds, a fresh water pond, and other associated facilities, which are related to operation of the Jim Bridger Power Plant and are authorized by rights-of-way held by PacifiCorp. These lands have been sufficiently changed in character by the improvements associated with the rights-of-way, that disposal of these lands to PacifiCorp through direct sale is deemed to be in the public interest.

The proposed sale would be made at fair market value which has been determined to be $722,500. The proposed sale is consistent with the Green River Resource Management Plan and would serve important public objectives which cannot be achieved prudently or feasibly elsewhere. The lands contain no other known public values. The planning document, environmental assessment, and approved appraisal report covering the proposed sale are available for review at the Bureau of Land Management, Rock Springs Field Office, Rock Springs, Wyoming.

Conveyance of the above public lands will be subject to:

1. Reservation of a right-of-way to the United States for ditches and canals pursuant to the Act of August 30, 1890, 43 U.S.C. 945.

2. Reservation of all minerals pursuant to section 209(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1719.

3. All valid existing rights documented on the official public land records at the time of conveyance.

There will be a decrease of 722.5 Federal acres within the Rock Springs Grazing Allotment. The 72 AUMs associated with the 722.5 acre parcel will be canceled. The grazing lessee has waived the 2 year notification period and therefore, this proposed sale is in compliance with 43 CFR 4110.42(b).

The public lands described above shall be segregated from all forms of appropriation under the public land laws; including the mining laws, upon publication of this notice in the **Federal Register**. The segregative effect will end upon issuance of the patent or 270 days from the date of the publication, whichever comes first.

For a period of 45 days after issuance of this notice, interested parties may submit comments to the Field Manager, Rock Springs Field Office, Bureau of Land Management, 280 Highway 191 North, Rock Springs, Wyoming 82901. Any adverse comments will be evaluated by the State Director who may sustain, vacate, or modify this realty action. In the absence of any objections, this proposed realty action will become final.

Dated: December 4, 2003.

Michael R. Holbert,

Field Manager.

[FR Doc. 04–621 Filed 1–12–04; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice of Proposed Information Collection for 30 CFR Parts 816 and 817

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Office of Surface Mining Reclamation and Enforcement (OSM) is announcing that the information collection request for the Permanent Program Performance Standards—Surface Mining Activities and Underground Mining Activities at 30 CFR Parts 816 and 817, has been forwarded to the Office of Management and Budget (OMB) for review and comment. The information collection request describes the nature of the information collection and the expected burden and cost.

DATES: OMB has up to 60 days to approve or disapprove the information collections but may respond after 30 days. Therefore, public comments should be submitted to OMB by February 12, 2004, in order to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: To request a copy of the information collection request, explanatory information and related form, contact John A. Trelease at (202) 208–2783, or electronically to *jtreleas@osmre.gov*.

SUPPLEMENTARY INFORMATION: The OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13), require that interested members of the public and affected agencies have an opportunity to comment on information collection and recordkeeping activities [see 5 CFR 1320.8(d)]. OSM has consolidated two information collections relating to coal mining performance standards, revised burden estimates, where appropriate, to reflect current reporting levels or adjustments based on reestimates of burden or respondents. OSM has submitted a request to OMB to renew its approval of the collection of information contained in: Permanent Program Performance Standards—Surface Mining Activities at 30 CFR 816, and Underground Mining Activities at 30 CFR 817. OSM is requesting a 3-year term of approval for the information collection activity.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information

unless it displays a currently valid OMB control number. The OMB control number for these collections of information are currently 1029–0047 for Part 816, and 1029–0048 for Part 817. Due to the consolidation of these parts in this collection request, OSM will request approval for both parts under 1029–0047.

As required under 5 CFR 1320.8(d), a **Federal Register** notice soliciting comments on this collection of information was published on October 7, 2003 (68 FR 57927). No comments were received. This notice provides the public with an additional 30 days in which to comment on the following information collection activity:

Title: Permanent Program Performance Standards—Surface and Underground Mining Activities, 30 CFR Parts 816 and 817.

OMB Control Number: 1029–0047.

Summary: Sections 515 and 516 of the Surface Mining Control and Reclamation Act of 1977 provides that permitees conducting coal mining operations shall meet all applicable performance standards of the Act. The information collected is used by the regulatory authority in monitoring and inspecting coal mining activities to ensure that they are conducted in compliance with the requirements of the Act.

Bureau Form Number: None.

Frequency of Collection: Once, on occasion, quarterly and annually.

Description of Respondents: Coal mining operators and State regulatory authorities.

Total Annual Responses: 186,341.

Total Annual Burden Hours: 870,333.

Total Nonwage Costs: $315,000.

Send comments on the need for the collection of information for the performance of the functions of the agency; the accuracy of the agency's burden estimates; ways to enhance the quality, utility and clarity of the information collection; and ways to minimize the information collection burdens on respondents, such as use of automated means of collections of the information, to the following addresses. Please refer to the appropriate OMB control number in all correspondence.

ADDRESSES: Please submit your comments via e-mail to the Office of Information and Regulatory Affairs, Office of Management and Budget, attention: Department of Interior Desk Officer, at *OIRA_Docket@omb.eop.gov* or via fax to (202) 395–6566. Also, please send a copy of your comments to John Trelease via e-mail to *jtreleas@osmre.gov*, or through the mail to John Trelease, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Ave, NW., Room 210–SIB, Washington, DC 20240.

Dated: December 9, 2003.

Sarah E. Donnelly,

Acting Chief, Division of Regulatory Support.

[FR Doc. 04–692 Filed 1–12–04; 8:45 am]

BILLING CODE 4310–05–M

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–437 and 731–TA–1060 and 1061 (Preliminary)]

Carbazole Violet Pigment 23 From China and India

Determination

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (Commission) determines, pursuant to section 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)) (the Act), that there is a reasonable indication that an industry in the United States is materially injured by reason of imports from China and India of carbazole violet pigment 23, provided for in subheading 3204.17.90 of the Harmonized Tariff Schedule of the United States, that are alleged to be subsidized by the Government of India and that are alleged to be sold in the United States at less than fair value (LTFV).

Commencement of Final Phase Investigations

Pursuant to section 207.18 of the Commission's rules, the Commission also gives notice of the commencement of the final phase of its investigations. The Commission will issue a final phase notice of scheduling, which will be published in the **Federal Register** as provided in section 207.21 of the Commission's rules, upon notice from the Department of Commerce (Commerce) of affirmative preliminary determinations in these investigations under section 703(b) and 733(b) of the Act, or, if the preliminary determinations are negative, upon notice of affirmative final determinations in these investigations under section 705(a) and 735(a) of the Act. Parties that filed entries of appearance in the preliminary phase of the investigations need not enter a separate appearance for the final phase of the investigations. Industrial users, and, if the merchandise under investigation is sold at the retail level, representative consumer organizations have the right to appear as parties in Commission antidumping and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigations.

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

Background

On November 21, 2003, petitions were filed with the Commission and Commerce by Nation Ford Chemical Co., Fort Mill, SC, and Sun Chemical Corp., Cincinnati, OH, alleging that an industry in the United States is materially injured and threatened with material injury by reason of subsidized imports of carbazole violet pigment 23 from India and LTFV imports of carbazole violet pigment 23 from China and India. Accordingly, effective November 21, 2003, the Commission instituted countervailing duty and antidumping investigations Nos. 701–TA–437 and 731–TA–1060 and 1061 (Preliminary).

Notice of the institution of the Commission's investigations and of a public conference 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** of November 28, 2003 (68 FR 66851). The conference was held in Washington, DC, on December 12, 2003, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on January 5, 2004. The views of the Commission are contained in USITC Publication 3662 (January 2004), entitled Carbazole Violet Pigment 23 from China and India: Investigations Nos. 701–TA–437 and 731–TA–1060–1061 (Preliminary).

By order of the Commission.

Issued: January 7, 2004.

Marilyn R. Abbott,

Secretary.

[FR Doc. 04–673 Filed 1–12–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. TA–421–5]

Innersprings from China

AGENCY: International Trade Commission.

ACTION: Institution and scheduling of an investigation under section 421(b) of the

Trade Act of 1974 (19 U.S.C. 2451(b)) (the Act).

SUMMARY: Following receipt of a petition filed on January 6, 2004, on behalf of the U.S. member companies of The American Innerspring Manufacturers (AIM),[1] Memphis, TN, the Commission instituted investigation No. TA–421–5, Innersprings from China, under section 421(b) of the Act to determine whether uncovered innerspring units (innersprings)[2] from China are being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products.

For further information concerning the conduct of this investigation, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 206, subparts A and E (19 CFR part 206), as amended, 68 FR 65164 (Nov. 19, 2003).

EFFECTIVE DATE: January 6, 2004.

FOR FURTHER INFORMATION CONTACT: Brian Allen (202–708–4728), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter 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 (*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*.

SUPPLEMENTARY INFORMATION:

Participation in the investigation and service list. Persons wishing to participate in the investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. The Secretary will prepare a service list containing the names and addresses of all persons, or their representatives, who are parties to this investigation upon the expiration of the period for filing entries of appearance.

Limited disclosure of confidential business information (CBI) under an administrative protective order (APO) and CBI service list. Pursuant to section 206.47 of the Commission's rules, the Secretary will make CBI gathered in this investigation available to authorized applicants under the APO issued in the investigation, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive CBI under the APO.

Hearing. The Commission has scheduled a hearing in connection with this investigation beginning at 9:30 a.m. on February 19, 2004, at the U.S. International Trade Commission Building. Subjects related to both market disruption or threat thereof and remedy may be addressed at the hearing. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before February 10, 2004. All persons desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on February 13, 2004, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the hearing are governed by sections 201.6(b)(2) and 201.13(f) of the Commission's rules.

Written submissions. Each party is encouraged to submit a prehearing brief to the Commission. The deadline for filing prehearing briefs is February 12, 2004. Parties may also file posthearing briefs. The deadline for filing posthearing briefs is February 24, 2004. In addition, any person who has not entered an appearance as a party to the investigation may submit a written statement of information pertinent to the consideration of market disruption or threat thereof and/or remedy on or before February 24, 2004. Parties may submit final comments on market disruption on March 4, 2004, and on remedy on March 11, 2004. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain CBI must also conform with the requirements of section 201.6 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002).

In accordance with section 201.16(c) of the Commission's rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by the service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Remedy. Parties are reminded that no separate hearing on the issue of remedy will be held. Those parties wishing to present arguments on the issue of remedy may do so orally at the hearing or in their prehearing briefs, posthearing briefs, or final comments on remedy.

Authority: This investigation is being conducted under the authority of section 421 of the Trade Act of 1974; this notice is published pursuant to section 206.3 of the Commission's rules.

Issued: January 8, 2004.
By order of the Commission.

Marilyn R. Abbott,
Secretary to the Commission.

[FR Doc. 04–694 Filed 1–12–04; 8:45 am]

BILLING CODE 7020–02–U

[1] Petitioning firms include Atlas Spring, Gardena, CA; Hickory Springs Manufacturing Co., Hickory, NC; Leggett & Platt, Carthage, MO; and Joseph Saval Spring & Wire Co., Inc., Taylor, MI.

[2] Uncovered innerspring units are composed of a series of individual metal springs wired together and fitted to an outer wire frame and are suitable for use as the innerspring component in the manufacture of innerspring mattresses. The imported products are provided for in statistical reporting number 9404.29.9010 of the Harmonized Tariff Schedule of the United States (HTS). Although the HTS category is provided for convenience and Customs purposes, the written description of the merchandise under investigation is dispositive.

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–498]

Certain Insect Traps; Notice of Decision Not To Review an Initial Determination Granting a Motion To Amend the Complaint and Notice of Investigation To Add Four Respondents

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review an initial determination (ID) issued by the presiding administrative law judge (ALJ) in the above-captioned investigation amending the complaint and notice of investigation to add four entities as respondents in the investigation.

FOR FURTHER INFORMATION CONTACT: Andrea Casson, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3105. Copies of all nonconfidential 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 (*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 the matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on September 12, 2003, based on a complaint filed by American Biophysics Corp. ("ABC") of North Kingstown, Rhode Island. 68 FR 24755. The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 in the importation into the United States, sale for importation, and/or sale within the United States after importation of certain insect traps that infringe the claims of ABC's U.S. Patents No. 6,286,249 and No. 6,145,243. The notice of investigation identified one respondent, Blue Rhino Corp. ("BRC") of Winston-Salem, North Carolina.

On November 10, 2003, ABC filed a motion to amend its complaint to add the following four entities as respondents in the investigation: Blue Rhino Consumer Products ("BRCP"), LLC of Winston-Salem, North Carolina; Blue Rhino Global Sourcing, LLC ("BRGS"), of Winston-Salem, North Carolina; Guangdong Dong Fang Imp. & Exp. Corp. of Shenzhen, China; and Lentek International, Inc. of Kissimmee, Florida. The Commission investigative attorney supported the motion. Existing respondent BRC and proposed respondents BRCP and BRGS filed a response indicating that they did not oppose the motion.

On December 8, 2003, the presiding administrative law judge issued an ID (Order No. 5) granting ABC's motion. No petitions for review of the ID were filed.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, and section 210.42(h) of the Commission Rules of Practice and Procedure, 19 CFR 210.42(h).

By order of the Commission.

Issued: January 7, 2004.

Marilyn R. Abbott,

Secretary.

[FR Doc. 04–675 Filed 1–12–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–504]

In the Matter of Certain Signature Capture Transaction Devices and Component Parts Thereof, and Systems That Employ Such Devices; Notice of Investigation

AGENCY: 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 December 9, 2003, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of NCR Corporation of Dayton, Ohio. An amended complaint was filed on December 24, 2003, and a supplement to the amended complaint was filed on December 29, 2003. The complaint, as amended and 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 signature capture transaction devices and component parts thereof, and systems that employ such devices, by reason of infringement of claims 20, 46, 55, and 65 of U.S. Patent No. 6,539,363. 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 permanent cease and desist orders.

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 imaging system (EDIS) at *http://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: Jeffrey R. Whieldon, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2580.

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 (2003).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on January 6, 2004, *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 signature capture transaction devices, or component parts thereof, or systems that employ such devices by reason of infringement of claims 20, 46, 55, or 65 of U.S. Patent No. 6,539,363 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—NCR Corporation, 1700 South Patterson Boulevard, Dayton, Ohio 45479–0001.

(b) The respondents are the following companies alleged to be in violation of section 337, and are parties upon which the complaint is to be served:

Ingenico S.A., d/b/a, Groupe Ingenico, 9, Quai de Dion Bouton, 92816. Puteaux Cedex, France.

Ingenico Corp., 1003 Mansell Road, Roswell, Georgia 30076.

SMTC Corporation, 635 Hood Road, Markham, Ontario, Canada L3R4N6.

(c) Jeffrey R. Whieldon Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW., Suite 401, Washington, DC 20436, who shall be the Commission investigative attorney, party to this investigation; and

(4) 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 the 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 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 such respondent.

By order of the Commission.

Issued: January 7, 2004.

Marilyn R. Abbott,

Secretary.

[FR Doc. 04–674 Filed 1–12–04; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Office of Justice Programs

Agency Information Collection Activities: Proposed Collection; Comments Requested

Action: 30-Day notice of information collection under review: Application for Public Safety Officers' Educational Assistance.

The Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, Payments and Benefits Division has submitted the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. The proposed information collection is published to obtain comments from the public and affected agencies. This proposed information collection was previously published in the **Federal Register** Volume 68, Number 202, page 59951 on October 20, 2003, allowing for a 60 day comment period.

The purpose of this notice is to allow for an additional 30 days for public comment until February 12, 2004. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to The Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285.

Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the 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.

Overview of this information:

(1) *Type of information collection:* Reinstatement, with Change, of a Previously Approved Collection for which Approval has Expired.

(2) *The title of the form/collection:* Application for Public Safety Officers' Educational Assistance.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* Form Number: OJP Form Number 1240/20. Bureau of Justice Assistance, Office of Justice Programs, Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: individuals or households. Other: None. The agency requires the information requested on this application to determine if individuals are eligible to receive educational assistance through the Public Safety Officers' Educational Assistance (PSOEA) Program, as established by the PSOEA Act of 1998 (Pub. L. 104–238). Respondents who complete the application may be spouses or eligible children of a public safety officer who was killed or permanently injured in the line of duty.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that 150 respondents will complete the application in approximately 20 minutes.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The estimated total public burden associated with this application is 50 hours.

If additional information is required contact: Mrs. Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Policy and Planning Staff, Justice Management Division, Suite 1600, Patrick Henry Building, 601 D Street NW., Washington, DC 20530.

Dated: January 7, 2004.

Brenda E. Dyer,

Department Deputy Clearance Officer, Department of Justice.

[FR Doc. 04–633 Filed 1–12–04; 8:45 am]

BILLING CODE 4410–18–U

DEPARTMENT OF LABOR

Office of the Secretary

Submission for OMB Review; Comment Request

January 6, 2004.

The Department of Labor (DOL) has submitted the following public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35). A copy of each individual ICR, with applicable supporting documentation, may be obtained by calling the Department of Labor, Departmental Clearance Officer, Ira Mills ((202) 693–4122) or by e-Mail to *Mills-Ira@dol.gov.*

Comments should be sent to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for BLS, Office of Management and Budget, Room 10235, Washington, DC 20503 ((202) 395–6881), within 30 days from the date

of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- 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.

Agency: Bureau of Labor Statistics.

Title: Multiple Worksite Report and the Report of Federal Employment and Wages.

OMB Number: 1220–0134.

Frequency: Quarterly.

Affected Public: Business or other for-profit; not-for profit institutions, Federal Government; state, local, or tribal government.

Number of Respondents: 118,246.

Estimated Time Per Response: 22.2 minutes per response.

Total Burden Hours: 173,523.

Total Annual Cost: $-0-.

Description: States use the Multiple Worksite Report to collect employment and wages data by worksite from employers covered by State Unemployment Insurance which are engaged in multiple operations within a State. These data are used for sampling, benchmarking, and economic analysis.

Ira L. Mills,

Departmental Clearance Officer.

[FR Doc. 04–639 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–24–M

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Prohibited Transaction Exemption (PTE) 2004–01; Exemption Application No. D–11191; United States Steel and Carnegie Pension Fund, Located in Atlanta, GA

AGENCY: Employee Benefits Security Administration, Department of Labor (the Department).

ACTION: Notice of technical correction.

On January 5, 2004, the Department published PTE 2003–40 in the **Federal Register** at 69 FR 375. PTE 2003–40 permits the in kind contribution of certain timber rights (the Timber Rights) under two timber purchase and cutting agreements to The United States Steel Corporation Plan for Employee Pension Benefits (the Plan) by the United States Steel Corporation (US Steel), the Plan sponsor and a party in interest with respect to the Plan. The exemption also permits ancillary transactions between the Plan and US Steel arising from certain rights retained by US Steel related to the timberland on which the Timber Rights are based.

Due to two technical errors appearing in the final exemption, the Department is hereby making certain revisions to the document. First, on page 375 of the notice granting the final exemption, the prohibited transaction exemption number, contained in the bracketed text at the beginning of the document, has been redesignated as "[Prohibited Transaction Exemption 2004–01; * * *]," to reflect the correct publication year and document number. Second, on page 383 of the grant notice, the final paragraph is revised to read as follows to reflect the correct signature date: "Signed at Washington, DC, this 30th day of December, 2003."

FOR FURTHER INFORMATION CONTACT: Ms. Silvia M. Quezada of the Department at (202) 693–8553. (This is not a toll-free number.)

Signed at Washington, DC, this 8th day of January, 2004.

Ivan L. Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 04–716 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,801]

Aneco Trousers Corporation, Hanover, PA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 15, 2003 in response to a petition filed by a company official on behalf of workers at Aneco Trousers Corporation, Hanover, Pennsylvania.

The petitioning group of workers is covered by an earlier petition instituted on December 11, 2003 (TA–W–53,774) that is the subject of an ongoing investigation for which a determination has not yet been issued. Further investigation in this case would duplicate efforts and serve no purpose; therefore the investigation under this petition has been terminated.

Signed at Washington, DC, this 17th day of December, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–650 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,542]

Bunnies by the Bay, Anacortes, Washington; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 17, 2003 in response to a petition filed by the company on behalf of workers at Bunnies by the Bay, Anacortes, Washington.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 31st day of December, 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–654 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,703]

Cone Mills Corporation, Corporate Office, Greensboro, NC; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 4, 2003 in response to a petition filed by a company official on behalf of workers at Cone Mills Corporation, Corporate Headquarters, Greensboro, North Carolina.

The subject firm worker group is covered by an amended certification issued for workers of Cone Mills Corporation, Cone White Oak, LLC

Division, Greensboro, North Carolina, TA–W–53,291B. Consequently, further investigation would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC this 23rd day of December, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–645 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,741]

Cone Mills Corporation, Salisbury Plant, Salisbury, NC; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 4, 2003 in response to a petition filed by a company official on behalf of workers at Cone Mills Corporation, Salisbury Plant, Salisbury, North Carolina.

The subject firm worker group is covered by an amended certification issued for workers of Cone Mills Corporation, Salisbury, North Carolina, TA–W–53,291C. Consequently, further investigation would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 23rd day of December, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–648 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,606]

Extreme Tool and Engineering, Wakefield, MI; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 21, 2003 in response to a worker petition filed by a company official on behalf of workers at Extreme Tool and Engineering, Wakefield, Michigan.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 16th day of December 2003

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–643 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,762]

Finegood Moldings, Inc., dba Good Companies, Laminating Department, Carson, CA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 10, 2003 in response to a petition filed on behalf of workers of Finegood Moldings, Inc., dba Good Companies, Laminating Department, Carson, California.

The petitioning group of workers is covered by an active certification issued on April 21, 2003 and which remains in effect (TA–W–51,452). Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 23rd day of December, 2003.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–649 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53, 822]

Flint River Textiles, Inc., Albany, GA; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 17, 2003 in response to a petition filed by a company official on behalf of workers at Flint River Textiles, Inc., Albany, Georgia.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 22nd day of December, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–657 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–51,368]

Mellon Bank, N.A., Pittsburgh, PA; Notice of Negative Determination on Reconsideration on Remand

The United States Court of International Trade (USCIT) granted the Secretary of Labor's motion for a voluntary remand for further investigation in *Former Employees of Mellon Bank, N.A.* v. *Elaine Chao, U.S. Secretary of Labor*, No. 03–00374.

The Department's initial negative determination for the workers of Mellon Bank, N.A. (hereafter "Mellon Bank") was issued on April 14, 2003, and published in the **Federal Register** on May 1, 2003 (68 FR 23322). The determination was based on the finding that workers did not produce an article within the meaning of section 222 of the Trade Act of 1974. The Department determined that the subject worker group were not engaged in the production of an article, but engaged in activities related to computer technology services.

By letter to the U.S. Court of International Trade, filed on June 13, 2003, the petitioner requested administrative reconsideration. The petitioner asserted that the workers produced a product through development and creation of software and, therefore, were not service providers.

On remand, the Department conducted an investigation to determine whether the petitioners were production workers and, if so, whether the workers were eligible to apply for TAA. The remand investigation consisted of independent research and analysis of software as a commodity and requesting additional information from the petitioner and the company regarding the functions of the subject worker group and the operations of the subject company.

The remand investigation revealed that Mellon Bank provides financial services for corporations, institutions and wealthy individuals. These services include asset management, trust and custody securities lending, foreign

exchange, annuities, private wealth management, private banking, cash management, and credit and capital market services. In addition, it was determined that neither Mellon Bank nor the petitioning workers produce an "article" within the meaning of the Trade Act of 1974.

The remand investigation also revealed that the petitioning workers designed and developed computer software applications that allow the subject company to provide financial services to its customers, such as software that were custom-designed to fit end-users' needs and produced reports that are electronically transmitted to the customer. These applications are not sold as manufactured products to the general public or sold as a component to an article that is available to the general public.

While the Department considers workers who are engaged in the mass copying of software and manufacturing of the medium upon which the software is stored, such as compact disks and floppy disks, to be production workers, the Department does not consider the design and development of the software itself to be production and, therefore, does not consider software designers and developers to be production workers.

The U.S. Customs Service does not regard software design and development as a tangible commodity and determines the value of software based only on the cost of the carrier media, such as compact discs, floppy disks, records, and tapes. Further, computer software is not listed on the Harmonized Tariff Schedule of the United States (HTS), a code that represents an international standard maintained by most industrialized countries as established by the International Convention on the Harmonized Commodity Description and Coding.

Throughout the Trade Act, an article is often referenced as something that can be subject to a duty. To be subject to a duty on a tariff schedule, an article will have a value that makes it marketable, fungible and interchangeable for commercial purposes. While a wide variety of tangible products are described as articles and characterized as dutiable in the HTS, informational products that could historically be sent in letter form and that can currently be electronically transmitted are not listed in the HTS. Such products are not the type of employment work products that customs officials inspect and that the TAA program was generally designed to address.

Conclusion

After reconsideration on remand, I affirm the original notice of negative determination of eligibility to apply for adjustment assistance for workers and former workers of Mellon Bank, N.A., Pittsburgh, Pennsylvania.

Signed at Washington, DC, this 6th day of January, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–652 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,503]

NTN–BCA Corporation, A Wholly Owned Subsidiary of NTN–USA, Greensburg, IN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 12, 2003, in response to a petition filed by a company official on behalf of workers at NTN–BCA Corporation, a wholly owned subsidiary of NTN–USA, Greensburg, Indiana.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation would serve no purpose, and the investigation is terminated.

Signed at Washington, DC this 23rd day of December, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–641 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–52,132]

Pennsylvania House, Inc., Clayton-Marcus Co., Inc., Ladd Furniture, Inc., Monroe, NC; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on July 29, 2003, applicable to workers of Pennsylvania House, Inc., Monroe, North Carolina. The notice was published in the **Federal Register** on August 14, 2003 (68 FR 48643).

At the request of the State agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in the production of upholstered furniture.

Information shows that Pennsylvania House, Inc. and Clayton-Marcus Co., Inc. are wholly-owned subsidiaries of Ladd Furniture, Inc. Workers separated from employment at the subject firm had their wages reported under separate unemployment insurance (UI) tax accounts for Clayton-Marcus Co., Inc. and Ladd Furniture, Inc.

Accordingly, the Department is amending the certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of Pennsylvania House, Inc. who were adversely affected by increased imports.

The amended notice applicable to TA–W–52,132 is hereby issued as follows:

All workers of Pennsylvania House, Inc., Clayton-Marcus Co., Inc., Ladd Furniture, Inc., Monroe, North Carolina, who became totally or partially separated from employment on or after June 23, 2002 through July 29, 2005, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

Signed at Washington, DC, this 16th day of December 2003.

Richard Church,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–653 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,706]

Philips Electronics, Advanced Transformer Division, Chicago, IL; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on December 4, 2003 in response to a worker petition filed on behalf of workers at Philips Electronics, Advanced Transformers Division, Chicago, Illinois.

The petitioning group of workers is covered by an active certification issued on December 5, 2003 and which remains in effect (TA–W–53,614). Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 15th day of December 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–646 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,657]

RMG Foundry, LLC, Mishawaka, IN; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on November 28, 2003 in response to a petition filed by a company official on behalf of workers at RMG Foundry, LLC, Mishawaka, Indiana.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 17th day of December 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–644 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,720]

Teleperformance USA, Butte, MT; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on December 5, 2003 in response to a petition filed by a company official on behalf of workers at Teleperformance USA, Butte, Montana.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed in Washington, DC, this 16th day of December 2003.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–647 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–41,889]

United Container Machinery, Inc., Glen Arm, MD; Notice of Revised Determination on Remand

The United States Court of International Trade (USCIT) granted the Department of Labor's request for voluntary remand of the negative determination on reconsideration in *Former Employees of United Container Machinery, Inc.* v. *U.S. Secretary of Labor* (Court No. 03–00346).

The Department's denial of Trade Adjustment Assistance (TAA) for the workers of United Container Machinery, Inc., Glen Arm, Maryland was issued on November 29, 2002, and was published in the **Federal Register** on December 23, 2002 (67 FR 78257). The investigation concluded that imports of products like or directly competitive with machinery for corrugated boxes produced at the subject company did not contribute importantly to the layoffs at the subject company during the relevant time period.

By letter dated January 1, 2003, the petitioner requested administrative reconsideration of the negative determination. The petitioner alleged that the subject worker group should be eligible for TAA because they were previously certified, that the subject company imported competitive products from Hungary, and that the subject company's customers may be importing. The Notice of Negative Determination Regarding Application for Reconsideration was issued on March 25, 2003, and was published in the **Federal Register** on April 7, 2003 (68 FR 16844). The request was denied because the information contained in the reconsideration request and the Department's follow-up inquiry concerning such information did not reveal a basis for further detailed investigation.

In response to the petitioner's appeal to the U.S. Court of International Trade, the Department requested, and was granted, a voluntary remand.

In the remand investigation, the Department requested from company officials information regarding the history of the subject company, company imports, details of the merger in which the subject company acquired the facility in Hungary, customer information, and clarification about alleged foreign affiliations.

The remand investigation revealed that the subject facility produced processed corrugated rolls. Corrugated rolls are large metal cylinders that are used to produce corrugated material. A paper matter is squeezed between pairs of corrugated rolls to make large flattened sheets used to make corrugated boxes.

There are two versions of processed corrugated rolls: smooth and fluted. The Glen Arm, Maryland facility produces both smooth and fluted processed corrugated rolls. The Hungary plant makes only smooth processed corrugated rolls. The smooth and fluted rolls function in the same way "a paper product is squeezed between the rolls to make large sheets of flat board. The process of making the two versions is the same, except that fluted rolls include an extra step of ridging (scoring the smooth surface so that it makes ridges in the end product). Further, the two versions produce the same end product—the end paper product of the smooth rolls is a large sheet of smooth flat board; the end paper product of the fluted rolls is a large sheet of fluted flat board. Thus, the two versions are like and directly competitive.

In July 2002, Barry-Wehmiller Company purchased United Container Machinery, Inc. The purchase included the Glen Arm, Maryland facility and the facility in Hungary.

The rolls made in Hungary are shipped to European customers and to the Glen Arm, Maryland facility. The smooth corrugated rolls sent to the Glen Arm, Maryland facility either satisfy domestic smooth corrugated roll customers or are processed to make fluted materials. The further processing includes ridging the smooth corrugated rolls, polishing the rolls, and testing the modified final product.

A careful review of the additional information supplied by the company revealed that the Glen Arm, Maryland facility experienced production and employment declines and that imports of processed corrugated rolls from Hungary remained steady during the corresponding time period. Therefore, the Department concludes the subject company increased its reliance upon imported processed corrugated rolls during the relevant time period.

Conclusion

After careful review of the additional facts obtained on the current remand, I conclude that there was an increased reliance on imported processed corrugated rolls like or directly competitive with those produced at the subject firm, and that such increased reliance on imports contributed importantly to the worker separations and sales or production declines at the

subject facility. In accordance with the provisions of the Trade Act, I make the following certification:

"All workers of United Container Machinery, Inc., Glen Arm, Maryland, who became totally or partially separated from employment on or after July 17, 2001, through two years from the issuance of this revised determination, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974."

Signed at Washington, DC, this 6th day of January, 2004.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–651 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,555 and TA–W–53,555A]

Vector Tobacco, Inc., Timberlack, NC; Vector Research LTD, Durham, NC; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 17, 2003, in response to a petition filed by the company on behalf of workers at Vector Tobacco, Inc., Timberlake, North Carolina (TA–W–53,555) and Vector Research LTD., Durham, North Carolina (TA–W–53,555A).

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed at Washington, DC, this 16th day of December, 2003.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–642 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,797]

WestPoint Stevens, Inc., Lanier Mill, Valley, AL; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, an investigation was initiated on December 15, 2003, in response to a petition filed by a company official on behalf of workers at WestPoint Stevens, Lanier Mill, Valley, Alabama.

The petitioner has requested that the petition be withdrawn. Consequently, further investigation in this case would serve no purpose, and the investigation has been terminated.

Signed in Washington, DC, this 29th day of December, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–656 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–53,640]

Wormuth Brothers, Athens, NY; Notice of Termination of Investigation

Pursuant to section 221 of the Trade Act of 1974, as amended, an investigation was initiated on November 25, 2003 in response to a petition filed by a company official on behalf of workers at Wormuth Brothers, Athens, New York.

The petitioner has requested that the petition be withdrawn. Consequently, the investigation has been terminated.

Signed at Washington, DC this 23rd day of December, 2003.

Linda G. Poole,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 04–655 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–P

DEPARTMENT OF LABOR

Employment and Training Administration

Labor Certification Process for Temporary Agricultural Employment of Nonimmigrant Workers in the United States (H–2A Workers); Cancellation of the Formal Briefing Scheduled To Be Held in Nashville, Tennessee, Highlighting the H–2A On-Line Application Processing System

AGENCY: Employment and Training Administration, Labor.

ACTION: Cancellation of formal briefing.

SUMMARY: Due to a lack of response from the regulated community and other interested parties in the Nashville, Tennessee, area, the Division of Foreign Labor Certification, Employment and Training Administration (ETA), Department of Labor, is canceling the previously announced formal briefing to be held on Thursday, January 22, 2004, from 9:30 a.m. to 4 p.m., in Nashville, Tennessee, and is instead concentrating its efforts on the January 15, 2004, employer briefing scheduled at the Holiday Inn Boxborough, 242 Adams Place, Boxborough, Massachusetts 01719 from 9:30 a.m. to 4 p.m. *See* 68 FR 69725 (December 15, 2003).

FOR FURTHER INFORMATION CONTACT: Charlene Giles; telephone (202) 693–2950. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The formal public briefings will be chaired by an official of the Employment and Training Administration. Persons appearing at the briefings will be allowed a hands on experience with the system and to pose questions to Department staff.

Signed at Washington, DC, this 8th day of January, 2004.

Emily Stover DeRocco,

Assistant Secretary, for Employment and Training.

[FR Doc. 04–662 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–30–U

DEPARTMENT OF LABOR

Employment Standards Administration

Proposed Collection; Comment Request

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Employment Standards Administration is soliciting comments concerning the proposed collection: Claim for Reimbursement-Assisted Reemployment (CA–2231). A copy of the proposed information collection request can be obtained by contacting the office listed below in the addresses section of this Notice.

DATES: Written comments must be submitted to the office listed in the

addresses section below on or before March 15, 2004.

ADDRESSES: Ms. Hazel M. Bell, U.S. Department of Labor, 200 Constitution Ave., NW., Room S–3201, Washington, DC 20210, telephone (202) 693–0418, fax (202) 693–1451, E-mail *bell.hazel@dol.gov.* Please use only one method of transmission for comments (mail, fax, or Email).

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Workers' Compensation Programs (OWCP) administers the Federal Employees' Compensation Act (FECA). Section 8104(a) of the Act provides vocational rehabilitation services to eligible injured Federal employees that are paid from the Employees' Compensation Fund. Authority has been granted to OWCP to use amounts from the fund to reimburse a private sector employer who has hired a rehabilitated injured Federal employee for a portion of his or her salary. The information collected on Form CA–2231 provides OWCP with the necessary remittance information for the employer, documents the hours of work, certifies the payment of wages to the claimant for which reimbursement is sought, and summarizes the nature and costs of the wage reimbursement program for a prompt decision by OWCP. This information collection is currently approved for use through June 30, 2004.

II. Review Focus

The Department of Labor is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- 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 submissions of responses.

III. Current Actions

The Department of Labor seeks the extension of approval to collect this information to ensure timely and accurate payments to eligible employers for reimbursement claims.

Type of Review: Extension.

Agency: Employment Standards Administration.

Title: Claim for Reimbursement-Assisted Reemployment.

OMB Number: 1215–0178.

Agency Number: CA–2231.

Affected Public: Business or other for-profit, Not-for-profit institutions.

Total Respondents: 20.

Total Annual Responses: 80.

Average Time per Response: 30 minutes.

Estimated Total Burden Hours: 40.

Frequency: Quarterly.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $32.00.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: January 6, 2004.

Bruce Bohanon,

Chief, Branch of Management Review and Internal Control, Division of Financial Management, Office of Management, Administration and Planning, Employment Standards Administration.

[FR Doc. 04–640 Filed 1–12–04; 8:45 am]

BILLING CODE 4510–CH–P

NATIONAL LABOR RELATIONS BOARD

Appointments of Individuals To Serve as Members of Performance Review Boards

5 U.S.C. 4314(c)(4) requires that the appointments of individuals to serve as members of performance review boards be published in the **Federal Register**. Therefore, in compliance with this requirement, notice is hereby given that the individuals whose names and position titles appear below have been appointed to serve as members of performance review boards in the National Labor Relations Board for the rating year beginning October 1, 2002 and ending September 30, 2003.

Name and Title

Richard L. Ahearn—Regional Director, Region 19,
Frank V. Battle—Deputy Director of Administration,
John F. Colwell—Chief Counsel to Board Member,
Harold J. Datz—Chief Counsel to the Chairman,
John H. Ferguson—Associate General Counsel, Enforcement Litigation,
Terrance F. Flynn—Chief Counsel to Board Member,
Robert A. Giannasi—Chief Administrative Law Judge,
Lester A. Heltzer—Executive Secretary,
John E. Higgins—Deputy General Counsel,
Peter B. Hoffman—Regional Director, Region 34,
Gloria Joseph—Director of Administration,
Barry J. Kearney—Associate General Counsel, Advice,
David B. Parker—Deputy Executive Secretary,
Gary W. Shinners—Chief Counsel to Board Member,
Richard A. Siegel—Associate General Counsel, Operations-Management
Lafe E. Solomon—Director, Office of Representation Appeals,
Jeffrey D. Wedekind, Solicitor,
Peter D. Winkler—Chief Counsel to Board Member.

Dated: Washington, DC, January 7, 2004.

By Direction of the Board.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 04–667 Filed 1–12–04; 8:45 am]

BILLING CODE 7545–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–346]

Davis-Besse Nuclear Power Station; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of FirstEnergy Nuclear Operating Company (the licensee) to withdraw its December 17, 2001, as supplemented by letter dated June 4, 2002, application for proposed amendment to Facility Operating License No. NPF–3 for the Davis-Besse Nuclear Power Station, Unit No. 1, located in Ottawa County, Ohio.

The proposed amendment would have modified the facility technical specifications (TS) pertaining to TS 3/4.3.1, "Reactor Protection System (RPS) Instrumentation," to delete an Action involving either reducing core thermal power and the high neutron flux reactor trip setpoint, or monitoring quadrant power tilt when an RPS channel is inoperable. Additionally, changes were

proposed to the content and format of TS Tables 3.3–1 and 4.3–1 to enhance TS clarity.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on November 25, 2003 (68 FR 66136). However, by letter dated November 26, 2003, the licensee withdrew the amendment request.

For further details with respect to this action, see the application for amendment dated December 17, 2001, as supplemented by letter dated June 4, 2002, and the licensee's letter dated November 26, 2003, which withdrew the application for license amendment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams/html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209, or 301–415–4737 or by email to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 5th day of January, 2004.

For the Nuclear Regulatory Commission.

Stephen P. Sands,

Project Manager, Section 2, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–679 Filed 1–12–04; 8:45 am]

BILLING CODE 7590–01–U

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–259, 50–260, and 50–296]

Tennessee Valley Authority, Notice of Receipt of Application for Renewal of Browns Ferry Nuclear Plant, Units 1, 2 and 3, Facility Operating License Nos. DPR–33, DPR–52, and DPR–68 for an Additional 20-Year Period

The U.S. Nuclear Regulatory Commission (NRC or Commission) has received an application, dated January 6, 2004, from the Tennessee Valley Authority, filed pursuant to Section 104b of the Atomic Energy Act of 1954, as amended, and 10 CFR part 54, to renew Operating License Nos. DPR–33, DPR–52, and DPR–68 for the Browns Ferry Nuclear Plant, Units 1, 2 and 3, respectively. Renewal of the licenses would authorize the applicant to operate the facilities for an additional 20-year period. The current operating licenses for the Browns Ferry Nuclear Plant, Units 1, 2 and 3, expire on December 20, 2013, June 28, 2014, and July 2, 2016, respectively. The Browns Ferry Nuclear Plant, Units 1, 2 and 3, are boiling-water reactors designed by General Electric Corporation, and are located in Limestone County, Alabama. The acceptability of the tendered application for docketing, and other matters, including an opportunity to request a hearing, will be addressed in subsequent **Federal Register** notices.

Copies of the application are available for public inspection at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, or electronically from the Publicly Available Records (PARS) component of the NRC's Agencywide Documents Access and Management System (ADAMS) under accession number ML040060355. The ADAMS Public Electronic Reading Room is accessible from the NRC web site at *http://www.nrc.gov/reading-rm/adams.html*. In addition, the application is available on the NRC web page at *http://www.nrc.gov/reactors/operating/licensing/renewal/applications.html*, while the application is under review. 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 at 1–800–397–4209, 301–415–4737, or by email to *pdr@nrc.gov*.

The staff has also verified that a copy of the license renewal application for the Browns Ferry Nuclear Plant, Units 1, 2 and 3 has been provided to the Athens-Limestone Public Library, at 405 South Street E, Athens, Alabama, 35611.

Dated at Rockville, Maryland, this 7th day of January, 2004.

For the Nuclear Regulatory Commission.

Pao-Tsin Kuo,

Program Director, License Renewal and Environmental Impacts, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 04–681 Filed 1–12–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–275 and 50–323]

Pacific Gas and Electric Company, Diablo Canyon Power Plant, Unit Nos. 1 and 2; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption from title 10 of the Code of Federal Regulations (10 CFR) part 50, section 50.68 for Facility Operating License Nos. DPR–80 and DPR–82, issued to Pacific Gas and Electric Company (the licensee), for operation of the Diablo Canyon Power Plant (DCPP), Unit Nos. 1 and 2, respectively, located in San Luis Obispo County, California. Therefore, as required by 10 CFR 51.21, the NRC is issuing this environmental assessment and finding of no significant impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action would exempt the licensee from the requirements of 10 CFR 50.68, "Criticality Accident Requirements," for handling the 10 CFR part 72 licensed contents of the Holtec HI-STORM 100 Cask System.

The proposed action is in accordance with the licensee's application dated October 8, 2003, as supplemented on November 25, 2003.

The Need for the Proposed Action

10 CFR 50.68(b)(1) sets forth the following requirement that must be met, in lieu of a monitoring system capable of detecting criticality events:

> Plant procedures shall prohibit the handling and storage at any one time of more fuel assemblies than have been determined to be safely subcritical under the most adverse moderation conditions feasible by unborated water.

The licensee is unable to satisfy the above requirement for handling of the 10 CFR part 72 licensed contents of the Holtec HI-STORM 100 Cask System. Section 50.12(a) allows licensees to apply for an exemption from the requirements of part 50 if the regulation is not necessary to achieve the underlying purpose of the rule and other conditions are met. The licensee has stated that compliance with 10 CFR 50.68(b)(1) is not necessary for handling the 10 CFR part 72 licensed contents of the cask system to achieve the underlying purpose of the rule.

Environmental Impacts of the Proposed Action

The NRC has completed its evaluation of the proposed action and concludes

that the exemption described above would continue to satisfy the underlying purpose of 10 CFR 50.68(b)(1). The details of the staff's safety evaluation will be provided with the letter to the licensee approving the exemption to the regulation.

The proposed action will not significantly increase the probability or consequences of accidents, no changes are being made in the types or amounts of effluents that may be released off site, and there is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential nonradiological impacts, the proposed action does not have a potential to affect any historic sites. It does not affect nonradiological plant effluents and has no other environmental impact. Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.*, the "no-action" alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

The action does not involve the use of any different resource than those previously considered in the Final Environmental Statement for the Diablo Canyon Power Plant, Unit Nos. 1 and 2, dated May 1973.

Agencies and Persons Consulted

On December 15, 2003, the staff consulted with the California State official, Mr. Steve Hsu of the Radiologic Health Branch of the California Department of Health Services, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated October 8, 2003, as supplemented on November 25, 2003. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), located at One White Flint North, Public File Area O1 F21, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html*. Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or (301) 415–4737, or by e-mail to *pdr@nrc.gov*.

Dated at Rockville, Maryland, this 7th day of January 2004.

For the Nuclear Regulatory Commission.

Stephen Dembek,

Chief, Section 2, Project Directorate IV, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 04–680 Filed 1–12–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

SUNSHINE ACT MEETING

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of January 12, 19, 26, February 2, 9, 16, 2004.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and closed.

MATTERS TO BE CONSIDERED:

Week of January 12, 2004

Wednesday, January 14, 2004

9:30 a.m. Briefing on Status of Office of Chief Information Officer Programs, Performance, and Plans (Public Meeting). (Contact: Jacqueline Silber, (301) 415–7330).

This meeting will be webcast live at the Web address—*www.nrc.gov*.

Week of January 19, 2004—Tentative

Wednesday, January 21, 2004

1:30 p.m. Discussion of Security Issues (Closed—Ex. 1).

Week of January 26, 2004—Tentative

There are no meetings scheduled for the Week of January 26, 2004.

Week of February 2, 2004—Tentative

There are no meetings scheduled for the Week of February 2, 2004.

Week of February 9, 2004—Tentative

There are no meetings scheduled for the Week of February 9, 2004.

Week of February 16, 2004—Tentative

Wednesday, February 18, 2004

9:30 a.m. Briefing on Status of Office of Chief Financial Officer Programs, Performance, and Plans (Public Meeting). (Contact: Edward L. New, (301) 415–5646).

*The schedule for Commission meeting is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: Timothy J. Frye, (301) 415–1651.

* * * * *

ADDITIONAL INFORMATION

By a vote of 3–0 on January 6, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that "Affirmation of SECY–03–0224 (Sequoyah Fuels Corp; State of Oklahoma's Petition for Review of LBP–03–25)" be held on January 8, and on less than one week's notice to the public.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *www.nrc.gov/what-we-do/policy-making/schedule.html*.

* * * * *

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301) 415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to *dkw@nrc.gov*.

Dated: January 8, 2004.

Timothy J. Frye,

Technical Coordinator, Office of the Secretary.

[FR Doc. 04–766 Filed 1–9–04; 12:06 pm]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

Draft Regulatory Guide; Issuance, Availability

The Nuclear Regulatory Commission (NRC) has issued for public comment a proposed revision of a guide in its Regulatory Guide Series. Regulatory Guides are developed to describe and make available to the public such information as methods acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques used by the staff in evaluating specific problems or postulated accidents, and data needed by the staff in its review of applications for permits and licenses.

The draft guide is temporarily identified by its task number, DG–7003, which should be mentioned in all correspondence concerning this draft guide. Draft Regulatory Guide DG–7003, "Standard Format and Content of Part 71 Applications for Approval of Packaging for Radioactive Material," is the proposed Revision 2 of Regulatory Guide 7.9. This revision is being developed to provide guidance on the preparation of applications for approval of packaging to be used for the shipment of Type B and fissile radioactive material.

This draft guide has not received complete staff approval and does not represent an official NRC staff position.

Comments may be accompanied by relevant information or supporting data. Written comments may be submitted by mail to the Rules and Directives Branch, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555; or they may be hand-delivered to the Rules and Directives Branch, Office of Administration, at 11555 Rockville Pike, Rockville, MD. Copies of comments received may be examined at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. Comments will be most helpful if received by March 9, 2004.

You may also provide comments via the NRC's interactive rulemaking web site through the NRC home page (*http://www@nrc.gov*). This site provides the ability to upload comments as files (any format) if your web browser supports that function. For information about the interactive rulemaking web site, contact Ms. Carol Gallagher, (301) 415–5905; e-mail *CAG@NRC.GOV*. For technical information about Draft Regulatory Guide DG–7003, contact Ms. N.L. Osgood at (301) 415–8513 (e-mail *NLO@NRC.GOV*).

Although a deadline is given for comments on these draft guides, comments and suggestions in connection with items for inclusion in guides currently being developed or improvements in all published guides are encouraged at any time.

Regulatory guides are available for inspection at the NRC's Public Document Room, 11555 Rockville Pike, Rockville, MD; the PDR's mailing address is USNRC PDR, Washington, DC 20555; telephone (301) 415–4737 or (800) 397–4209; fax (301) 415–3548; e-mail *PDR@NRC.GOV*. Requests for single copies of draft or final regulatory guides (which may be reproduced) or for placement on an automatic distribution list for single copies of future draft guides in specific divisions should be made in writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Reproduction and Distribution Services Section, or by fax to (301) 415–2289; e-mail *DISTRIBUTION@NRC.GOV*. Telephone requests cannot be accommodated. 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 22nd day of December 2003.

For the Nuclear Regulatory Commission.

Mabel Lee,

Director, Program Management, Project Development and Support, Office of Nuclear Regulatory Research.

[FR Doc. 04–678 Filed 1–12–04; 8:45 am]

BILLING CODE 7590–01–U

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request; Copies Available From: Securities and Exchange Commission, Office of Filings and Information Services, Washington, DC 20549.

Extension:

Rule 12g3–2, OMB Control No. 3235–0119, SEC File No. 270–104; Rules 7a–15 thru 7a–37, OMB Control No. 3235–0132, SEC File No. 270–115; Rule 13e–1, OMB Control No. 3235–0305, SEC File No. 270–255.

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 requests for extension of the previously approved collections of information discussed below.

Rule 12g3–2 (OMB 3235–0119; SEC File No. 270–104) provides an exemption from section 12(g) of the Securities Exchange Act of 1934 for foreign private issuers. Rule 12g3–2 is designed to provide investors in foreign securities with information about such securities and the foreign issuer. All information required by Rule 12g3–2 must be filed with the Commission and made available to the public upon request. It estimated that 1,800 foreign issuers make submissions pursuant to Rule 12g3–2 annually and it takes approximately one burden hour per response for a total annual burden of 1,800 hours. It is estimated that 100 percent of the burden is prepared by the filer.

Rules 7a–15 through 7a–37 (OMB 3235–0132; SEC File No. 270–115) set forth the general requirements relating to applications, statements and reports that must be filed under the Trust Indenture Act of 1939 by issuers and trustees qualifying indentures for offerings of debt securities. The respondents are persons and entities subject to the Trust Indenture Act requirements. Rules 7a–15 through 7a–37 are disclosure guidelines and do not directly result in any collection of information. The Rules are assigned only one burden hour for administrative convenience.

Rule 13e–1 (OMB 3235–0305; SEC File No. 270–255) makes it unlawful for an issuer who has received notice that it is the subject of a tender offer made under 14(d)(1) of the Act and which has commenced under Rule 14d–2 to purchase any of its equity securities during the tender offer unless it first files a statement with the Commission containing information required by the Rule. This rule is in keeping with the Commission's statutory responsibility to prescribe rules and regulations that are necessary for the protection of investors. Public companies are the respondents. Rule 13e–1 submissions take approximately 10 burden hours to prepare and are filed by 20 respondents. It is estimated that 25 percent of 200 total burden hours (50 hours) is prepared by the company. The remaining 75 percent of the total burden is attributed to outside cost.

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.

Written comments regarding the above information should be directed to the following persons: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10202, New Executive Office Building,

Washington, DC 20503; and (ii) Kenneth A. Fogash, Acting Associate Executive Director/CIO, Office of Information Technology, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Comments must be submitted to OMB within 30 days of this notice.

Dated: January 5, 2004.

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–607 Filed 1–12–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

Issuer Delisting Notice of Application of One Liberty Properties, Inc. To Withdraw Its Common Stock, $1.00 par Value, From Listing and Registration on the American Stock Exchange LLC File No. 1–11083

January 7, 2004.

One Liberty Properties, Inc., a Maryland corporation ("Issuer"), has filed an application with the Securities and Exchange Commission ("Commission"), pursuant to Section 12(d) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its Common Stock Exchange LLC ("Amex" or "Exchange").

The Board of Directors of the Issuer unanimously approved a resolution on December 15, 2003 to withdraw the Issuer's Security from listing on the Amex and to list the Security on New York Stock Exchange ("NYSE"). The Issuer states that it is taking such action to avoid the direct and indirect costs and the division of the market resulting from dual listing on Amex and NYSE.

The Issuer stated in its application that it has met the requirements of Amex Rule 18 by complying with all applicable laws in the State of Maryland, in which it is incorporated, and with the Amex's rules governing an issuer's voluntary withdrawal of a security from listing and registration.

The Issuer's application relates solely to the withdrawal of the Securities from listing on the Amex and from registration under Section 12(b) of the Act[3] shall not affect its obligation to be registered under Section 12(g) of the Act.[4]

Any interested person may, on or before February 3, 2004, submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, facts bearing upon whether the application has been made in accordance with the rules of the Amex and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[5]

Jonathan G. Katz,

Secretary.

[FR Doc. 04–608 Filed 1–12–04; 8:45 am]

BILLING CODE 8010–01–M

[1] 15 U.S.C. 78(d).

[2] 17 CFR 240.12d2–2(d).

[3] 15 U.S.C. 78*l*(b).

[4] 14 U.S.C. 78*l*(g).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49022; File No. SR–Amex–2001–46]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1, 2, and 3 Thereto by the American Stock Exchange LLC Relating to the Adoption of a Facilitation Rule and Member Firm Guarantee for Index Shares

January 5, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 11, 2001, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On November 7, 2001, Amex filed Amendment No. 1 to the proposed rule change.[3] On September 24, 2003, Amex filed Amendment No. 2 to the proposed rule change.[4] On December 4, 2003, Amex filed Amendment No. 3 to the proposed rule change.[5] 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 Amex proposes to adopt a facilitation rule and a member firm participation guarantee for member firms facilitating transactions in Portfolio Depositary Receipts and Index Fund Shares and to codify the Exchange's policy prohibiting the use of non-public information received during the facilitation process. The text of the proposed rule change, as amended, is set forth below. *Italics* indicate material to be added.

* * * * *

Rule 1000 Portfolio Depositary Receipts

(a) through (b) No change.

* * * Commentary

.01 through .04 No change.

.05 (1) Facilitation Orders—A member who holds both an order for a public customer of a member organization and a facilitation order may cross such orders if:

(a) the member organization discloses on its order ticket for the public customer order which is subject to facilitation, all the terms of such order, including, if applicable, any contingency involving options or other related securities; and

(b) the member requests bids and offers for the shares subject to facilitation, then discloses the public customer order and any contingency respecting such order which is subject to facilitation and identifies the order as being subject to facilitation; and

(c) after providing an opportunity for such bids and offers to be made, the member, on behalf of the public customer whose order is subject to facilitation, either bids above the highest bid or offers below the lowest offer in the market. After all other market participants are given an opportunity to accept the bid or offer made on behalf of the public customer whose order is subject to facilitation, the member may cross all or any remaining

[5] 17 CFR 200.30–3(a)(1).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* letter from Claire P. McGrath, Vice President and Special Counsel, Amex, to Nancy Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated November 5, 2001. In Amendment No. 1, Amex increased the proposed participation guarantee for member firms facilitating transactions in Portfolio Depositary Receipts and Index Fund Shares from 30% or 40% of the facilitation trade to 40% or 50% of the facilitation trade.

[4] *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated September 23, 2003. In Amendment No. 2, which replaced the original filing and previous amendment, Amex clarified the specialist's allocation of executed shares in facilitation transactions and made other, minor changes.

[5] *See* letter from Claire P. McGrath, Senior Vice President and Deputy General Counsel, Amex, to Nancy Sanow, Assistant Director, Division, Commission, dated December 3, 2003. In Amendment No. 3, Amex made a technical correction to the proposed rule text.

part of such order and the facilitation order at such customer's bid or offer by announcing in public outcry that (s)he is crossing such orders stating the quantity and price(s).

(2) Member Firm Participation—(a) Notwithstanding provisions of paragraph (c), a member firm seeking to facilitate its own public customer's Portfolio Depositary Receipt order for the eligible order size will be permitted to participate in the firm's proprietary account as the contra-side of that order to the extent of the percentages set forth below:

(i) 40% of the order if the order is traded at the best bid or offer given by the trading crowd in response to a floor broker's request for a market; or

(ii) 50% of the order if the member firm improves the market that was provided by the trading crowd in response to a floor broker's request and the order is traded at that best bid or offer.

If, however, a public customer order on the specialist's book or represented in the trading crowd has priority over the facilitation order, the member firm may participate in only those shares remaining after the public customer's order has been filled.

(b) the eligible order size shall be 25,000 shares or larger, unless the Exchange has established a smaller eligible order size.

(c) if a facilitation transaction pursuant to this subparagraph (2) occurs at the specialist's bid or offer, the specialist shall be allocated the greater of either (i) 10% of the executed shares if the facilitating member firm, pursuant to subparagraph (2)(a)(i), has participated to the extent of 40% of the executed shares; or (ii) a share of the executed shares that have been divided equally among the specialist and other participants to the trade. The specialist's participation allocation shall only apply to the number of shares remaining after all public customer orders and the member firm's facilitation order have been satisfied. However, the total number of shares guaranteed to be allocated to the member firm and the specialist in the aggregate shall not exceed 50% of the facilitation transaction. If the facilitation transaction occurs at a price at which the specialist is not on parity, the specialist is entitled to no guaranteed participation allocation.

(d) nothing in this Commentary .05 is intended to prohibit a member firm or specialist from trading more than their guaranteed participation allocations if the other members of the trading crowd choose not to trade the remaining portion of the facilitation order.

With respect to paragraphs (1) and (2) above, when accepting a bid or offer made on behalf of a public customer whose order is subject to facilitation, all contingencies of the public customer order must be satisfied. Once the bid or offer has been made on behalf of the public customer whose order is subject to facilitation, such order has precedence over any other bid or offer in the crowd to trade immediately with the facilitation order.

For purposes of this Commentary .05 the term "public customer of a member organization" means a customer that is neither a member nor a broker/dealer.

* * * * *

.06 It may be considered conduct inconsistent with just and equitable principles of trade for any member or person associated with a member, who has knowledge of all material terms and conditions of (i) an order being facilitated, or (ii) orders being crossed, the execution of which are imminent, to enter, based on such knowledge, an order to buy or sell a Portfolio Depositary Receipt that is the subject of the order, an order to buy or sell the overlying option class, or an order to buy or sell any related instrument until either (i) all the terms of the order and any changes in the terms and conditions of the order of which that member or associated person has knowledge are disclosed to the trading crowd or (ii) the trade can no longer reasonably be considered imminent in view of the passage of time since the order was received. For purposes of this Commentary .06, an order to buy or sell a "related instrument," means an order to buy or sell securities comprising ten percent or more of the component securities in the Portfolio Depositary Receipt or an order to buy or sell a futures contract on any economically equivalent index.

* * * * *

Rule 1000A Index Fund Shares

(a) through (b) No change.

* * * Commentary

.01 through .05 No change.

.06 (1) Facilitation Orders—A member who holds both an order for a public customer of a member organization and a facilitation order may cross such orders if:

(a) the member organization discloses on its order ticket for the public customer order which is subject to facilitation, all the terms of such order, including, if applicable, any contingency involving options or other related securities; and

(b) the member requests bids and offers for the shares subject to facilitation, then discloses the public customer order and any contingency respecting such order which is subject to facilitation and identifies the order as being subject to facilitation; and

(c) after providing an opportunity for such bids and offers to be made, the member, on behalf of the public customer whose order is subject to facilitation, either bids above the highest bid or offers below the lowest offer in the market. After all other market participants are given an opportunity to accept the bid or offer made on behalf of the public customer whose order is subject to facilitation, the member may cross all or any remaining part of such order and the facilitation order at such customer's bid or offer by announcing in public outcry that (s)he is crossing such orders stating the quantity and price(s).

(2) Member Firm Participation—(a) Notwithstanding provisions of paragraph (c), a member firm seeking to facilitate its own public customer's Index Fund Share order for the eligible order size will be permitted to participate in the firm's proprietary account as the contra-side of that order to the extent of the percentages set forth below:

(i) 40% of the order if the order is traded at the best bid or offer given by the trading crowd in response to a floor broker's request for a market; or

(ii) 50% of the order if the member firm improves the market that was provided by the trading crowd in response to a floor broker's request and the order is traded at that best bid or offer.

If, however, a public customer order on the specialist's book or represented in the trading crowd has priority over the facilitation order, the member firm may participate in only those shares remaining after the public customer's order has been filled.

(b) the eligible order size shall be 25,000 shares or larger, unless the Exchange has established a smaller eligible order size.

(c) if a facilitation transaction pursuant to this subparagraph (2) occurs at the specialist's bid or offer, the specialist shall be allocated the greater of either (i) 10% of the executed shares if the facilitating member firm, pursuant to subparagraph (2)(a)(i), has participated to the extent of 40% of the executed shares; or (ii) a share of the executed shares that have been divided equally among the specialist and other participants to the trade. The specialist's participation allocation shall only apply to the number of shares remaining after all public customer orders and the member firm's

facilitation order have been satisfied. However, the total number of shares guaranteed to be allocated to the member firm and the specialist in the aggregate shall not exceed 50% of the facilitation transaction. If the facilitation transaction occurs at a price at which the specialist is not on parity, the specialist is entitled to no guaranteed participation allocation.

(d) nothing in this Commentary .06 is intended to prohibit a member firm or specialist from trading more than their guaranteed participation allocations if the other members of the trading crowd choose not to trade the remaining portion of the facilitation order.

With respect to paragraphs (1) and (2) above, when accepting a bid or offer made on behalf of a public customer whose order is subject to facilitation, all contingencies of the public customer order must be satisfied. Once the bid or offer has been made on behalf of the public customer whose order is subject to facilitation, such order has precedence over any other bid or offer in the crowd to trade immediately with the facilitation order.

For purposes of this Commentary .06 the term "public customer of a member organization" means a customer that is neither a member nor a broker/dealer.

* * * * *

.07 It may be considered conduct inconsistent with just and equitable principles of trade for any member or person associated with a member, who has knowledge of all material terms and conditions of (i) an order being facilitated, or (ii) orders being crossed, the execution of which are imminent, to enter, based on such knowledge, an order to buy or sell a Index Fund Share that is the subject of the order, an order to buy or sell the overlying option class, or an order to buy or sell any related instrument until either (i) all the terms of the order and any changes in the terms and conditions of the order of which that member or associated person has knowledge are disclosed to the trading crowd or (ii) the trade can no longer reasonably be considered imminent in view of the passage of time since the order was received. For purposes of this Commentary .06, an order to buy or sell a "related instrument," means an order to buy or sell securities comprising ten percent or more of the component securities in the Index Fund Share or an order to buy or sell a futures contract on any economically equivalent index.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Amex is proposing amendments to Amex Rules 1000 and 1000A to provide for the adoption of a facilitation rule and participation guarantee for member firms facilitating public customer orders in Portfolio Depositary Receipts and Index Fund Shares ("Index Shares"). As explained by Amex, a facilitation order is utilized to cross a public customer order with an order for a member firm. Other market participants can compete only with the member firm order by accepting the bid or offer made on behalf of the public customer. According to Amex, since, under the proposed facilitation rule, other market participants would not be permitted to compete with the public customer side of the order, using the facilitation rule will assure that the public customer's order is completely executed. Members wishing to engage in a facilitation cross on behalf of their public customers would be required to comply with the procedures set forth in the proposed amendments.[6]

Amex states that member firms, however, believe that when seeking to facilitate large public customer Index Share orders with an order for the firm's own proprietary account, they should be able to participate to some extent with their customer's order. Therefore, Amex proposes that Commentary .05 to Rule 1000 and Commentary .06 to Rule 1000A be adopted to provide that a member firm whose proprietary account is facilitating its own customer's order of 25,000 Index Shares or more may participate as contra-party to the extent of either 50% or 40% the trade.[7] The member firm would be required to follow the procedures set forth in the proposed rules for the facilitation of a public customer order to be eligible for the participation guarantee.

Amex states that member firms should be aware that public customer orders on the specialist's book or represented in the crowd would have priority over the member firm's guaranteed participation, and that therefore, a member firm's minimum participation would be 50% or 40% of the number of Index Shares remaining after the public customer orders with priority have been filled. For example, if there is a public customer order on the book or represented in the trading crowd for 10,000 Index Shares to buy, the member firm facilitating its customer order to sell 25,000 Index Shares would have a guaranteed 50% or 40% participation on only the remaining 15,000 Index Shares.

In addition, proposed subparagraphs 2(c) of Commentary .05 to Rule 1000 and Commentary.06 to Rule 1000A set forth the specialist's participation in executed shares allocated after all public customer orders and the member firm's facilitation order have been satisfied. Subparagraphs 2(c) provide that the specialist would be allocated the greater of either (i) 10% of the executed shares if the facilitating member firm, pursuant to subparagraphs (2)(a)(i) of Commentary .05 to Rule 1000 and Commentary.06 to Rule 1000A, has participated to the extent of 40% of the executed shares; or (ii) a share of the executed shares that have been divided equally among the specialist and other participants to the trade.

The Exchange believes that providing member firms that are seeking to facilitate their own public customer orders with a guaranteed participation will provide an incentive for the member firms to bring large Index Share orders to the floor of the Amex rather than to the floor of another exchange or to the over-the-counter market. Thus, the Exchange believes that this proposal is necessary for it to remain competitive.

[6] The proposed procedures provide that a member who holds both an order for a public customer of a member organization and a facilitation order may cross such orders if the member organization discloses, for the public customer order, all the terms of such order, requests bids and offers, identifies the order as being subject to facilitation and bids/offers above/below the highest bid/lowest offer.

[7] A member firm seeking to facilitate its own public customer's order would be permitted to participate in the firm's proprietary account as the contra-side of that order to the extent of 50% of the order if the member firm improves the market provided by the trading crowd in response to the floor broker's initial request for a market and the order is executed at the improved bid or offer. A member firm would be guaranteed to participate to the extent of 40% of the order if the order is traded at the best bid or offer given by the trading crowd in response to a floor broker's request for a market.

The adoption of Commentary .06 to Rule 1000 and Commentary .07 to Rule 1000A would prohibit the use of non-public information received during the facilitation processes. As discussed above, facilitation orders are orders in which a member or member organization executes a crossing transaction with an order for a public customer. The facilitation rule provides procedures that allow the customer's order to be completely executed and prohibits the trading floor from supplanting the customer.

Amex states that since the proposed facilitation rule is designed to promote the interaction of orders in an open-outcry auction, the proposed rule requires the disclosure of information to the trading crowd in order to provide the crowd with an opportunity to participate in the transaction with the facilitating member. These proposed rules impose order exposure requirements on floor brokers seeking to cross buy orders and sell orders, and seek to reconcile these practices with the rules and practices of the auction market. According to Amex, affording trading crowds an opportunity to participate in transactions from which they may be excluded results in more competitive markets and executions for customers at the best available prices. In furtherance of that effort, the Exchange now seeks to codify and expand its policy that prohibits the use of non-public information, by either a member or a person associated with a member, for their own benefit, by trading in the Index Shares or in related instruments prior to that information being disclosed. Use of such non-public information by such member or associated person (regardless of whether that party ultimately completes the Index Shares transaction) is generally considered conduct inconsistent with just and equitable principles of trade.

Thus, Amex proposes to adopt provisions for both Portfolio Depositary Receipts and Index Fund Shares that state that it may be inconsistent with just and equitable principles of trade for any member or associated person, who has knowledge of all the material terms of (i) an order being facilitated, or (ii) orders being crossed, to enter an order to buy or sell an Index Share or other related instrument prior to the time the order's terms are disclosed to the trading floor crowd or the execution of the facilitated transaction can no longer reasonably be considered imminent. The term "related instrument" is defined in the proposed rules as a security comprising ten percent or more of the component securities in the Portfolio Depositary Receipt or the Index Fund Share or a futures contract on any economically equivalent index.

Amex states that the purpose of this policy is to prevent members and associated persons from using undisclosed information about imminent Index Share transactions to trade the relevant Index Shares or any closely-related instrument in advance of persons represented in the trading crowd. Without this prohibition, such trading can threaten the integrity of the auction market or disadvantage other market participants.

2. Statutory Basis

The Exchange states that the proposed rule change is consistent with Section 6(b) of the Act in general and furthers the objectives of Section 6(b) 5 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 impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–Amex–2001–46. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of the filing will also be available for inspection and copying at the principal offices of the Amex. All submissions should refer to File No. SR–Amex–2001–46 and should be submitted by February 3, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–609 Filed 1–12–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49025; File No. SR–Amex–2003–106]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto by the American Stock Exchange LLC Relating to the Retroactive Application of a Monthly Options Transaction Fee Cap for Specialists and Registered Options Traders

January 6, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

1, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Amex. On January 2, 2004, the Exchange amended the proposal.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons, and is granting accelerated approval to the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to retroactively apply a fee cap of $72,000 per month in any single options class for specialists and registered options traders ("ROTs") subject to options transaction fees from July 1, 2003 to November 30, 2003. The text of the proposed rule change is available at the Amex and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 III below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Amex proposed, in a companion filing (SR–Amex–2003–104),[4] to adopt a fee cap of $72,000 per month in any single option class, exclusive of license fees, for specialists and ROTs subject to transaction fees.[5] With the instant proposed rule change, Amex proposes that this fee cap be effective as of July 1, 2003 so that the Amex will retroactively apply the fee cap from July 1, 2003 to November 30, 2003. Accordingly, the Exchange will rebate to those specialists and ROTs transaction fees (exclusive of the options licensing fee) that have been paid in excess of the $72,000 fee cap in any single option class in any one month from July 1, 2003 through November 30, 2003.

The Exchange believes that specialists and ROTs who bring in substantial order flow to the Exchange should be rewarded through the proposed fee reduction. As proposed, specialists and ROTs in any single option class will be required to trade 200,000 contracts for equity options and 232,258 contracts in index options to reach the fee cap (based on the current rate of $0.36 per contract side). However, as indicated in SR–Amex–2003–104,[6] the number of contracts required to reach the fee cap in the top 300 equity options may increase as a result of the proposed market share fee program. Although the Exchange submits that only a small number of firms will likely reach these limits, the proposal is intended to provide incentives to firms to continue to attract order flow.

2. Statutory Basis

The Exchange believes that the proposed fee change is consistent with Section 6(b)(4) of the Act[7] regarding the equitable allocation of reasonable dues, fees and other charges among exchange members and other persons using exchange facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Amex believes the proposed rule change will impose no burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–Amex–2003–106. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR–Amex–2003–106 and should be submitted by February 3, 2004.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Amex has asked the Commission to approve the proposed rule change, as amended, on an accelerated basis, so that the fee reduction can be allocated in 2003 and the Amex and its member firms may close its books for the year 2003.

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, the requirements of Section 6(b)(4) of the Act.[8] Specifically, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,[9] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to 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.[10] The

[3] See letter from Jeffrey P. Burns, Associate General Counsel, Amex, to Joseph P. Morra, Special Counsel, Division of Market Regulation, Commission, dated December 31, 2003 ("Amendment No. 1"). In Amendment No. 1, Amex explained that it requested accelerated approval of the filing so that the rebated monies could be allocated in 2003 for the purpose of closing the books for the year.

[4] See Securities Exchange Act Release No. 49019 (January 5, 2004) (File No. SR–Amex–2003–104). This proposal was filed pursuant to section 19(b)(3)(A) of the Act and was effective upon filing.

[5] For this purpose, transaction fees applicable to specialists and ROTs include the options transaction fee, the options comparison fee, and the options floor brokerage fee.

[6] See *supra* note 4.

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78f(b)(4).

[9] 15 U.S.C. 78f(b)(5).

[10] In approving this proposal, the Commission has considered the proposed rule's impact on

Continued

Commission believes that the proposal may increase order flow to the Exchange, which should enhance liquidity on the Amex.

The Commission finds good cause for approving the proposed rule change, as amended, prior to the thirtieth day after the date of publication of the notice of filing thereof in the **Federal Register**. Specifically, the Commission notes that accelerated approval will allow the Amex and its member firms to close its books for the year 2003 without unnecessary delay. Accordingly, the Commission believes that there is good cause, consistent with Sections 6(b)(4)[11] and 19(b)(2) of the Act,[12] to approve the proposal, as amended, on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change (SR–Amex–2003–106), as amended, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–613 Filed 1–12–04; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49017; File No. SR–Amex–2003–93]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to the Listing and Trading of Notes Linked to the Annual Performance of the Standard & Poor's 500 Stock Index

January 2, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on October 27, 2003, the American Stock Exchange LLC ("Amex") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which the Amex has prepared. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to list and trade, under Section 107A of the Amex Company Guide, Targeted Efficiency Equity Securities (or "Notes") of Wachovia Corporation, the return on which is based on the performance of the Standard & Poor's 500 Stock Index,[3] ("S&P 500 Index"), subject to an annual reset provision and cap.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Amex has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Under section 107A of the Amex Company Guide, the Amex may approve for listing and trading securities which cannot be readily categorized under the listing criteria for common and preferred stocks, bonds, debentures, or warrants.[4] The Amex proposes to list Notes for trading based on the S&P 500 Index.[5] The Notes are senior non-convertible debt securities of Wachovia that will have a term of three years.[6] The Notes will conform to the listing guidelines under section 107A of the Amex Company Guide[7] and the continued listing guidelines under sections 1001–1003 of the Amex Company Guide.[8]

Wachovia will issue the Notes in denominations of whole "Units," with each Unit representing a single Note. The original public offering price will be $5 per Note. The Notes will provide for an annual calculation of the percentage change of the S&P 500 Index so that any positive performance of the S&P 500 Index during each Annual Calculation Period will be doubled subject to a maximum payment amount or ceiling. An investor in the Notes will be subject to the full extent of a negative return of the S&P 500 Index in any Annual Calculation Period. According to the Amex, the S&P 500 Index value is disseminated at least once every fifteen seconds throughout the trading day over the Consolidated Tape Association's Network B.[9]

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efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[11] *See supra* note 8.

[12] 15 U.S.C. 78s(b)(2).

[13] *Id.*

[14] 17 CFR 200.30–3(a)12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The S&P 500 Index is a broad-based stock index, which provides an indication of the performance of the U.S. equity market. The S&P 500 Index is a capitalization-weighted index reflecting the total market value of 500 widely held component stocks relative to a particular base period. The S&P 500 Index is computed by dividing the total market value of the 500 stocks by an S&P 500 Index Divisor. The Index Divisor keeps the S&P 500 Index comparable over time to its base period of 1941–1943 and is the reference point for all maintenance adjustments. The securities included in the S&P 500 Index are listed on the Amex, the New York Stock Exchange, Inc., or traded through the Nasdaq Stock Market, Inc. ("Nasdaq"). The S&P 500 Index reflects the price of the common stocks of 500 companies without taking into account the value of the dividend paid on such stocks.

[4] *See* Securities Exchange Act Release No. 27753 (March 1, 1990), 55 FR 8626 (March 8, 1990) (SR–Amex–89–29).

[5] The S&P 500 Index is determined, calculated, and maintained by Standard & Poor's, a division of the McGraw-Hill Companies, Inc.

[6] Wachovia Corporation and Standard & Poor's have entered into a non-exclusive license agreement providing for the use of the S&P 500 by Wachovia and certain affiliates and subsidiaries in connection with certain securities, including these Notes. Standard and Poor's is not responsible for and will not participate in the creation and issuance of the Notes.

[7] The initial listing standards for the Notes require: (1) A minimum public distribution of one million units; (2) A minimum of 400 shareholders; (3) a market value of at least $4 million; and (4) a term of at least one year. In addition, the listing guidelines provide that the issuer has assets in excess of $100 million, stockholder's equity of at least $10 million, and pre-tax income of at least $750,000 in the last fiscal year or in two of the three prior fiscal years. In the case of an issuer that is unable to satisfy the earning criteria stated in section 101 of the Amex Company Guide, the Amex will require the issuer to have the following: (1) Assets in excess of $200 million and stockholders' equity of at least $10 million; or (2) assets in excess of $100 million and stockholders' equity of at least $20 million.

[8] The Amex's continued listing guidelines are set forth in sections 1001 through 1003 of part 10 to the Amex Company Guide. Section 1002(b) of the Amex Company Guide states that the Amex will consider removing from listing any security where, in the opinion of the Amex, it appears that the extent of public distribution or aggregate market value has become so reduced to make further dealings on the Amex inadvisable. With respect to continued listing guidelines for distribution of the Notes, the Amex will rely, in part, on the guidelines for bonds in section 1003(b)(iv). Section 1003(b)(iv)(A) provides that the Amex will normally consider suspending dealings in, or removing from the list, a security if the aggregate market value or the principal amount of bonds publicly held is less than $400,000.

[9] Telephone conversation between Jeffrey P. Burns, Associate General Counsel, Amex, and Patrick M. Joyce, Special Counsel, Division of

The Notes will entitle the owner at maturity to receive an amount based upon the sum of annual percentage changes of the S&P 500 Index during the term of the Notes, not to exceed a maximum payment (the "Capped Amount"), to be determined on the date of issuance of the Notes. During each Annual Calculation Period, if the value of the S&P 500 Index has increased as compared to the Initial Index Value, the annual return will equal two times the amount of that percentage increase, not to exceed the Capped Amount. If the value of the S&P 500 Index has decreased as compared to the Initial Index Value during the annual calculation period, the annual return will equal the full negative or downside percentage change. This negative return will not be limited by a floor. The Notes will not have a minimum principal amount that will be repaid, and accordingly, are fully exposed to any decline in the level of the S&P 500 Index.[10] The Notes are not callable by the Issuer.

The Redemption Amount is the payment that the holder or investor will receive based on the sum of the annual returns ("Index Return") of the S&P 500 Index determined at each Annual Calculation Period. For each Annual Calculation Period, the Initial Index Value will be the closing level of the S&P 500 Index on the first day of the Annual Calculation Period. The Final Index Value is the closing value of the S&P 500 Index on the last day of the Annual Calculation Period. If the Final Index Value is greater than the Initial Index Value, the calculation of the Index Return is set forth below:

$$\left[200\% \times \left(\frac{\text{Final Index Value} - \text{Initial Index Value}}{\text{Initial Index Value}}\right)\right], \text{ subject to Capped Amount.}$$

If the Final Index Value is less than the Initial Index Value, the calculation of the Index Return is set forth below:

$$\left(\frac{\text{Final Index Value} - \text{Initial Index Value}}{\text{Initial Index Value}}\right)$$

The Redemption Amount for a Note equals the principal amount per Note multiplied by the sum of one plus the Index Return: $5 × [1 + Index Return]

The Notes are cash-settled in U.S. dollars and do not give the holder any right to receive a portfolio security, dividend payments, or any other ownership right or interest in the portfolio or index of securities comprising the S&P 500 Index. The Notes are designed for investors who want to participate or gain exposure to the S&P 500 Index, subject to a cap, and who are willing to forego market interest payments on the Notes during such term. The Commission has previously approved the listing of options on the S&P 500 Index, as well as securities the performance of which is linked to or based on the S&P 500 Index.[11]

As of November 20, 2003, the market capitalization of the securities included in the S&P 500 ranged from a high of $289.478 billion to a low of $629 million. The average daily trading volume for these same securities for the last six months ranged from a high of 44.909 million shares to a low of 10.673 million shares and from a high of 1.966 million shares to a low of 0.127 million shares, respectively.

Because the Notes are linked to an equity index and are issued in a denomination other than $1,000, the Amex's existing equity floor trading rules will apply to the trading of the Notes. First, pursuant to Amex Rule 411, the Amex would impose a duty of due diligence on its members and member firms to learn the essential facts relating to every customer prior to trading the Notes.[12] Second, the Notes would be subject to the equity margin rules of the Amex.[13] Third, the Amex would, prior to trading the Notes, distribute a circular to the membership providing guidance with regard to member firm compliance responsibilities (including suitability recommendations) when handling transactions in the Notes and highlighting the special risks and characteristics of the Notes. With respect to suitability recommendations and risks, the Amex would require members, member organizations and employees thereof recommending a transaction in the Notes: (1) To determine that such transaction is suitable for the customer, and (2) to have a reasonable basis for believing that the customer can evaluate the special characteristics of, and is able to bear the financial risks of, such transaction. In addition, Wachovia will deliver a prospectus in connection with the initial sales of the Notes.

The Amex represents that its surveillance procedures are adequate to properly monitor the trading of the Notes. Specifically, the Amex will rely on its existing surveillance procedures governing equities, which have been deemed adequate under the Act. In addition, the Amex also has a general policy which prohibits the distribution of material, non-public information by its employees.

2. Statutory Basis

The Amex believes that the proposed rule change is consistent with section 6(b) of the Act[14] and furthers the objectives of section 6(b)(5) of the Act[15] in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

Market Regulation, Commission, on November 10, 2003.

[10] A negative return of the S&P 500 Index reduce the redemption amount at maturity with the potential that the holder of the Note could lose his entire investment.

[11] *See* Securities Exchange Act Release No. 47911 (May 22, 2003), 68 FR 32558 (May 30, 2003) (approving the listing and trading of Wachovia "TEES" Notes linked to the S&P 500 Index). *See also* Securities Exchange Act Release Nos. 19907 (June 24, 1983), 48 FR 30814 (July 5, 1983) (approving the listing and trading of options on the S&P 500 Index); 31591 (December 11, 1992), 57 FR 60253 (December 18, 1992) (approving the listing and trading of Portfolio Depositary Receipts based on the S&P 500 Index); 27382 (October 26, 1989), 54 FR 45834 (October 31, 1989) (approving the listing and trading of Exchange Stock Portfolios based on the value of the S&P 500 Index); 30394 (February 21, 1992), 57 FR 7409 (March 2, 1992) (approving the listing and trading of SPDR, a unit investment trust linked to the S&P 500 Index); 47983 (June 4, 2003), 68 FR 35032 (June 11, 2003) (approving the listing and trading of CSFB Accelerated Return Notes linked to S&P 500 Index); 48152 (July 10, 2003), 68 FR 42435 (July 17, 2003) (approving the listing and trading of UBS Partial Protection Notes linked to the S&P 500 Index); and 48486 (September 11, 2003), 68 FR 54758 (September 18, 2003) (approving the listing and trading of contingent principal protection notes linked to the S&P 500 Index).

[12] Amex Rule 411 requires that every member, member firm, or member corporation use due diligence to learn the essential facts relative to every customer and to every order or account accepted.

[13] *See* Amex Rule 462 and section 107B of the Amex Company Guide.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Amex does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Amex did not receive any 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically a the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–Amex–2003–93. The file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to the File No. SR–Amex–2003–93 and should be submitted by February 3, 2004.

IV. Commission's Findings and Order Granting Accelerated Approval of 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, and, in particular, with the requirements of section 6(b)(5) of the Act.[16] The Commission finds that this proposal is similar to several approved notes whose value is linked to an equity index currently listed and traded on the Amex.[17] Accordingly, the Commission finds that the listing and trading of the Notes based on the S&P 500 Index are consistent with the Act and will promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and, in general, protect investors and the public interest consistent with Section 6(b)(5) of the Act.[18]

As described more fully above, the Notes will provide investors who are willing to forego market interest payments during the term of the Notes with a means to participate or gain exposure to the S&P 500 Index, subject to a cap. At maturity, the holder of a Note will receive an amount based upon the Index Return determined at each Annual Calculation period of the S&P 500 Index. Specifically, the holder of a Note will be entitled to receive a payment based on whether the Final Index Value is greater or less than the Initial Index Value. If the Final Index Value is greater than the Initial Index Value, the holder of the Notes will receive the Index Return equal to two times the amount of that percentage increase, not to exceed the Capped Amount. If the Final Index Value is less than or equal to the Initial Index Value, the annual return will equal the full negative or downside percentage change.

The Commission notes that the Notes are not leveraged and are not principal-protected instruments. The Notes are debt instruments whose price will be derived and based upon the value of the S&P 500 Index. The Notes do not have a minimum principal amount that will be repaid at maturity, and the payments of the Notes prior to or at maturity may be less than the original issue price of the Notes. Thus, if the value of the S&P 500 has declined at maturity, the holder of the Note will receive less than the original public offering price of the Note. Accordingly, the level of risk involved in the purchase or sale of the Notes is similar to the risk involved in the purchase or sale of traditional common stock. Because the final rate of return of the Notes is derivatively priced, based on the performance of the 500 common stocks underlying the S&P 500 Index, and because the Notes are instruments that do not guarantee a return of principal, there are several issues regarding the trading of this type of product. For the reasons discussed below, however, the Commission believes that the Amex's proposal adequately addresses the concerns raised by this type of product.

The Commission notes that the Amex's rules and procedures that address the special concerns attendant to the trading of hybrid securities will be applicable to the Notes. In particular, by imposing the hybrid listing standards, suitability, disclosure, and compliance requirements noted above, the Amex, in the Commission's view, has addressed adequately the potential problems that could arise from the hybrid nature of the Notes. The Amex will require members, member organizations, and employees thereof recommending a transaction in the Notes to: (1) Determine that such transaction is suitable for the customer, and (2) have a reasonable basis for believing that the customer can evaluate the special characteristics and bear the financial risks of such transaction.

Moreover, the Commission notes that the Amex will distribute a circular to its membership calling attention to the specific risks associated with the Notes. The Commission also notes that Wachovia will deliver a prospectus in connection with the initial sales of the Notes. In addition, the Commission notes that Amex will incorporate and rely upon its existing surveillance procedures governing equities. The Commission believes that the Amex has appropriate surveillance procedures in place to detect and deter potential manipulation for similar index-linked products.

As discussed more fully above, the underlying stocks that make up the S&P 500 Index are well-capitalized, highly liquid securities. Moreover, the issuers of the underlying securities that make up the S&P 500 Index are subject to reporting requirements under the Act, and all of the component stocks are either listed or traded on, or traded through the facilities of, the NYSE, the Amex, or the Nasdaq National Market. The Commission notes that the S&P 500 Index is determined, calculated, and

[16] 15 U.S.C. 78f(b)(5).

[17] *See* Securities Exchange Act Release Nos. 47911 (May 22, 2003), 68 FR 32558 (May 30, 2003) (approving the listing and trading of notes (Wachovia TEES) linked to the S&P 500); 47983 (June 4, 2003), 68 FR 35032 (June 11, 2003) (approving the listing and trading of a CSFB Accelerated Return Notes linked to S&P 500); 48152 (July 10, 2003), 68 FR 42435 (July 17, 2003) (approving the listing and trading of a UBS Partial Protection Note linked to the S&P 500); and 48486 (September 11, 2003), 68 FR 54758 (September 18, 2003) (approving the listing and trading of CSFB contingent principal protection notes linked to the S&P 500).

[18] 15 U.S.C. 78f(b)(5). In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

maintained by Standard and Poor's. As of November 20, 2003, the market capitalization of the securities included in the S&P 500 ranged from a high of $289.478 billion to a low of $629 million. The average daily trading volume for these same securities for the last six months ranged from a high of 44.909 million shares to a low of 10.673 million shares and from a high of 1.966 million shares to a low of 0.127 million shares, respectively.

Given the large trading volume and capitalization of the compositions of the stocks underlying the S&P 500 Index, the Commission believes that the listing and trading of Notes based on the performance of the S&P 500 Index should not unduly impact the market for the underlying securities comprising the S&P 500 Index or raise manipulative concerns. Additionally, the Commission believes that the Amex's surveillance procedures will serve to deter as well as detect any potential manipulation.

Furthermore, the Commission notes that the Notes depend upon the individual credit of the issuer, Wachovia. To some extent this credit risk is minimized by the listing standards in section 107A of the Amex Company Guide, which provide that only issuers satisfying substantial asset and equity requirements may issue securities such as the Notes. In addition, the Amex's "Other Securities" listing standards further require that the Notes have a market value of at least $4 million.[19] In any event, financial information regarding Wachovia, in addition to the information on the 500 common stocks comprising the S&P 500 Index, will be publicly available.[20]

The Commission does have a concern, however, that a broker-dealer such as Wachovia, or a subsidiary providing a hedge for the issuer, will incur position exposure. As the Commission has concluded in previous approval orders for other hybrid instruments issued by broker-dealers,[21] however, the Commission believes that this concern is minimal given the size of the Notes issuance in relation to the net worth of Wachovia.

Finally, the Commission notes that the value of the S&P 500 Index will be disseminated at least once every fifteen seconds throughout the trading day over the Consolidated Tape Association's Network B. The Commission believes that providing access to the value of the S&P 500 Index at least once every fifteen seconds throughout the trading day is extremely important and will provide benefits to investors in the product.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice thereof in the **Federal Register**. The Amex has requested accelerated approval because this product is similar to several other instruments currently listed and traded on the Amex. The Commission believes that the Notes will provide investors with an additional investment choice and that accelerated approval of the proposal will allow investors to begin trading the Notes promptly. Additionally, the Notes will be listed pursuant to Amex's existing hybrid security listing standards as described above. Based on the above, the Commission believes that there is good cause, consistent with sections 6(b)(5) and 19(b)(2) of the Act,[22] to approve the proposal on an accelerated basis.

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[23] that the proposed rule change (SR–Amex–2003–93) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[24]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–614 Filed 1–12–04; 8:45 am]

BILLING CODE 8010–01–U

[19] *See* Amex Company Guide Section 107A.

[20] The Commission notes that the 500 stocks that make up the S&P 500 Index are reporting companies under the Act, and that the Notes will be registered under Section 12 of the Act.

[21] *See, e.g.*, Securities Exchange Act Release Nos. 44913 (October 9, 2001), 66 FR 52469 (October 15, 2001) (order approving the listing and trading of notes whose return is based on the performance of the Nasdaq–100 Index) (File No. SR–NASD–2001–73); 44483 (June 27, 2001), 66 FR 35677 (July 6, 2001) (order approving the listing and trading of notes whose return is based on a portfolio of 20 securities selected from the Amex Institutional Index) (File No. SR–Amex–2001–40); and 37744 (September 27, 1996), 61 FR 52480 (October 7, 1996) (order approving the listing and trading of notes whose return is based on a weighted portfolio of healthcare/biotechnology industry securities) (File No. SR–Amex–96–27).

[22] 15 U.S.C. 78f(b)(5) and 78s(b)(2).

[23] 15 U.S.C. 78s(b)(2).

[24] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49019; File No. SR–Amex–2003–104]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the American Stock Exchange LLC to Cap Monthly Options Transactions Fees Incurred by Specialists and Registered Options Traders ("ROTs") in any Single Options Class at $72,000, and Implement Market Share Fee Program for Specialists and ROTs in the Top 300 Equity Options

January 5, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 1, 2003, the American Stock Exchange LLC ("Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Amex has designated this proposal as one establishing or changing a due, fee, or other charge imposed by the Amex under Section 19(b)(3)(A)(ii) of the Act,[3] 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 adopt the following changes to its Options Fee Schedule: (i) A transaction fee cap of $72,000 per month in any single options class, exclusive of the options licensing fee, for specialists and registered options traders ("ROTs"), and (ii) a market share fee program for the top 300 equity options that would reduce transaction fees paid by specialists and ROTs in such classes if a 20% or greater monthly market share is maintained. The text of the proposed rule change is available at the Amex and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex 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

Options Fee Cap for Specialists and ROTs

The Exchange is proposing to adopt a transaction fee cap of $72,000 per month in any single options class, exclusive of the options licensing fee, for specialists and ROTs. Specialists and ROTs that have incurred transaction fees, which include the options transaction fee, the options comparison fee, and the options floor brokerage fee, greater than $72,000 per month in any single options class going forward, will now be billed at the capped fee of $72,000.

The Exchange believes that specialists and ROTs who bring in substantial order flow to the Exchange should be rewarded through the proposed fee reduction. As proposed, specialists and ROTs in any single option class will be required to trade 200,000 contracts for equity options and 232,258 contracts in index options to reach the cap (based on the current rate of $0.36 per contract side). However, the number of contracts required to reach the fee cap in the top 300 equity options may increase as a result of the market share fee program described below. Although the Exchange submits that only a small number of firms will reach these limits, the proposal is intended to provide additional incentives to firms to continue to attract order flow.

Market Share Fee Program

The Exchange is proposing to adopt a market share fee program for the top 300 equity options ("Program"). The Program will commence on December 1, 2003. The Program is designed to provide incentives to specialists and ROTs to maintain and increase the Exchange's market share of total national volume in the top 300 equity option classes.

The Amex believes the Program will provide incentives to maintain highly competitive quotes by reducing the applicable options transaction fees as long as the specialist or ROT maintains a 20% market share on a monthly basis.

Specialists and ROTs in the top 300 equity option classes who maintain an Amex market share of at least 20% in those classes in a particular month will receive a lower options transaction fee for their transactions in those classes during that month. The revised options transaction fee will be as follows:

Options transaction fee	Market share break point
$0.26	0% to 19.99%
0.24	20% to 24.99%
0.21	25% and greater

Because clearing firms for specialists and ROTs are unable to immediately calculate the effective transaction fee based upon the relevant market share, the Exchange will implement a manual procedure. Specifically, at the end of each month, the Exchange will calculate the market share of each option class and then send the appropriate credit amount through to each clearing firm for the account of the specialist or ROT. The credit amount is the amount such specialist or ROT overpaid for those option transactions that are subject to the lower fee.[4] For example, specialists/ROTs that maintain a market share of 20–24.99% in a top 300 equity options class will receive a $.02 per contract credit amount while those specialists/ROTs that maintain a market share of 25% or greater in a top 300 equity options class will receive a $.05 per contract credit amount. All specialists and ROTs will be provided with reports showing the total credit they received along with all details supporting the Exchange's calculations on or about the fifteenth (15) business day of the subsequent month.

The program is intended to provide positive incentives for specialists/ROTs to increase or maintain their market shares by continuing to provide highly competitive quotes. The Exchange further believes that those specialists and ROTs that provide substantial order flow to the Exchange should be rewarded through the proposed fee reduction.

2. Statutory Basis

The Exchange believes the proposal is consistent with Section 6(b) of the Act,[5] in general, and Section 6(b)(4) of the Act,[6] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among exchange members and other persons using exchange facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[7] and subparagraph (f)(2) of Rule 19b–4[8] 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 such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–Amex–2003–104. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than

[4] The current transaction fee applicable to specialists/ROTs is $0.36 per contract side for equity options.

[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).

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR–Amex–2003–104 and should be submitted by February 3, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[9]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–615 Filed 1–12–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49024; File No. SR–AMEX–2003–78]

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of a Proposed Rule Change by American Stock Exchange Relating to Resolving Uncompared Options Transactions

January 6, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934,[1] notice is hereby given that on August 27, 2003, the American Stock Exchange LLC ("Amex") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by Amex. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Amex proposes to amend Amex Rule 970 (Comparison of Option Transactions Excluded From Clearance) to make the processes for resolving uncompared transactions in its intra-day options and equities comparison systems more consistent.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Amex included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Amex 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 the Statutory Basis for, the Proposed Rule Change

Amex Rule 970 sets forth the process by which Amex members reconcile uncompared option transactions on the business day following the trade date, or T+1.[3] Specifically, Rule 970 requires that, at a time designated by Amex on T+1, each member or member organization must review their contract sheets listing all uncompared option trades and option advisory trades. For each uncompared option trade, members must deliver to the contra-party a Rejected Option Transaction Notice ("ROTN"), which details the terms of the uncompared trade. The contra-party or an authorized representative must then accept ("OK") or reject ("DK") and sign the ROTN no later than one-half hour (fifteen minutes if the transaction was executed by a specialist or floor broker) prior to the opening of trading on T+1.

In July 1992, Amex introduced the Intra-day Comparison System for Options (the "IDCO") to facilitate the intra-day comparison of option trades and the reconciliation of uncompared option trades. The IDCO provides an electronic input and correction facility for option transactions executed on Amex. Specifically, the system displays uncompared options trades and option advisory trades and delivers an electronic ROTN to the appropriate contra-party. In addition, the system allows members or member organizations to accept or reject a ROTN, to correct or delete uncompared trades, and to add new trades for comparison where necessary.

Amex proposes to amend Rule 970 by adopting a format consistent with that of Amex Rule 731, which sets forth a similar process for resolving uncompared equity transactions and the use of the Intra-Day Comparison System for Equities ("IDCE"). With login and password safeguards to protect members against unauthorized rejections and acceptances of electronic ROTNs, Amex believes that the use of the IDCO renders unnecessary the requirement that members manually sign paper ROTNs for each uncompared option transaction. With the exception of eliminating the manual signature requirement for paper ROTNs, Amex does not propose any other change to the comparison process for option transactions. For clarity and consistency, Amex proposes to supplement and preserve the current language of Rule 970 in new Commentary.

Amex believes that the proposed rule change is consistent with section 6(b) of the Act[4] in general and furthers the objectives of section 6(b)(5) of the Act[5] in particular because it is designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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

Amex does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or such longer period (i) as the Commission may delegate up to ninety days of such date if it finds such longer period to be appropriate and published its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

[9] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C 78s(b)(1).

[2] The Commission has modified the text of the summaries prepared by Amex.

[3] An uncompared transaction is one in which trade data is received from one member but no corresponding data is received from a contra-member.

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 5th Street NW., Washington, DC 20549–0069. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–AMEX–2003–78. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the rule filing that are filed with the Commission, and all written communications relating to the rule filing between the Commission and any person, other than those that may be withheld from the public in accordance with provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room in Washington, DC. Copies of such filing will also be available for inspection and copying at Amex's principal office. All submissions should refer to File No. SR–AMEX–2003–78 and should be submitted within by February 3, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[6]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–619 Filed 1–12–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49026; File No. SR–BSE–2002–06]

Self-Regulatory Organizations; Boston Stock Exchange; Notice of Filing of Proposed Rule Change to Clarify Exchange Liability

January 6, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on September 26, 2002, the Boston Stock Exchange ("BSE") filed with the Securities and Exchange Commission ("Commission") and on November 4, 2002, May 29, 2003, and July 21, 2003, amended the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by BSE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

BSE is seeking to amend various Articles of its Constitution and Sections of its Rules to clarify the liability of BSE in relation to its members' contractual obligations.[2]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, BSE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. BSE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[3]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to amend certain sections of the BSE Constitution and Rules to clarify BSE's liability in relation to its members' contractual obligations.

In particular, BSE is seeking to modify Articles XII and XIII of its Constitution to insure that any BSE member who is a party to a transaction remains solely liable for the transaction. This language is consistent with similar language and approaches of other exchanges in limiting the liability of an exchange with respect to contracts entered into by members.[4] In Article XIII of its Constitution, the BSE is also seeking to add certain language from the BSECC Participant Hypothecation Agreement. The provision to be inserted into the Constitution would prevent BSE from becoming a de facto guarantor of an insolvent member's contractual obligations.

Likewise, BSE is seeking to amend other sections of its rules consistent with this theme. In Chapter III, "Comparisons—Liability on Contracts," Section 4, "Failures to Compare," the proposed language would state that BSE shall have no liability to any of the original parties to a contract entered into by a member. Also, in Chapter VI, "Failure to Fulfill Contracts," Section 1, "Closing Contracts," the proposed language would make clear that no action taken by BSE in closing or assisting to close a contract entered into by a BSE member shall have the effect of transferring any liability related to that contract to BSE. Chapter VI, Section 2, "Notice of Closing Contracts," would echo this approach for instances in which BSE takes action to attempt to close a contract on behalf of a member in default. None of these changes are in response to any recent circumstance. They are only aimed at clarifying BSE's unique position in relation to assisting its members in other contractual matters exclusively linked to conducting transactions in the buying and selling of equity securities.

BSE believes that the proposal is consistent with the requirements of Section 6(b) of the Act and furthers the objectives of Section 6(b)(5), in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, in that it is designed to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

(B) Self-Regulatory Organization's Statement on Burden on Competition

BSE does not believe that the proposed rule change will impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

BSE has neither solicited nor received comments on the proposed change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] The Boston Stock Exchange Clearing Corporation ("BSECC") has filed a proposed rule change to amend various Sections of its Rules as they pertain to BSECC's liability in order to maintain a consistent approach with the BSE's proposed rule changes. Securities Exchange Act Release No. 49027 (January 6, 2004), [File No. SR–BSECC–2003–01].

[3] The Commission has modified the text of the summaries prepared by BSE.

[4] *See, e.g.*, New York Stock Exchange Rules 137 and 142; Chicago Stock Exchange Rules, Article XXV, Rule 11; and Philadelphia Stock Exchange Rule 254.

longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–BSE–2002–06. This file number should be included on the subject line if e-mail is used. To help us process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of BSE.

All submissions should refer to File No. SR–BSE–2002–06 and should be submitted by February 3, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–611 Filed 1–12–04; 8:45 am]

BILLING CODE 8010–01–U

[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49027; File No. SR–BSECC–2003–01]

Self-Regulatory Organizations; Boston Stock Exchange Clearing Corporation; Notice of Filing of Proposed Rule Change To Clarify Liability and Clearing Agency Services

January 6, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] notice is hereby given that on May 29, 2003, the Boston Stock Exchange Clearing Corporation ("BSECC") filed with the Securities and Exchange Commission ("Commission") and on July 21, 2003, August 25, 2003, and September 12, 2003, amended the proposed rule change described in Items I, II, and III below, which items have been prepared primarily by BSECC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

BSECC is seeking to delete or amend certain Sections of its Rules to clarify BSECC's liability and clearing agency services.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, BSECC 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. BSECC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[2]

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to delete or amend certain sections of the BSECC Rules to clarify BSECC's liability and clearing agency services.

BSECC is seeking to make several changes to its Rules as they pertain to BSECC's liability in order to maintain a consistent approach with the Boston Stock Exchange's ("BSE") proposed rule changes clarifying BSE's liability in relation to its members' contractual obligations.[3] In sum, these changes:

- Clarify in Rule II, Section 1, that BSECC's clearing fund is to make good losses suffered by BSECC without the losses of its members having priority;
- Eliminate a provision in Rule II, Section 5(e), which allows the retained earnings of BSECC to be used to satisfy any loss or liability resulting from a BSECC member's default;
- Eliminate Rule III, Section 4, stating that BSECC guarantees settlement of all trades executed on the floor of BSE;[4]
- Strengthen the BSECC indemnification clause, Rule XII, section 6, by stating that each member will remain "solely responsible" and liable for its transactions;
- Amend Rule III, section 3(e), to make BSECC loans to members discretionary, not automatic. The current automatic loan provision is inconsistent with the purpose of the proposed rule change that members will be solely liable for their transactions and that BSECC is not the ultimate guarantor for its members; and
- Amend Rule XI, section 3 to increase the fine from $5,000 to $30,000 for violations of BSECC Rules.

The proposed rule change would delete all references to Boston Representative Broker/Dealer Accounts, BSE Service Corporation, and Institutional Members. Such references are no longer applicable as they relate to services or lines of business in which BSECC is no longer involved. Also, BSECC has in various places added references to NSCC to make consistent BSECC's references to NSCC in its Rules and to clarify that BSECC will perform functions for the usual settlement of transactions with NSCC and DTC on behalf of BSECC members upon request.

BSECC is not seeking these amendments in response to any recent or perceived action by any of its members. Rather, BSECC is seeking to clarify, by eliminating inconsistencies and providing succinct language, the position which it holds with respect to liability on the part of its members. Moreover, BSECC is seeking to maintain a consistent approach in the application of its various regulatory responsibilities

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified the text of the summaries prepared by BSECC.

[3] The Boston Stock Exchange has filed a proposed rule change to amend various Articles of its Constitution and Sections of its Rules to clarify the liability of the exchange in relation to its members' contractual obligations. Securities Exchange Act Release No. 49026 (January 6, 2004), [File No. SR–BSE–2002–06].

[4] BSE guarantees exchange trades until they are accepted by the National Securities Clearing Corporation ("NSCC").

while at the same time updating various sections of its Rules.

BSECC believes that the proposed rule change is consistent with the requirements of section 17A of the Act [5] and the rules and regulations thereunder applicable to BSECC because it will permit the resources of BSECC to be appropriately utilized for promoting the accurate clearance and settlement of securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

BSECC does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

BSECC has neither solicited nor received comments on the proposed change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–BSECC–2003–01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of BSECC.

All submissions should refer to File No. SR–BSECC–2003–01 and should be submitted by February 3, 2004.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[6]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–618 Filed 1–12–04; 8:45 am]

BILLING CODE 8010–01–P

[5] 15 U.S.C. 78q–1.

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49028; File No. SR–CBOE–2003–54]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc. Relating to Misrepresentations and Omissions in Communications to the Exchange and the Options Clearing Corporation

January 6, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 12, 2003, the Chicago Board Options Exchange, Inc. ("CBOE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The CBOE proposes to amend CBOE Rule 4.6 (False Statements) and adopt new CBOE Rule 4.22 to distinguish willfully made or material misrepresentations or omissions from other misrepresentations or omissions. The Exchange also proposes to amend CBOE Rule 17.50 to provide a new summary fine schedule for violations of proposed CBOE Rule 4.22. The text of the proposed rule change is below. Additions are italicized; deletions are in brackets.

* * * * *

CHAPTER IV

Business Conduct

* * * * *

[False Statements] *Misrepresentations or Omissions*

RULE 4.6 No member, *person associated with a member* or applicant for membership shall make any *willful or material misrepresentation, including a misstatement or* false statement[s], *or omission* [or misrepresentations] in any application, report or other communication to the Exchange, [and no member shall make any false statement or misrepresentation] *or* to the Clearing Corporation with respect to the reporting or clearance of any Exchange transaction, or *willfully or materially* adjust any position at the Clearing Corporation in any class of options traded on the Exchange except for the purpose of correcting a bona fide error in recording or of transferring the position to another account.

Interpretations and Policies:

.01 No member, person associated with a member or applicant for membership shall be considered to be in violation of CBOE Rule 4.6 due to misrepresentations or omissions resulting from causes, such as systems malfunctions, which are outside the control of the member, associated person or applicant and could not be avoided by the exercise of due care.

* * * * *

Communications to the Exchange or the Clearing Corporation

RULE 4.22 No member, person associated with a member or applicant for membership shall make any misrepresentation or omission in any application, report or other communication to the Exchange, or to the Clearing Corporation with respect to the reporting or clearance of any Exchange transaction, or adjust any position at the Clearing Corporation in any class of options traded on the Exchange except for the purpose of correcting a bona fide error in recording or of transferring the position to another account. Violations of this Rule may be

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

subject to summary fine under Exchange Rule 17.50(g)(11).

Interpretations and Policies:

.01 The Exchange will distinguish misrepresentations and omissions from willful or material misrepresentations and omissions. Willful or material misrepresentations and omissions may be considered a violation of Exchange Rule 4.6.

* * * * *

CHAPTER XVII—Discipline

* * * * *

RULE 17.50. Imposition of Fines for Minor Rule Violations

(a)–(b) Unchanged.

(c)(1) Any person against whom a fine is imposed pursuant to subsection (g)(1), (g)(2), (g)(3), (g)(4), (g)(5), (g)(8), (g)(9), [or] (g)(10) *or (g)(11)* of this Rule and any person against whom a fine exceeding $2,500 is imposed pursuant to subsection (g)(6) of this Rule may contest the Exchange's determination by filing with the Office of the Secretary of the Exchange, on or before the date specified pursuant to subsection (b)(iv) of this Rule, a written answer as provided in Exchange Rule 17.5, at which point the matter shall become subject to review by the Business Conduct Committee. The filing must include a request for a hearing, if a hearing is desired. Hearings will be conducted in accordance with the provisions of Exchange Rule 17.6. If a hearing is not requested, the review will be based on written submissions and will be conducted in a manner to be determined by the Business Conduct Committee.

(2)–(4) Unchanged.

(d)–(f) Unchanged.

(g)

(1)–(10) Unchanged.

(11) Communications to the Exchange or the Clearing Corporation (Rule 4.22) A fine shall be imposed upon a member, person associated with a member or applicant for membership, as applicable, who violates Rule 4.22. Such fines shall be imposed on the basis of the following schedule:

Number of offenses in any rolling twelve-month period	*Fine amount*
1st Offense	*$500*
2nd Offense	*1,000*
3rd Offense	*2,500*
Subsequent Offenses	*Referral to Business Conduct Committee*

Interpretations and Policies:

.01–.04 Unchanged.

* * * * *

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 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

The Exchange is proposing to amend CBOE Rule 4.6 (False Statements), which prohibits members and applicants for membership from making any false statement or misrepresentation to the Exchange or the Options Clearing Corporation ("OCC"), or from adjusting any position at OCC except to correct a bona fide error or transfer a position to another account. The purpose of the proposed rule change is to: (i) Distinguish willful or material misrepresentations (including misstatements and false statements) and omissions from other misrepresentations and omissions; and (ii) provide that non-willful and non-material misrepresentations, omissions and improper option position adjustments may be dealt with under the Exchange's minor rule violation fine plan rather than with formal disciplinary action.

CBOE Rule 4.6 addresses three categories of prohibited conduct: false statements, misrepresentations, and improper position adjustments. The grouping of these three categories under a single heading "False Statements" has resulted in comments by members that a member could be charged by the Exchange with violating CBOE Rule 4.6 for conduct that does not rise to the level of a false statement, such as a minor misstatement or omission, and that such charge would unfairly characterize their conduct due to the fact that the rule is titled "False Statements." According to members, if such charges were brought by the Exchange against a member and the charges or the settlement of the Exchange investigation are publicly disclosed, an appearance may be created that a respondent was found to have made false statements, when in fact the conduct was less egregious.

Current CBOE Rule 4.6 applies to any false statement or misrepresentation made by a member, person associated with a member or applicant for membership in a communication to the Exchange or OCC, regardless of whether the false statement or misrepresentation was made knowingly or was of a material fact. Current CBOE Rule 4.6 does not distinguish between willfully made or material false statements and misrepresentations and other less serious types of misstatements and misrepresentations. Member firms have commented to the Exchange that if a member firm employee is charged with violating CBOE Rule 4.6 for a minor misstatement, he may lose employment because of the apparent seriousness of being charged with making a "False Statement" even though the actual violative conduct and penalty imposed by the Exchange may be less severe.

The Exchange proposes to limit the scope of CBOE Rule 4.6 to willfully made or material misrepresentations (which includes misstatements and false statements) and omissions by members, associated persons of members, or applicants for membership in communications to the Exchange or OCC. Misrepresentations and omissions of a less serious nature (those that are neither willfully made nor of a material fact) are distinguished from the foregoing in that they are proposed to be prohibited by new CBOE Rule 4.22. Improper option position adjustments are proposed to be covered by both rules to give the Exchange the flexibility to charge a violation of CBOE Rule 4.6 in those situations involving a serious offense. CBOE Rule 4.6 is proposed to be renamed "Misrepresentations or Omissions." The Exchange believes that the proposed rule changes will clarify for members how the Exchange applies these rules.

By amending CBOE Rule 4.6 and adding new CBOE Rule 4.22, the Exchange also intends to provide a clearer, more concise statement of the disciplinary penalties that apply to misrepresentations and omissions to the Exchange or the OCC. Willful or material misrepresentations or omissions in communications to the Exchange or OCC and willful or material improper position adjustments would be charged under revised CBOE Rule 4.6. CBOE Rule 4.6 would continue to be applied in those instances involving a serious offense that carries substantial penalties for violation such as large fines and suspension or expulsion from membership.

Misrepresentations or omissions in communications to the Exchange or OCC and improper position adjustments that are neither willfully made nor of a material nature could be charged under new CBOE Rule 4.22. Offenses charged under proposed CBOE Rule 4.22 will allow the Exchange to fashion more appropriate disciplinary measures. A violation of proposed CBOE Rule 4.22 may be deemed minor in nature and therefore subject to summary fine. CBOE Rule 17.50 (Minor Rule Violation Fine Plan) is proposed to be amended to add a new fine schedule applicable to violations of proposed CBOE Rule 4.22. However, nothing in proposed CBOE Rule 4.22 shall prevent the Exchange, whenever it determines that any violation of that Rule is intentional, egregious, or otherwise not minor in nature, from proceeding under the Exchange's formal disciplinary rules.

The proposed rule changes are similar to existing rules at other exchanges that distinguish between willfully made false or misleading statements or omissions of material fact and other types of statements or omissions.[3]

2. Statutory Basis

The Exchange believes that the proposed rule change will advance the objectives of Section 6(b)(6) of the Act[4] in that it will provide that Exchange members and persons associated with members shall be appropriately disciplined in those instances when a rule violation is minor in nature, but warrants a sanction more serious than a warning or cautionary letter. The Exchange believes that the proposed rule change provides a fair procedure for disciplining members and persons associated with members in accordance with the requirements of Sections 6(b)(7)[5] and 6(d)(1)[6] of the Act. Finally, the Exchange believes that the proposed rule change is consistent with and furthers the objectives of Section 6(b)(5) of the Act[7] in that it is designed to prevent fraudulent and manipulative acts or practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and to protect investors and the public interest.

[3] *See e.g.*, New York Stock Exchange, Inc. Rules 476 and 476A.

[4] 15 U.S.C. 78f(b)(6).

[5] 15 U.S.C. 78f(b)(7).

[6] 15 U.S.C. 78f(d)(1).

[7] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to 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 Exchange consents, the Commission will:

A. By order approve such proposed rule change, or

B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–CBOE–2003–54. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to file number SR–CBOE–2003–54 and should be submitted by February 3, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–616 Filed 1–12–04; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49023; File No. SR–ISE–2003–37]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the International Securities Exchange, Inc. To Amend the Procedures for Executing Stock-Option Orders Under ISE Rule 722

January 5, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 18, 2003, the International Securities Exchange, Inc. ("ISE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to revise the procedures for executing stock-option orders by: (1) automating the transmission of the stock leg(s) of a stock-option combination order to a broker-dealer on behalf of members; and (2) allowing for the pricing of the options leg(s) of stock-option combination orders in penny increments.

The text of the proposed rule change appears below. New text is in italic. Deleted text is in brackets.[3]

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] With the Exchange's consent, the Commission has made technical corrections to the proposed rule text. Telephone conversation between Katherine Simmons, Vice President and Associate General Counsel, ISE, and Christopher Solgan, Attorney,

Rule 722. Complex Orders

* * * * *

(b) Applicability of Exchange Rules. Except as otherwise provided in this Rule, complex orders shall be subject to all other Exchange Rules that pertain to orders generally.

(1) Minimum Increments. Bids and offers on complex orders may be expressed in any decimal price, *and the option leg(s) of a stock-option order may be executed in one cent increments,* regardless of the minimum increments otherwise [appropriate] *applicable* to the individual *option* legs of the order. Complex orders expressed in net price increments that are not multiples of the minimum increment are not entitled to the same priority under subparagraph (b)(2) of this Rule as such orders expressed in increments that are multiples of the minimum increment.

* * * * *

Supplementary Material to Rule 722

.01 A bid or offer made as part of a stock-option order (as defined in (a)(5)(i) above) or a SSF-option order (as defined in (a)(5)(ii) above) is made and accepted subject to the following conditions: (1) the order must disclose all legs of the order and must identify the security (which in the case of a single stock future requires sufficient identification to determine the market(s) on which the single stock future trades) and the price at which the non-option leg(s) of the order is to be filled; and (2) concurrent with the execution of the options leg of the order, the initiating member and each member that agrees to be a contra-party on the non-option leg(s) of the order must *either elect to have the stock leg(s) of a stock-option order electronically communicated to a designated broker-dealer for execution as provided in .02 below or* take steps immediately to transmit the non-option leg(s) to a non-Exchange market(s) for execution. Failure to observe these requirements will be considered conduct inconsistent with just and equitable principles of trade and a violation of Rule 400.

A trade representing the execution of the options leg of a stock-option or SSF-option order may be cancelled at the request of any member that is a party to that trade only if market conditions in any of the non-Exchange market(s) prevent the execution of the non-option leg(s) at the price(s) agreed upon.

.02 *Automated Stock-Option Orders. A Member may elect to have the Exchange electronically communicate the stock leg(s) of a stock-option order to a designated broker-dealer for execution. To make such an election, the Member must enter into a brokerage agreement with the designated broker-dealer. The Exchange will automatically transmit the stock leg(s) of a trade to the designated broker-dealer for execution on behalf of the Member. A trade of a stock-option order will be automatically cancelled if market conditions prevent the execution of the stock or option leg(s) at the prices necessary to achieve the agreed upon net price.*

* * * * *

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 proposes to revise the procedures for executing stock-option orders by: (1) Automating the transmission of the stock leg(s) of a stock-option combination order to a broker-dealer on behalf of members; and (2) allowing for the pricing of the options leg(s) of stock-option combination orders in penny increments.

Automatic Transmission of Stock Legs

Supplementary Material .01 to ISE Rule 722 currently describes a manual procedure by which a stock-option order may be executed on the Exchange. This manual procedure requires each party to a stock-option trade to take steps immediately to transmit the stock leg(s) of the order to a non-Exchange market for execution. The Exchange proposes to offer an automated process for the communication of stock-option orders by electronically transmitting the orders related to the stock leg(s) for execution on behalf of the parties to the trade. To participate in this automated process for stock-option orders, an ISE member must enter into a customer agreement with the designated broker-dealer. In addition, each member will be responsible for whatever fees and other charges the designated broker-dealer imposes for executing the trades. The Exchange will not receive any fees related to the stock portion of the stock-option trade. Members will be able to continue using the current manual procedure for execution of stock-option orders if they choose.

The electronic communication of the orders by the Exchange eliminates the necessity for each party to the trade to separately communicate orders to the broker-dealer for execution, thereby making the process more efficient. Once the orders are communicated to the broker-dealer for execution, the broker-dealer has complete responsibility for determining whether the orders may be executed in accordance with all of the rules applicable to execution of equity orders, including compliance with the applicable short-sale, trade-through and trade reporting rules. As with the current manual procedure, if the broker-dealer cannot execute the equity orders at the designated price, the stock-option combination order will not be executed on the Exchange.

Penny Pricing for Options Legs of Stock-Option Orders

Because the options leg(s) of a stock-option order must be executed in $.05 increments (for options trading below $3) and $.10 increments (for options trading at or above $3),[4] while the stock leg(s) of a stock-option order trades in $.01 increments, it is not always possible to achieve a proposed net price for stock-option orders. For example, suppose an investor proposes to buy stock and sell options at a net price of $8.50. If the stock is $11.72 bid to $11.74 offered, and the option is $3.20 bid to $3.30 offered, a net price of $8.50 cannot be achieved without executing the option leg at $3.22, $3.23, or $3.24.[5] Therefore, the Exchange proposes to allow for the execution of the option leg(s) of stock-option combination orders in one-cent increments to allow investors greater opportunities to receive execution of their stock-option orders. The options leg(s) of a stock-option order will continue to be reported through the Options Price Reporting Authority ("OPRA") with a code that indicates that the trade was

Division of Market Regulation, Commission, on December 30, 2003.

[4] *See* ISE Rule 710.

[5] To execute the order within the bid and offer for the stock and the option, a net price of $8.50 could only be achieved by (1) executing the stock at $11.72 and the option at $3.22 ($11.72–$8.50); (2) executing the stock at $11.73 and the option at $3.23 ($11.73–$8.50); or (3) executing the stock at $11.74 and the option at $3.24 ($11.74–$8.50).

part of a complex order. The actual price of the trade will be reported.

(2) Statutory Basis

The Exchange believes that the proposed rule change is consistent with the Act in general, and Section 6(b)(5)[6] in particular. The Exchange states that the proposed rule change is intended to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange further believes that the automated procedure for transmitting the stock leg(s) of a stock-option order would provide a more efficient means for members to execute orders, and the execution of the options leg(s) of a stock-option order in $.01 minimum increments would improve investors' ability to receive execution of their orders.

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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the Exchange consents, the Commission will:

(A) by order approve such proposed rule change; or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549–0609. Comments should be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. SR–ISE–2003–37. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hard copy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–ISE–2003–37 and should be submitted by February 3, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[7]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–617 Filed 1–12–04; 8:45 am]

BILLING CODE 8010–01–P

[6] 15 U.S.C. 78f(b)(5).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49030; File No. SR–NASD–2003–194]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Elimination of Duplicate Assessments and Fees Contained In Schedule A of the NASD By-Laws

January 6, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 29, 2003, the National Association of Securities Dealers, Inc. ("NASD"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. NASD has designated the proposed rule change as one constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule under Section 19(b)(3)(A)(i) of the Act[3] and Rule 19b–4(f)(1) thereunder[4] and as establishing or changing a due, fee, or other charge under Section 19(b)(3)(A)(ii) of the Act[5] and Rule 19b–4(f)(2) thereunder,[6] which render the proposal effective upon receipt of this filing by the Commission.[7] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is proposing to amend Section 5 of Schedule A to the NASD By-Laws ("Section 5") to clarify that two or more members that are under substantially the same ownership or control (commonly referred to as a "simultaneous filing group" or "SFG") may eliminate certain duplicate fees and assessments and to remind members to provide NASD with prior notice in the format specified by NASD if they wish to establish eligibility for the reduced fees. Below is the text of the proposed rule change. Proposed new language is in *italic;* proposed deletions are in brackets.

* * * * *

Schedule A to NASD By-Laws

Assessments and fees pursuant to the provisions of Article VI of the By-Laws of NASD shall be determined on the following basis.

Sections 1 through 4. No change.

Section 5—Elimination of Duplicate Assessments and Fees

Two or more members under substantially the same ownership or control shall be required to pay *(1)* only one personnel assessment and one [registration renewal] *system processing* fee annually for those individuals

[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] 15 U.S.C. 78s(b)(3)(A)(ii).

[6] 17 CFR 240.19b–4(f)(2).

[7] NASD clarified that it filed the proposed rule change pursuant to both Section 19(b)(3)(A)(i) and Section 19(b)(3)(A)(ii) of the Act, as discussed in the purpose section of the notice and in the body of NASD's Form 19b–4 filing. Telephone conversation between Shirley H. Weiss, Associate General Counsel, NASD, and David A. Hsu, Attorney, Division of Market Regulation, Commission, on January 6, 2004.

employed by more than one of the members; [and] *(2)* only one fee annually for each branch office registered at the same location by more than one of the members[.]; *and (3)* [There shall be] only one registration fee, *one fingerprint processing fee, and one termination fee* applicable to each applicant registered *or terminated* simultaneously with two or more members under substantially the same ownership or control. *To establish their eligibility to receive the reduction in fees described herein, members must provide NASD with information as requested by NASD and in the format specified by NASD prior to NASD's assessment of such fees.*

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Section 5 addresses the elimination of certain duplicate assessments and fees for two or more members under substantially the same ownership or control. The proposed rule change will amend Section 5 to codify NASD's stated policies and practices with respect to the availability of these reduced fees to simultaneous filing groups. First, the proposed rule change will change the reference to a "registration renewal fee" to "system processing fee," to conform the terminology to an amendment to Section 5 made in 1999.[8] Second, the proposed rule change will clarify that, in addition to being able to pay only one system processing fee, a simultaneous filing group, as described in Section 5, may pay only one fingerprint processing fee and one termination fee. Third, the proposed rule change will add language reminding members that, as a procedural matter, they must provide NASD with certain information as requested by NASD and in the format specified by NASD in order to receive the reduced fees prior to NASD's assessment of such fees.

NASD notes that this language will codify existing long-standing practice, which requires members to follow certain procedures to obtain the benefits of NASD's simultaneous filing group program and the reduced registration fees associated therewith, including establishing an simultaneous filing group, notifying NASD staff of the affiliated firms included in the simultaneous filing group, and requesting and completing an SFG Participation Agreement.[9]

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,[10] which requires, among other things, that NASD rules provide for the equitable allocation of reasonable dues, fees, and other charges among members, issuers and other persons using any facility or system that NASD operates or controls. NASD also believes that the proposed rule change to amend Section 5 will more accurately reflect its long-standing policies and practices with respect to assessing certain reduced fees to simultaneous filing groups that establish their eligibility for such reductions.

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. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Sections 19(b)(3)(A)(i) and (ii) of the Act[11] and subparagraphs (f)(1) and (f)(2) of Rule 19b–4 thereunder[12] because it constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule and establishes or changes a due, fee, or other charge.[13] At any time within 60 days of this filing, the Commission may summarily abrogate this proposal if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–NASD–2003–194. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, comments should be sent in hard copy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of NASD. All submissions should refer to File No. SR–NASD–2003–194 and should be submitted by February 3, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[14]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–610 Filed 1–12–04; 8:45 am]

BILLING CODE 8010–01–P

[8] The "registration renewal fee" was replaced with a "system processing fee" in 1999. *See* Exchange Act Release No. 41937 (Sept. 28, 1999). The reference in Section 5 to "registration renewal fee" should have been, but was not, changed at that time.

[9] NASD is in the process of posting a description of the Simultaneous Form Filing Program on its Web site. In the interim, and thereafter, members may call NASD's Gateway Call Center (301–590–6500) for information about the program.

[10] 15 U.S.C. 78*o*–3(b)(5).

[11] 15 U.S.C. 78s(b)(3)(A)(i) and (ii).

[12] 17 CFR 240.19b–4(f)(1) and (2).

[13] *See supra* note 7.

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49021; File No. SR–NASD–2003–197]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Delay the Implementation Date of Amendments to Article VIII (District Committees and District Nominating Committees) of the By-Laws of NASD Regulation, Inc.

January 5, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 29, 2003, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. NASD filed the proposal pursuant to Section 19(b)(3)(A)(i) of the Act,[3] and Rule 19b–4(f)(1)[4] thereunder, in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule, which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASD is filing with the Commission a proposed rule change to delay, until February 1, 2004, the implementation date of amendments to Article VIII (District Committees and District Nominating Committees) of the By-Laws of NASD Regulation, Inc. that were established by SR–NASD–2003–55.[5] NASD filed SR–NASD–2003–55 to streamline the nomination and election processes governing NASD District Committees and District Nominating Committees ("Committees"), modernize communication procedures, and improve the consistency among the Committees across all districts. There is no change to the rule text associated with this rule filing. NASD subsequently filed SR–NASD–2003–107 to delay the implementation date of the amendments to January 1, 2004 to avoid disrupting the 2004 election cycle, which was already underway.[6]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASD included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to notify the Commission and other interested parties of the delay in implementation of amendments to Article VIII of the By-Laws of NASD Regulation, Inc. ("Article VIII") established by SR–NASD–2003–55 until February 1, 2004. On March 21, 2003, NASD filed a proposed rule change to streamline the nomination and election processes governing District Committees and District Nominating Committees, modernize communication procedures, and improve the consistency among the Committees across all districts. On June 11, 2003, the SEC published a notice of filing and immediate effectiveness of the proposed rule change.[7] The amendments were to become effective 30 days later. NASD submitted a subsequent rule filing to extend the implementation date of the amendments to January 1, 2004 because NASD's election cycle for District Committees and District Nominating Committees for 2004 was already underway and NASD did not want new rules to become effective in the middle of such election cycle.[8]

In this rule filing, NASD is proposing to extend the implementation date of the amendments to February 1, 2004. As the amendments to Article VIII were not effective prior to the start of the 2004 election cycle, NASD is conducting these elections in accordance with the existing provisions of Article VIII. NASD believed that the 2004 election cycle would be completed by December 2003. However, a contested election in one of the Districts has resulted in a delay in the 2004 election cycle. NASD expects to have the 2004 District Committee and District Nominating Committee elections completed and certified by the end of January 2004 and, therefore, proposes to delay the implementation date of the amendments to Article VIII until February 1, 2004 in order to avoid any confusion among participants and to prevent any disruption in the election procedures that could be brought on by adopting amendments in the middle of the election cycle.

1. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[9] which require, among other things, that NASD 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. In addition, the proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A)(i) of the Act[10] and paragraph (f)(1) of Rule 19b–4[11] thereunder, in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule. NASD believes that delaying the implementation date of the amendments to Article VIII of the By-Laws of NASD Regulation, Inc. until February 1, 2004 will permit this year's Committee elections to proceed in an orderly fashion under existing procedures. Any change to existing procedures in the middle of the current Committee election cycle may cause unnecessary confusion to participants and disrupt the election process.

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.[12]

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[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. 48105 (June 11, 2003), 68 FR 35926 (June 17, 2003).

[6] *See* Securities Exchange Act Release No. 48259 (July 30, 2003), 68 FR 46673 (August 6, 2003).

[7] *See* Securities Exchange Act Release No. 48015 (June 11, 2003), 68 FR 35926 (June 17, 2003).

[8] *See* Securities Exchange Act Release No. 48259 (July 30, 2003), 68 FR 46673 (August 6, 2003).

[9] 15 U.S.C. 78*o*–3(b)(6).

[10] 15 U.S.C. 78s(b)(3)(A)(i).

[11] 17 CFR 240.19b–4(f)(1).

[12] Telephone conversation between Kosha Dalal, Assistant General Counsel, Office of General Counsel, NASD and Leah Mesfin, Attorney, Division of Market Regulation, Commission on January 2, 2004.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The proposed rule change has been filed by NASD as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule under Section 19(b)(3)(A)(i) of the Act[13] and Rule 19b–4(f)(1) thereunder,[14] which renders the proposal effective upon receipt of this filing by the Commission.

At any time within 60 days of this filing, the Commission may summarily abrogate this proposal if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments may also be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. SR–NASD–2003–197. This file number should be included on the subject line if e-mail is used. To help the Commission process and review comments more efficiently, comments should be sent in hardcopy or by e-mail but not by both methods. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to file number SR–NASD–2003–197 and should be submitted by February 3, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 04–612 Filed 1–12–04; 8:45 am]

BILLING CODE 8010–01–U

[13] 15 U.S.C. 78s(b)(3)(A)(i).

[14] 17 CFR 240.19b–4(f)(1).

[15] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Declaration of Disaster #3559]

Commonwealth of Puerto Rico; Amendment #3

In accordance with a notice received from the Department of Homeland Security—Federal Emergency Management Agency, effective December 19, 2003, the above numbered declaration is hereby amended to include the municipalities of Aibonito and Naranjito as disaster areas due to damages caused by severe storms, flooding, mudslides and landslides beginning on November 10, 2003 and continuing through November 23, 2003.

In addition, applications for economic injury loans from small businesses located in the contiguous municipalities of Barranquitas, Cidra, Comerio, and Corozal may be filed until the specified date at the previously designated location. All other municipalities contiguous to the above named primary municipalities have been previously declared.

All other information remains the same, *i.e.*, the deadline for filing applications for physical damage is January 20, 2004, and for economic injury the deadline is August 23, 2004.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008).

Dated: December 22, 2003.

Herbert L. Mitchell,

Associate Administrator for Disaster Assistance.

[FR Doc. 04–596 Filed 1–12–04; 8:45 am]

BILLING CODE 8025–01–P

SOCIAL SECURITY ADMINISTRATION

Statement of Organization, Functions and Delegations of Authority

This statement amends Part S of the Statement of the Organization, Functions and Delegations of Authority which covers the Social Security Administration (SSA). Chapter S2 covers the Deputy Commissioner, Operations. Notice is given that Subchapter S2R, the Office of Central Operations, is being amended to reflect the realignment of the Center for Management Support and the Center for Human Resources into one center; *i.e.*, the Center for Human Resources. The new material and changes are as follows:

Section S2R.10 *The Office of Central Operations*—(Organization):

C. The Immediate Office of the Associate Commissioner, Office of Central Operations (S2R).

4. The Assistant Associate Commissioner for Management Operations and Support (S2RC).

Delete:

b. The Center for Management Support (S2RC2).

Reletter:

"c" to "b";

"d" to "c";

"e" to "d";

"f" to "e".

Section S2R.20 *The Office of Central Operations—(Functions):*

C. The Immediate Office of the Associate Commissioner, OCO (S2R) provides internal operations and management support and assistance to the Associate Commissioner and all OCO components.

4. The Assistant Associate Commissioner for Management and Operations Support (S2RC) is responsible for the direction of six centers which perform systems, management, program, material resources, personnel management services, and security and integrity support functions for OCO.

Delete: "six" prior to the word "centers".

Add: five

b. The Center for Management Support (S2RC2):

Delete: b in its entirety.

Reletter:

"c" to "b";

"d" to "c";

"e" to "d";

"f" to "e".

d. The Center for Human Resources (S2RC5): Add: 14. In the area of Labor Management and Employee Relations: Maintain responsibility for all aspects of the mid-term and impact and implementation bargaining process that pertain only to OCO; process grievances through all steps of the grievance procedure; in consultation with the Office of General Counsel, represent OCO managers at all stages of the arbitration process, including the preparation of position papers and briefs; and process all aspects of systems violations in accordance with guidance issued by the Office of Human Resources and the Deputy Commissioner for Operations.

Add: 15. Develops and conducts OCO-wide operational training and employee development activities. Analyzes and evaluates training and effectiveness. Ensures that required Agency-level, other Government agency, and private vendor training is provided.

Add: 16. Resource Planning and Management

Dated: December 24, 2003.

Reginald F. Wells,

Deputy Commissioner for Human Resources.

[FR Doc. 04–684 Filed 1–12–04; 8:45 am]

BILLING CODE 4191–02–U

DEPARTMENT OF STATE

[Public Notice 4582]

Determinations Pursuant to Executive Order 13224

In the Matter of the Amended Designations of the Kurdistan Freedom and Democracy Congress also known as the Freedom and Democracy Congress of Kurdistan, also known as KADEK, also known as the Kurdistan Workers' Party, also known as the PKK, also known as Partiya Karkeran Kurdistan, also known as the People's Defense Force, also known as Halu Mesru Savunma Kuvveti (HSK), also known as Kurdistan People's Congress (KHK), also known as People's Congress of Kurdistan, also known as KONGRA-GEL, as a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act and pursuant to Section 1(b) of Executive Order 13224.

Based upon a review of the administrative record assembled in this matter, and in consultation with the Attorney General, the Secretary of the Treasury, and the Secretary of Homeland Security, the Deputy Secretary of State has concluded that there is a sufficient factual basis to find that the Kurdistan Workers' Party, also known as the Freedom and Democracy Congress of Kurdistan and other aliases, has changed its name to the Kurdistan People's Congress (KHK), also known as People's Congress of Kurdistan, and also known as KONGRA-GEL, and that the relevant circumstances described in Section 219(a)(1) of the Immigration and Nationality Act, as amended (the "INA") (8 U.S.C. 1189(a)(1)), and in Section 1(b) of Executive Order 13224, as amended ("E.O. 13224"), still exist with respect to that organization.

Therefore, the Deputy Secretary of State hereby further amends the designation of that organization as a foreign terrorist organization, pursuant to Section 219(a)(4)(B) of the INA (8 U.S.C. 1189(a)(4)(B)), and further amends the 2001 designation of that organization pursuant to Section 1(b) of E.O. 13224, to include the following new names: Kurdistan People's Congress (KHK), People's Congress of Kurdistan, KONGRA–GEL.

Consistent with the determination in section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously", no prior notice need be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

Dated: January 5, 2004.

Cofer Black,

Coordinator for Counterterrorism, Department of State.

[FR Doc. 04–576 Filed 1–12–04; 5:00 pm]

BILLING CODE 4710–10–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Opportunity To Participate, Criteria Requirements and Application Procedure for Participation in the Military Airport Program (MAP).

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

ACTION: Notice of criteria and application procedures for designation or redesignation, for the fiscal year 2004 MAP.

SUMMARY: This notice announces the criteria, application procedures, and schedule to be applied by the Secretary of Transportation in designating or redesignating, and funding capital development annually for up to 15 current (joint-use) or former military airports seeking designation or redesignation to participate in the Military Airport Program (MAP).

The MAP allows the Secretary to designate current (joint-use) or former military airports to receive grants from the Airport Improvement Program (AIP). The Secretary is authorized to designate an airport (other than an airport designated before August 24, 1994) only if:

(1) The airport is a former military installation closed or realigned under the Title 10 U.S.C. § 2687 (announcement of closures of large Department of Defense installations after September 30, 1977), or under Section 201 or 2905 of the Defense Authorization Amendments and Base Closure and Realignment Acts; or

(2) the airport is a military installation with both military and civil aircraft operations.

The Secretary shall consider for designation only those current or former military airports, at least partly converted to civilian airports as part of the national air transportation system, that will reduce delays at airports with more than 20,000 hours of annual delays in commercial passenger aircraft takeoffs and landings, or will enhance airport and air traffic control system capacity in metropolitan areas or reduce current and projected flight delays (49 U.S.C. 47118(c)).

DATES: Airport sponsors should send applications for new designation and redesignation in the MAP to the FAA Regional Airports Division or Airports District Office that serves the airport. That office must receive applications on or before February 12, 2004.

ADDRESSES: Submit an original and two copies of Standard Form (SF) 424, "Application for Federal Assistance," prescribed by the Office of Management and Budget Circular A–102, available at *http://www.whitehouse.gov/omb/grants/grants_forms.html,* along with any supporting and justifying documentation. Applicant should specifically request to be considered for designation or redesignation to participate in the fiscal year 2004 MAP. Submission should be sent to the Regional FAA Airports Division or Airports District Office that serves the airport. Applicants may find the proper office on the FAA Web site *http://www.faa.gov/arp/regions.cfm* or may contact the office below.

FOR FURTHER INFORMATION CONTACT: Mr. Murdock (*oliver.murdock@faa.gov*) or Leonard C. Sandelli (*len.sandelli@faa.gov*), National Planning Division (APP–400), Office of Airport Planning and Programming, Federal Aviation Administration (FAA), 800 Independence Avenue, SW., Washington, DC, 20591, (202) 267–8244, or (202) 267–8785, respectively.

SUPPLEMENTARY INFORMATION:

General Description of the Program

The MAP provides capital development assistance to civil airport sponsors of designated current (joint-use) military airfields or former military airports that are included in the FAA's National Plan of Integrated Airport Systems (NPIAS). Airports designated to

the MAP may obtain funds from a set-aside (currently four percent) of AIP discretionary funds for airport development, including certain projects not otherwise eligible for AIP assistance. These airports may also be eligible to receive grants from other categories of AIP funding.

Number of Airports

A maximum of 15 airports per fiscal year (FY) may participate in the MAP at any time. There are 5 slots available for designation or redesignation in FY 2004. One of the 5 airports may be designated as a general aviation airport.

Term of Designation

The maximum term is five fiscal years following designation. The FAA can designate airports for a period less than five years. The FAA will evaluate the conversion needs of the airport in its capital development plan to determine the appropriate length of designation.

Redesignation

Previously designated airports may apply for redesignation for an additional term not to exceed five years. Those airports must meet current eligibility requirements in 49 U.S.C. 47118 (a) at the beginning of each grant period and have MAP eligible projects. The FAA will evaluate applications for redesignation primarily in terms of warranted projects fundable only under the MAP as these candidates tend to have fewer conversion needs than new candidates. The FAA wants MAP airports to graduate to regular AIP participation.

Eligible Projects

In addition to eligible AIP projects, MAP can fund passenger terminal facilities, fuel farms, utility systems, surface automobile parking lots, hangars, and air cargo terminals up to 50,000 square feet. Designated or redesignated military airports can also receive not more than $10,000,000 for fiscal years 2004 and 2005 and $7,000,000 for each fiscal year after 2005 for projects to construct, improve, or repair terminal building facilities. Designated or redesignated military airports can also receive not more than $10,000,000 for fiscal years 2004 and 2005 and $7,000,000 for each fiscal year after 2005 for MAP eligible projects that include hangars, cargo facilities, fuel farms, automobile surface parking, and utility work.

Designation Considerations

In making designations of new candidate airports, the Secretary of Transportation may only designate an airport (other than an airport so designated before August 24, 1994) if it meets the following general requirements:

(I) (1) The airport is a former military installation closed or realigned under—

(A) Section 2687 of Title 10;

(B) Section 201 of the Defense Authorization Amendments and Base Closure and Realignment Act (BRAC) (10 U.S.C. 2687 note); or

(C) Section 2905 of the Defense Base Closure and Realignment Act of 1990 (10 U.S.C. 2687 note); or

(1) The airport is a military installation with both military and civil aircraft operations.

(II) The airport is classified as a commercial service or reliever airport in the NPIAS. One of the designated airports, if included in the NPIAS, may be a general aviation (GA) airport (public airport other than an air carrier airport, 14 CFR 152.3) that was a former military installation closed or realigned under BRAC, as amended, or 10 U.S.C. 2687. (See 49 U.S.C. 47118(g)). A general aviation airport must qualify under (1) above.

(III) In designating new candidate airports, the Secretary shall consider if a grant would:

(1) reduce delays at an airport with more than 20,000 hours of annual delays in commercial passenger aircraft takeoffs and landings; or

(2) Enhance airport and air traffic control system capacity in a metropolitan area or reduce current and projected flight delays.

The application for new designations will be evaluated in terms of how the proposed projects would contribute to congestion relief and/or how the airport would enhance air traffic or airport system capacity and provide adequate user services.

Project Evaluation

Recently realigned or closed military airports as well as active military airfields with new joint-use agreements have the greatest need of funding to convert to, or to incorporate, civil airport operations. Newly converted airports and new joint-use locations frequently have minimal capital development resources and will therefore receive priority consideration for designation and MAP funding. The FAA will evaluate the need for eligible projects based upon information in the candidate airport's five-year Airport Capital Improvement Plan (ACIP). These projects need to be related to development of that airport and/or the air traffic control system. It is the intent of the Secretary of Transportation to fund those airport projects which maximize the benefits to the capacity of the air traffic control and airport systems, and/or promote the reduction of airport congestion.

1. The FAA will evaluate candidate airports and/or the airports such candidate airports would relieve based on the following specific factors:

- Compatibility of airport roles and the ability of the airport to provide an adequate airport facility;
- The capability of the candidate airport and its airside and landside complex to serve aircraft that otherwise must use the relieved airport;
- Landside surface access;
- Airport operational capability, including peak hour and annual capacities of the candidate airport;
- Potential of other metropolitan area airports to relieve the congested airport;
- Ability to satisfy, relieve, or meet air cargo demand within the metropolitan area;
- Forecasted aircraft and passenger levels, type of commercial service anticipated, *i.e.*, scheduled or charter commercial service;
- Type and capacity of aircraft projected to serve the airport and level of operations at the relieved airport and the candidate airport;
- The potential for the candidate airport to be served by aircraft or users, including the airlines, serving the congested airport;
- Ability to replace an existing commercial service or reliever airport serving the area; and
- Any other documentation to support the FAA designation of the candidate airport.

2. The FAA will evaluate the development needs that, if funded, would make the airport a viable civil airport that will enhance system capacity or reduce delays. Newly closed installations or airports with new joint-use agreements with existing military aviation facilities will be strongly considered for designation since they tend to have the greatest conversion needs.

Application Procedures and Required Documentation

Airport sponsors applying for designation or redesignation must complete and submit an SF 424, "Application for Federal Assistance," and provide supporting documentation to the appropriate FAA regional or district office serving that airport.

Standard Form 424:

Sponsors can obtain this form at *http://www.whitehouse.gov/omb/grants/grants_forms.html*. A form that can be completed with a computer is available at *http://www2.faa.gov/arp/forms/*

f424.doc. Fill this form out completely including the following: Mark Item 1 *Type of Submission* as a "pre-application" and indicate it is for "construction." Mark item 8 *Type of Application* as "new" and in "other" fill in "Military Airport Program." Fill in Item 11 *Descriptive Title of Applicants Project.* "Designation (or redesignation) to the Military Airport Program." In Item 15a *Estimated Funding,* indicate the total amount of funding requested from the MAP during the entire term for which you are applying.

Supporting Documentation

(A) *Identification as Current or Former Military Airport.* The application must identify the airport as either a current or former military airport and indicate whether it was:

(1) Closed or realigned under Section 201 of the Defense Authorization Amendments and Base Closure and Realignment Act, and/or Section 2905 of the Defense Base Closure and Realignment Act of 1990 (Installations Approved for Closure by the Defense Base Realignment and Closure Commissions), or

(2) Closed or realigned pursuant to 10 U.S.C. 2687 as excess property (bases announced for closure by Department of Defense (DOD) pursuant to this title after September 30, 1977 (this is the date of announcement for closure and not the date the property was deeded to the airport sponsor)), or

(3) A military installation with both military and civil aircraft operations. The airport receiving a general aviation designation may be joint-use but must qualify under (1) or (2) above.

(B) *Qualifications for MAP:*

Submit documents for (1) through (7) below:

(1) Documentation that the airport meets the definition of a "public airport" as defined in 49 U.S.C. § 47102(16).

(2) Documentation indicating the required environmental review for civil reuse or joint-use of the military airfield has been completed. This environmental review need not include review of the individual projects to be funded by the MAP. Rather, the documentation should reflect that the environmental review necessary to convey the property, enter into a long-term lease, or finalize a joint-use agreement has been completed. The military department conveying or leasing the property, or entering into a joint-use agreement, has the lead responsibility for this environmental review. The environmental review and approvals must indicate that the operator or owner of the airport has good title, satisfactory to the Secretary, or assures that good title will be acquired, to meet AIP requirements.

(3) For a former military airport, documentation that the eligible airport sponsor holds or will hold satisfactory title, a long-term lease in furtherance of conveyance of property for airport purposes, or a long-term interim lease for 25 years or longer, to the property on which the civil airport is being located. Documentation that an application for surplus or BRAC airport property has been accepted by the Federal Government is sufficient to indicate the eligible airport sponsor holds or will hold satisfactory title or a long-term lease.

(4) For a current military airport, documentation that the airport sponsor has an existing joint-use agreement with the military department having jurisdiction over the airport. This is necessary so the FAA can legally issue grants to the sponsor. In here and (3) directly above, the airport must possess the necessary property rights in order to accept a grant for its proposed projects during FY 2004.

(5) Documentation that the airport is classified as a "commercial service airport" or a "reliever airport" as defined in 49 U.S.C. 47102(7) and 47102(18), unless the airport is applying for the general aviation slot.

(6) Documentation that the airport owner is an eligible airport "sponsor" as defined in 49 U.S.C. 47102(19).

(7) Documentation that the airport has an approved airport layout plan (ALP) and a five-year airport capital improvement plan (ACIP) indicating all eligible grant projects proposed to be funded either from the MAP or other portions of the AIP.

(C) Evaluation Factors:

Submit information on the items below to assist in our evaluation:

(1) Information identifying the existing and potential levels of visual or instrument operations and aeronautical activity at the current or former military airport and, if applicable, the relieved airport. Also, if applicable, information on how the airport contributes to air traffic system or airport system capacity. If served by commercial air carriers, the revenue passenger and cargo levels should be provided.

(2) A description of the airport's projected civil role and development needs for transitioning from use as a military airfield to a civil airport. Include how development projects would serve to reduce delays at an airport with more than 20,000 hours of annual delays in commercial passenger aircraft takeoffs and landings; or enhance capacity in a metropolitan area or reduce current and projected flight delays.

(3) A description of the existing airspace capacity. Describe how anticipated new operations would affect the surrounding airspace and air traffic flow patterns in the metropolitan area in or near the airport. Include a discussion of the level to which operations at this airport create airspace conflicts that may cause congestion or whether air traffic works into the flow of other air traffic in the area.

(4) A description of the airport's five-year ACIP, including a discussion of major projects, their priorities, projected schedule for project accomplishment, and estimated costs. The ACIP must specifically identify the safety, capacity, and conversion related projects, associated costs, and projected five-year schedule of project construction, including those requested for consideration for MAP funding.

(5) A description of those projects that are consistent with the role of the airport and effectively contribute to the joint-use or conversion of the airfield to a civil airport. The projects can be related to various improvement categories depending on what is needed to convert from military to civil airport use, to meet required civil airport standards, and/or to provide capacity to the airport and/or airport system. The projects selected (*e.g.*, safety-related, conversion-related, and/or capacity-related), must be identified and fully explained based on the airport's planned use. Those projects that may be eligible under MAP, if needed for conversion or capacity-related purposes, must be clearly indicated, and include the following information:

Airside

- Modification of airport or military airfield for safety purposes, including airport pavement modifications (*e.g.*, widening), marking, lighting, strengthening, drainage or modifying other structures or features in the airport environs to meet civil standards for airport imaginary surfaces as described in 14 CFR part 77.
- Construction of facilities or support facilities such as passenger terminal gates, aprons for passenger terminals, taxiways to new terminal facilities, aircraft parking, and cargo facilities to accommodate civil use.
- Modification of airport or military utilities (electrical distribution systems, communications lines, water, sewer, storm drainage) to meet civil standards. Also, modifications that allow utilities on the civil airport to operate independently, where other portions of the base are conveyed to entities other

than the airport sponsor or retained by the Government.

- Purchase, rehabilitation, or modification of airport and airport support facilities and equipment, including snow removal, aircraft rescue, fire fighting buildings and equipment, airport security, lighting vaults, and reconfiguration or relocation of eligible buildings for more efficient civil airport operations.
- Modification of airport or military airfield fuel systems and fuel farms to accommodate civil aviation use.
- Acquisition of additional land for runway protection zones, other approach protection, or airport development.
- Cargo facility requirements.
- Modifications which will permit the airfield to accommodate general aviation users.

Landside

- Construction of surface parking areas and access roads to accommodate automobiles in the airport terminal and air cargo areas and provide an adequate level of access to the airport.
- Construction or relocation of access roads to provide efficient and convenient movement of vehicular traffic to, on, and from the airport, including access to passenger, air cargo, fixed base operations, and aircraft maintenance areas.
- Modification or construction of facilities such as passenger terminals, surface automobile parking lots, hangars, air cargo terminal buildings, and access roads to cargo facilities to accommodate civil use.

(6) An evaluation of the ability of surface transportation facilities (road, rail, high-speed rail, maritime) to provide intermodal connections.

(7) A description of the type and level of aviation and community interest in the civil use of a current or former military airport.

(8) One copy of the FAA-approved ALP for each copy of the application. The ALP or supporting information should clearly show capacity and conversion related projects. Other information such as project costs, schedule, project justification, other maps and drawings showing the project locations, and any other supporting documentation that would make the application easier to understand should also be included. You may also provide photos, which would further describe the airport, projects, and otherwise clarify certain aspects of this application. These maps and ALP's should be cross-referenced with the project costs and project descriptions.

Redesignation of Airports Previously Designated and Applying for up to an Additional Five Years in the Program

Airports applying for redesignation to the Military Airport Program must submit the same information required by new candidate airports applying for a new designation. On the SF 424, Application for Federal Assistance, prescribed by the Office of Management and Budget Circular A–102, airports must indicate their application is for redesignation to the MAP. In addition to the above information, they must explain:

(1) Why a redesignation and additional MAP eligible project funding is needed to accomplish the conversion to meet the civil role of the airport and the preferred time period for redesignation not to exceed five years;

(2) Why funding of eligible work under other categories of AIP or other sources of funding would not accomplish the development needs of the airport; and

(3) Why, based on the previously funded MAP projects, the projects and/or funding level were insufficient to accomplish the airport conversion needs and development goals.

This notice is issued pursuant to Title 49 U.S.C. 47118.

Issued at Washington, DC, on January 5, 2004.

James R. White,

Acting Director, Office of Airport Planning and Programming.

[FR Doc. 04–593 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice To Intend To Rule on Application 04–02–C–00–HPN To Impose a Revenue From a Passenger Facility Charge (PFC) at Westchester County Airport, White Plains, NY

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice to intend to rule on application.

SUMMARY: The FAA proposes to rule and invites public comment on the application to impose a PFC at Westchester County Airport under the provisions of the Aviation Safety and Capacity Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and Part 158 of the Federal Aviation Regulations (14 CFR part 158).

DATES: Comments must be received on or before February 12, 2004.

ADDRESSES: Comments on this Application may be mailed or delivered in triplicate to the FAA at the following address: Mr. Dan Vornea, Project Manager, New York District Office, 600 Old Country Road, Suite 446, Garden City, NY 11530.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Robert J. Bracchitta, Assistant Commissioner, Department of Transportation, Westchester County at the following address: Westchester County Airport, Building #11, 36 Loop Road, White Plains, New York 10604.

Air carriers and foreign air carriers may submit copies of their written comments previously provided to Westchester County Airport under section 158.23 of part 158.

FOR FURTHER INFORMATION CONTACT: Dan Vornea, Project Manager, New York Airports District Office, 600 Old Country Road, Suite 446, Garden City, NY 11530, Telephone No. (516) 227–3812. The application may be reviewed in person at this same location.

SUPPLEMENTARY INFORMATION: The FAA proposes to rule and invites public comment on the application to impose a PFC at Westchester County Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101–508) and part 158 of the Federal Aviation Regulations (14 CFR part 158).

On January 5, 2004 the FAA determined that the application to impose a PFC submitted by the Westchester County was substantially completed within the requirements of section 158.25 of part 158. The FAA will approve or disapprove the application, in whole or in part, no later than May 1, 2004.

The following is a brief overview of the application:

Application Number: 04–02–C–00–HPN.

Level of Proposed PFC: $4.50.

Proposed Charge Effective Date: May 1, 2004.

Proposed Charge Expiration Date: October 1, 2014.

Total Estimated PFC Revenue: $20,200,000.

Brief Description of Proposed Project: Design and Construction of a New Deicing Facilities.

Class or classes of air carriers which the public agency has requested not to be required to collect PFS's are: Non-Scheduled/On Demand Air Carriers filing FAA Form 1800–31.

Any person may inspect the Application in person at the FAA office

listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA Regional Office: 1 Aviation Plaza, Jamaica, N.Y. 11434–4809.

In addition, any person may, upon request, inspect the application notice and other documents germane to the application in person at the Westchester County Airport.

Issued in Garden City, New York on January 5, 2004.

Philip Brito,

Manager, NYADO, Eastern Region.

[FR Doc. 04–594 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Environmental Impact Statement: Ada County, ID

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The FHWA is issuing this notice to advise the public that an Environmental Impact Statement (EIS) will be prepared for a proposed highway project in Ada County, Idaho.

FOR FURTHER INFORMATION CONTACT: Russell Jorgenson, Idaho Division Field Operations Engineer, Federal Highway Administration, 3050 Lakeharbor Lane, Suite 126, Boise, Idaho 83703, telephone: (208) 334–9180, Ext. 122; Greg Vitley, Senior Environmental Planner, Idaho Transportation Department, District 3, P.O. Box 8028, Boise, ID 83707, telephone (208) 334–8300; or Sally Goodell, Three Cities River Crossing Coordinator, Ada County Highway District, 318 East 37th Street, Garden City, Idaho 83714, telephone (208) 387–6100.

SUPPLEMENTARY INFORMATION: The Federal Highway Administration, in cooperation with the Ada County Highway District and the Idaho Transportation Department, will prepare an EIS that identifies an alignment for a transportation corridor that will connect State Highway 44/55 on the north with US 20/26 on the south. The proposed highway alternatives vary from approximately 1.5 to 3.0 miles in length and will provide 4 to 6 travel lanes. This alignment includes a new bridge across the Boise River. The study area is located in the northwestern part of the Boise Metropolitan Area, and borders or passes through portions of the cities of Boise, Eagle and Garden City as well as Ada County.

This improvement is considered necessary to relieve existing and projected traffic congestion in the study area. Alternatives under consideration include, (1) taking no action, (2) road alignment alternatives for connecting State Highway 44/55 and US Highway 20/26 and, (3) alternative bridge types for the crossing of the Boise River. The termini for the project are State Highway 44/55 on the north and US Highway 20/26 to the south.

Letters describing the proposed action and soliciting comments will be sent to the appropriate Federal, State and local agencies and citizens who have previously expressed interest in this proposed project. Scoping will begin with the publication of the Notice of Intent. As part of the scoping process, public information meetings will be held in addition to public hearings. Public notice will be given of the time and place of any public information meetings and public hearings. The draft EIS will be made available in electronic format for public and agency review and comment and hard copies will be available in public places to be determined and published. Accommodations for persons with special needs for reviewing the EIS will be available by contacting one of the contact sources listed above.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues are identified, comments and suggestions are invited from all interested parties.

Comments or questions concerning this proposed action and the EIS should be directed to FHWA or the Ada County Highway District at the addresses provided above.

Authority: 23 U.S.C. 315; 23 CFR 771.123; 49 CFR 1.48.

Issued on: January 6, 2004.

Stephen A. Moreno,

Division Administrator, Federal Highway Administration, Boise, Idaho.

[FR Doc. 04–632 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–22–M

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[FMCSA Docket No. FMCSA–2003–14911]

Exemptions From Certain Controlled Substances and Alcohol Testing Regulations; Mayflower Transit LLC dba Aero Mayflower Transit and United Van Lines LLC Requesting Exemptions

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice of denial of application for exemptions.

SUMMARY: The FMCSA denies Mayflower Transit LLC and United Van Lines' LLC application for exemptions from certain Federal controlled substance and alcohol testing requirements. The applicants requested exemptions that would allow them to impose controlled substance and alcohol testing on their non-CDL (commercial drivers license) drivers using the same standards, forms and requirements, and in the same random testing pool, as their CDL drivers. The FMCSA denies the exemptions because Mayflower Transit LLC and United Van Lines LLC did not explain how they would achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the random controlled substances and alcohol testing requirements.

EFFECTIVE DATE: January 13, 2004.

FOR FURTHER INFORMATION CONTACT: Ms. Kaye Kirby, Office of Bus Truck Standards and Operations, Physical Qualifications Division, (202) 366–3109, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:15 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: Public Participation: The Docket Management System (DMS) is available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help guidelines under the "help" section at: *http://dms.dot.gov.*

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review the Department of Transportation's complete Privacy Act Statement in the **Federal Register** (FR) published on April 11, 2000 (volume 65, Number 70; Pages 19477–78) or read it on the DMS "help" section.

Background

On May 15, 2003, 68, FR, 26374, the FMCSA published a Notice of its receipt of an application from Mayflower and United Van Lines that requested exemptions that would allow them to impose controlled substance and alcohol testing on their non-CDL drivers using the same standards, forms and requirements, and in the same random testing pool as their CDL drivers. Mayflower and United Van Lines noted

that for purposes of administrative efficiency and to promote safety in their operations, Mayflower and United Van Lines included all of the commercial motor vehicle drivers, including the non-CDL drivers, in the company controlled substance and alcohol testing programs conducted under the Department of Transportation (DOT) regulations. This request for exemptions was prompted as a result of a compliance review conducted by FMCSA during which Mayflower was cited for including non-CDL drivers in its controlled substances and alcohol testing program. Consequently, Mayflower and United Van Lines requested exemptions from certain controlled substance and alcohol testing requirements specifically, 49 CFR 382.105, 49 CFR 382.305(I)(1), and 49 CFR 40.13(a), (b), (c) and (d).

Sections 31315 and 31136 of title 49 of the United States Code provide the authority to grant exemptions from certain portions of the Federal Motor Carrier Safety Regulations (FMCSRs). Exemptions provide time-limited regulatory relief from one or more FMCSRs given to a person or class of persons subject to the regulations, or who intend to engage in an activity that would make them subject to the regulations. Exemptions provide the person or class of persons with relief from the regulations for up to two years and may be renewed. These sections also require the agency to ensure that the terms and conditions for the exemptions would achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the regulations when evaluating applications for exemptions.

Discussion of Docket Comments

The FMCSA received eight comments to the notice announcing the FMCSA's receipt of the application from Mayflower and United Van Lines. The Drug and Alcohol Testing Industry Association (DATIA), Lawrence C. Hartung, Ronald K Edwards, Michael Silverman, Renee Lane, and Thomas E. Swayne were opposed to granting exemptions to Mayflower and United Van Lines. These commenters believe the management of two pools within the same company, one regulated and one not regulated, is a relatively common task, which can be managed easily by someone within the company, by Third Party Administrators (TPA), or Medical Review Officers (MROs). This is currently done on a daily basis with little additional administrative work, and the overall effort to manage the two pools is negligible. In addition, commenters noted that the overall size of these two employers could potentially skew statistical data for the entire industry if they were allowed to include non-CDL employees in with CDL employees. It was noted that for the safety of the general public, the DOT has set standards requiring all CDL drivers to be tested at a certain rate each year. Adding all the non-CDL drivers and employees to the same random pool would prevent them from achieving the required rate of testing. DATIA stated, "to allow employers to include non-covered employees in the same pool as FMCSA covered employees would have far reaching negative effects on the FMCSA drug and alcohol testing program."

Another commenter, Joe Kroening, appeared to be in favor of granting the request and noted that he fully supported the testing of all drivers and helpers in the industry whether or not they hold CDLs. The remaining commenter did not express opposition or support for granting Mayflower and United Van Lines an exemption.

FMCSA Decision

The FMCSA has carefully reviewed the Mayflower and United Van Lines application for exemptions from certain Federal controlled substance and alcohol testing requirements. The agency agrees with certain commenters that the administrative burden is not overwhelming, and the management of two pools within the same company is a relatively common task managed easily either within the company, or by TPAs and MROs. Federal controlled substances and alcohol testing requirements (49 CFR 382.105, 49 CFR 382.305(I)(1), and 49 CFR 40.13(a), (b)(c) and (d)) are designed to keep testing standards high in the interest of public safety. Mayflower and United Van Lines have not demonstrated how their proposal would achieve a level of safety that is equivalent to, or greater than, the levels of safety that would be obtained by complying with the controlled substances and alcohol testing requirements. Consequently, the FMCSA is denying the Mayflower and United Van Lines request for exemptions from the Federal requirements for controlled substance and alcohol testing.

Issued on: January 6, 2004.

Rose A. McMurray,

Associate Administrator, Policy and Program Development.

[FR Doc. 04–595 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Petition for Special Approval of Alternate Standard

In accordance with Section 21, Part 238 of Title 49 Code of Federal Regulations (CFR), notice is hereby given that the Federal Railroad Administration (FRA) received a request for special approval of an alternate standard of compliance for certain requirements of railroad safety standards. The individual petition is described below, including the party seeking relief, the regulatory provisions involved, the nature of the relief being requested, and the petitioner's arguments in favor of relief.

National Railroad Passenger Corporation (Amtrak) Special Approval Petition Docket Number FRA–2003–16666

The National Railroad Passenger Corporation (Amtrak) seeks approval for use of an alternate standard to comply with section 311 of the *Passenger Equipment Safety Standards* (49 CFR part 238) for single car testing of passenger car brakes. Section 311 requires single car brake tests to be performed in accordance with either APTA Standard SS–M–005–98, "Code of Tests for Passenger Car Equipment Using Single Car Testing Device," published March 1999, or with an alternative procedure approved by FRA pursuant to 49 C.F.R. 238.21. Amtrak requests an alternate standard for single car brake tests on "Talgo" train sets utilized by Amtrak.

Amtrak states that although Talgo brake equipment can receive the single car test utilizing the APTA standard, the proposed alternate standard would allow a semi-permanently coupled train set to remain coupled during testing. Amtrak indicates that the proposed alternate procedure on shorter length cars combined with reduced brake pipe volume would produce air flow rates not compatible with the APTA standard. During the brake pipe leakage test, the APTA standard allows for a 5–PSI drop in pressure for one minute in a single car, while the alternate Talgo standard allows only a 4.3–PSI drop in 30 minutes for the entire train set (normally 12 to 14 cars). In the service stability test, the APTA standard allows the brake cylinder pressure to increase by three PSI in one minute. In the alternate Talgo brake test procedure, an increase of 1.5 PSI occurs during the same time frame. The control valve leakage test in the APTA standard

allows a 2–PSI-per-minute leakage rate. In the alternate Talgo procedure, leakage is not allowed.

Amtrak has supplied a copy of the alternate Talgo standard, a statement affirming that Amtrak has served a copy of the petition on designated representatives of its employees, and a list of the names and addresses of the persons served. These documents are available in the docket for this proceeding.

You may participate in this proceeding by submitting written views, data, or comments. Include the basis upon which you are supplying the information or comment and submit a concise statement of your particular interest in the proceeding. FRA does not anticipate scheduling a public hearing in connection with this proceeding because the facts do not appear to warrant a hearing. However, if you desire an opportunity to present an oral comment, please notify FRA, in writing, before the end of the comment period and specify the basis for your request.

Identify all of your communications with the appropriate docket number (FRA–2003–16666) and submit them to the Docket Clerk, DOT Docket Management Facility, Room PL–401 (Plaza Level), 400 7th Street, SW., Washington, DC 20590. Communications received within 30 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. You may examine all written communications concerning this proceeding during regular business hours (9 a.m.–5 p.m.) at the above facility. You also may view all documents in the public docket via the Internet by visiting the docket facility's Web site at *http://dms.dot.gov* and searching by the docket number for this proceeding.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78). The Statement may also be found at *http://dms.dot.gov.*

Issued in Washington, DC, on January 8, 2004.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

[FR Doc. 04–704 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket RSPA–98–4957; Notice 04–01]

Request for Extension of Existing Information Collection

AGENCY: Research and Special Programs Administration, DOT.

ACTION: Request for OMB approval and public comments.

SUMMARY: As required by the Paperwork Reduction Act of 1995, the Research and Special Programs Administration (RSPA) is publishing this notice seeking public comments on a proposed renewal of an information collection for *Incorporation by Reference of Industry Standard on Leak Detection.* This information collection requires hazardous liquid pipeline operators who have leak detection systems to maintain records of those systems.

DATES: Comments on this notice must be received no later than March 15, 2004 to be assured of consideration.

ADDRESSES: You must identify the docket number RSPA–98–4957; Notice 04–01 at the beginning of your comments. Comments can be mailed to the U.S. Department of Transportation, Dockets Facility, Plaza 401, 400 Seventh St., SW., Washington, DC 20590. Comments can also be sent by e-mail to *dms.dot.gov.*

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Marvin Fell, Office of Pipeline Safety, Research and Special Programs Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20950, (202) 366–6205 or by electronic mail at *marvin.fell@rspa.dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Incorporation by Reference of Industry Standard on Leak detection.

OMB Number: 2137–0598.

Type of Request: Extension of an existing information collection.

Respondents: Hazardous liquid pipeline operators that use computational monitoring systems (CPM's) for leak detection.

Estimate of Burden: 2 hours per operator.

Estimated Number of Responses per Respondent: 1.

Estimated Total Burden : 100 hours.

Estimated Number of Respondents: 50.

Abstract: Pipeline safety regulations do not require hazardous liquid pipeline operators to have computer-based leak detection systems. However, if these operators choose to acquire such software-based leak detection systems they must adhere to the American Petroleum Institute API 1130 when operating, maintaining and testing their existing software-based leak detection systems. The testing information of these systems must be maintained by hazardous liquid pipeline operators.

Copies of this information collection can be reviewed at the Dockets Facility, Plaza 401, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590 from 9 a.m. to 5 p.m. Monday through Friday except Federal holidays. They also can be viewed via the Internet at *http://dms.dot.gov.*

Comments are invited on: (a) The need for the proposed collection of information 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 the use of appropriate automated, electronic, mechanical, or other technological collection techniques. Send written comments in duplicate to Dockets Facility, Plaza 401, U.S. Department of Transportation, 400 Seventh St., SW., Washington, DC 20590. Please reference the docket number of this notice (RSPA–98–4957; Notice 04–01) when submitting your comments. Comments can also be sent electronically to *dms.dot.gov.*

Issued in Washington, DC, on January 7, 2004.

James K. O'Steen,

Deputy Associate Administrator for Pipeline Safety.

[FR Doc. 04–638 Filed 1–12–04; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34452]

Union Pacific Railroad Company—Temporary Trackage Rights Exemption—The Burlington Northern and Santa Fe Railway Company

The Burlington Northern and Santa Fe Railway Company (BNSF) has agreed to grant temporary overhead trackage rights to Union Pacific Railroad Company (UP) over BNSF's rail line between BNSF milepost 0.0 at Klamath Falls, OR, and BNSF milepost 203.0 at Keddie, CA, a distance of approximately 203 miles.

The transaction was scheduled to be consummated on January 11, 2004, and the authorization is scheduled to expire on or about March 1, 2004. The purpose of the temporary trackage rights is to facilitate maintenance work on UP lines.

As a condition to this exemption, any employees affected by the temporary trackage rights will be protected by the conditions imposed in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982).

This notice is filed under 49 CFR 1180.2(d)(8).[1] If it contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34452, must be filed with the Surface Transportation Board, 1925 K Street NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on William G. Barr, 1416 Dodge Street, Room 830, Omaha, NE. 68179.

Board decisions and notices are available on the Board's Web site at *http://www.stb.dot.gov*.

Decided: January 6, 2004.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–686 Filed 1–12–04; 8:45 am]

BILLING CODE 4915–00–P

[1] UP originally filed the instant notice of exemption under 49 CFR 1180.2(d)(7), and also filed a petition for partial revocation of the trackage rights. UP amended its notice in a letter dated January 5, 2004, because the proposed transaction qualifies for the new class exemption adopted by the Board in *Railroad Consolidation Procedures—Exemption for Temporary Trackage Rights*, STB Ex Parte No. 282 (Sub-No. 20) (STB served May 23, 2003).

DEPARTMENT OF THE TREASURY

Departmental Offices; Debt Management Advisory Committee Meeting

Notice is hereby given, pursuant to 5 U.S.C. App. 2, § 10(a)(2), that a meeting will be held at the Hay-Adams Hotel, 16th and Pennsylvania Avenue, NW., Washington, DC, on February 3, 2004 at 11 a.m. of the following debt management advisory committee: Treasury Borrowing Advisory Committee of The Bond Market Association ("Committee").

The agenda for the meeting provides for a charge by the Secretary of the Treasury or his designate that the Committee discuss particular issues, and a working session. Following the working session, the Committee will present a written report of its recommendations. The meeting will be closed to the public, pursuant to 5 U.S.C. App. 2, § 10(d) and Pub. L. 103–202, § 202(c)(1)(B) (31 U.S.C. 3121 note).

This notice shall constitute my determination, pursuant to the authority placed in heads of agencies by 5 U.S.C. App. 2, § 10(d) and vested in me by Treasury Department Order No. 101–05, that the meeting will consist of discussions and debates of the issues presented to the Committee by the Secretary of the Treasury and the making of recommendations of the Committee to the Secretary, pursuant to Pub. L. 103–202, § 202(c)(1)(B). Thus, this information is exempt from disclosure under that provision and 5 U.S.C. 552b(c)(3)(B). In addition, the meeting is concerned with information that is exempt from disclosure under 5 U.S.C. 552b(c)(9)(A). The public interest requires that such meetings be closed to the public because the Treasury Department requires frank and full advice form representatives of the financial community prior to making its final decision on major financing operations. Historically, this advice has been offered by debt management advisory committees established by the several major segments of the financial community. When so utilized, such a committee is recognized to be an advisory committee under 5 U.S.C. App. 2, § 3.

Although the Treasury's final announcement of financing plans may not reflect the recommendations provided in reports of the Committee, premature disclosure of the Committee's deliberations and reports would be likely to lead to significant financial speculation in the securities market. Thus, this meeting falls within the exemption covered by 5 U.S.C. 552b(c)(9)(A).

Treasury staff will provide a technical briefing to the press on the day before the Committee meeting, following the release of a statement of economic conditions, financing estimates and technical charts. This briefing will give the press an opportunity to ask questions about financing projections and technical charts. The day after the Committee meeting, Treasury will release the minutes of the meeting, any charts that were discussed at the meeting, and the Committee's report to the Secretary.

The Office of Debt Management is responsible for maintaining records of debt management advisory committee meetings and for providing annual reports setting forth a summary of Committee activities and such other matters as may be informative to the public consistent with the policy of 5 U.S.C. 552(b). The Designated Federal Officer or other responsible agency official who may be contacted for additional information is Tim Bitsberger, Deputy Assistant Secretary, Federal Finance, at (202) 622–2245.

Dated: January 6, 2004.

Brian C. Roseboro,

Assistant Secretary, Financial Markets.

[FR Doc. 04–605 Filed 1–12–04; 8:45 am]

BILLING CODE 4810–25–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Forms W–2, W–2c, W–2AS, W–2GU, W–2VI, W–3, W–3c, W–3cPR, W–3PR, and W–3SS

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and

other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Forms W–2, W–2c, W–2AS, W–2GU, W–2VI, W–3, W–3c, W–3cPR, W–3PR, and W–3SS.

DATES: Written comments should be received on or before March 15, 2004 to be assured of consideration.

ADDRESSES: Direct all written comments to Robert M. Coar, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Carol Savage at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3945, or through the Internet at *CAROL.A.SAVAGE@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: W–2 (Wage and Tax Statement), W–2c (Corrected Wage and Tax Statement), W–2AS (American Samoa Wage and Tax Statement), W–2GU (Guam Wage and Tax Statement), W–2VI (U.S. Virgin Islands Wage and Tax Statement), W–3 (Transmittal of Wage and Tax Statements), W–3c (Transmittal of Corrected Wage and Tax Statements), W–3PR (Informe de Comprobantes de Retencion), W–3cPR (Transmision de Comprobantes de Retencion Corregidos), and W–3SS (Transmittal of Wage and Tax Statements).

OMB Number: 1545–0008.

Form Number: Forms W–2, W–2c, W–2AS, W–2GU, W–2VI, W–3, W–3c, W–3cPR, W–3PR, and W–3SS.

Abstract: Employers report income and withholding information on Form W–2. Forms W–2AS, W–2GU and W–2VI are variations of Form W–2 for use in U.S. possessions. The Form W–3 series is used to transmit W–2 series forms to the Social Security Administration. Forms W–2c, W–3c and W–3cPR are used to correct previously filed Forms W–2, W–3, and W–3PR. Individuals use Form W–2 to prepare their income tax returns.

Current Actions: There are no changes being made to these forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations individuals, or households, not-for-profit institutions, farms, and Federal, state, local or tribal governments.

Estimated Number of Responses: 253,007,121.

Estimated Time Per Response: Varies.

Estimated Total Annual Burden Hours: 124,459,980.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 7, 2004.

Robert M. Coar,

IRS Reports Clearance Officer.

[FR Doc. 04–711 Filed 1–12–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1041 and Related Schedules D, J, and K–1

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1041 and related Schedules D, J, and K–1, U.S. Income Tax Return for Estates and Trusts.

DATES: Written comments should be received on or before March 15, 2004 to be assured of consideration.

ADDRESSES: Direct all written comments to Robert M. Coar, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Carol Savage at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3945, or through the Internet at *CAROL.A.SAVAGE@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: U.S. Income Tax Return for Estates and Trusts (Form 1041), Capital Gains and Losses (Schedule D), Accumulation Distribution for Certain Complex Trusts (Schedule J), and Beneficiary's Share of Income, Deductions, Credits, etc. (Schedule K–1).

OMB Number: 1545–0092.

Form Number: 1041 and related Schedules D, J, and K–1.

Abstract: IRC section 6012 requires that an annual income tax return be filed for estates and trusts. The data is used by the IRS to determine that the estates, trusts, and beneficiaries filed the proper returns and paid the correct tax.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and individuals.

Estimated Number of Respondents: 3,496,119.

Estimated Time Per Respondent: 117 hours, 38 minutes.

Estimated Total Annual Burden Hours: 411,281,532.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration

of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 7, 2004.

Robert M. Coar,

IRS Reports Clearance Officer.

[FR Doc. 04–712 Filed 1–12–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 990 and Schedules A and B

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 990, Return of Organization Exempt From Income Tax Under Section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation), Schedule A, Organization Exempt Under Section 501(c)(3) (Except Private Foundation), and Section 501(e), 501(f), 501(k), 501(n), or Section 4947(a)(1) Nonexempt Charitable Trust, and Schedule B, Schedule of Contributors.

DATES: Written comments should be received on or before March 15, 2004, to be assured of consideration.

ADDRESSES: Direct all written comments to Robert M. Coar, Internal Revenue Service, room 5244, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the forms and instructions should be directed to Carol Savage at Internal Revenue Service, room 6407, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–3945, or through the Internet at *CAROL.A.SAVAGE@irs.gov*.

SUPPLEMENTARY INFORMATION:

Title: Return of Organization Exempt From Income Tax Under Section 501(c), 527, 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation) (Form 990), Organization Exempt Under Section 501(c)(3) (Except Private Foundation), and Section 501(e), 501(f), 501(k), 501(n), or Section 4947(a)(1) Nonexempt Charitable Trust (Schedule A), and Schedule of Contributors (Schedule B).

OMB Number: 1545–0047.

Form Number: 990, and Schedules A and B (Form 990).

Abstract: Form 990 is needed to determine that Code section 501(a) tax-exempt organizations fulfill the operating conditions of their tax exemption. Schedule A (Form 990) is used to elicit special information from section 501(c)(3) organizations. Schedule B is used by tax-exempt organizations to list contributors and allows the IRS to distinguish and make public disclosure of the contributors list within the requirements of Code section 527. IRS uses the information from these forms to determine if the filers are operating within the rules of their exemption.

Current Actions: There are no changes being made to the forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Not-for-profit institutions.

Estimated Number of Respondents: 287,769.

Estimated Time Per Respondent: 167 hrs., 23 min.

Estimated Total Annual Burden Hours: 48,166,918.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: January 7, 2004.

Robert M. Coar,

IRS Reports Clearance Officer.

[FR Doc. 04–713 Filed 1–12–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Area 7 Taxpayer Advocacy Panel Including the State of California

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Area 7 committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The Taxpayer Advocacy Panel (TAP) is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. The TAP will use citizen input to make recommendations to the Internal Revenue Service.

DATES: The meeting will be held Tuesday, February 3, 2004.

FOR FURTHER INFORMATION CONTACT: Mary Peterson O'Brien at 1–888–912–1227, or (206) 220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section

10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Area 7 Taxpayer Advocacy Panel will be held Tuesday, February 3, 2004 from 12 pm Pacific Time to 1 pm Pacific Time via a telephone conference call. The public is invited to make oral comments. Individual comments will be limited to 5 minutes. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or (206) 220–6096, or write to Mary Peterson O'Brien, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Mary Peterson O'Brien. Ms. O'Brien can be reached at 1–888–912–1227 or (206) 220–6096.

The agenda will include the following: Various IRS issues.

Dated: January 7, 2004.

Bernard Coston,

Director, Taxpayer Advocacy Panel.

[FR Doc. 04–714 Filed 1–12–04; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Small Business/Self Employed—Payroll Committee of the Taxpayer Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the Small Business/Self Employed—Payroll Committee of the Taxpayer Advocacy Panel will be conducted (via teleconference). The TAP will be discussing issues pertaining to increasing compliance and lessening the burden for Small Business/Self Employed individuals. Recommendations for IRS systemic changes will be developed.

DATES: The meeting will be held Thursday, February 5, 2004.

FOR FURTHER INFORMATION CONTACT: Mary O'Brien at 1–888–912–1227, or (206) 220–6096.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Small Business/Self Employed—Payroll Committee of the Taxpayer Advocacy Panel will be held Thursday, February 5, 2004 from 3:00pm EDT to 4:30pm EDT via a telephone conference call. If you would like to have the TAP consider a written statement, please call 1–888–912–1227 or (206) 220–6096, or write to Mary O'Brien, TAP Office, 915 2nd Avenue, MS W–406, Seattle, WA 98174. Due to limited conference lines, notification of intent to participate in the telephone conference call meeting must be made with Mary O'Brien. Ms. O'Brien can be reached at 1–888–912–1227 or (206) 220–6096.

The agenda will include the following: Various IRS issues.

Dated: January 7, 2004.

Bernard Coston,

Director, Taxpayer Advocacy Panel.

[FR Doc. 04–715 Filed 1–12–04; 8:45 am]

BILLING CODE 4830–01–P

Federal Register

Tuesday,
January 13, 2004

Part II

Office of Personnel Management

5 CFR Parts 317, 352, 531, and 534
Senior Executive Service Pay and Performance Awards; Interim Final Rule

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 317, 352, 531, and 534

RIN 3206–AK32

Senior Executive Service Pay and Performance Awards

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing interim regulations to establish a new pay-for-performance system for the Senior Executive Service (SES). The new SES pay system replaces the current six-level system with an open-range "payband" and allows a higher annual maximum rate of basic pay. These regulations set forth the requirements for converting SES members to the new pay system and adjusting SES rates of basic pay.

DATES: *Effective Date:* The regulations are effective on January 1, 2004.

Applicability Date: The regulations apply on the first day of the first applicable pay period beginning on or after January 1, 2004.

Comment Date: Comments must be received by OPM on or before March 15, 2004.

ADDRESSES: Send or deliver comments to Donald J. Winstead, Deputy Associate Director for Pay and Performance Policy, Office of Personnel Management, Room 7H31, 1900 E Street, NW., Washington, DC 20415–8200; by FAX at (202) 606–0824; or by e-mail at *pay-performance-policy@opm.gov.*

FOR FURTHER INFORMATION CONTACT: For information, please contact Jo Ann Perrini by telephone at (202) 606–2858; by FAX at (202) 606–0824; or by email at pay-performance-policy@opm.gov.

SUPPLEMENTARY INFORMATION: Section 1125 of the "National Defense Authorization Act for Fiscal Year 2004" (Public Law 108–136, November 24, 2003) (the "Act") amends 5 U.S.C. 5382 to replace the current six-level pay system for the Senior Executive Service (SES) with a single, open-range "payband" that has only its minimum and maximum rates of basic pay fixed by statute. The minimum rate of basic pay in the SES rate range may not be less than the minimum rate of basic pay (excluding locality pay) payable under 5 U.S.C. 5376 for senior-level positions ($103,700 in 2004), and the maximum rate of basic pay in the SES rate range may not exceed the rate for level III of the Executive Schedule ($144,600 in 2004). The new section 5382 also allows the maximum rate of basic pay to be set at level III of the Executive Schedule for a position in a system equivalent to the SES as determined by the President's Pay Agent (*i.e.*, the Secretary of Labor and the Directors of the Office of Management and Budget (OMB) and the Office of Personnel Management (OPM)).

The new section 5382 will allow an agency to establish a higher maximum rate of basic pay in the SES rate range up to the rate for level II of the Executive Schedule ($157,000 in 2004) if the agency obtains the certification specified in 5 U.S.C. 5307(d). In addition, agencies that obtain such certification will be allowed to apply to their SES members a higher aggregate limitation on pay under 5 U.S.C. 5307(d) that is equivalent to the total annual compensation payable to the Vice President ($201,600 in 2004). Section 1322 of the Homeland Security Act of 2002 (Public Law 107–296, November 25, 2002) added a new paragraph (d) to 5 U.S.C. 5307 to allow those agencies that are granted such certification to apply a higher aggregate limitation on pay equivalent to the total compensation payable to the Vice President. Under 5 U.S.C. 5307(d)(3)(A), the regulations prescribing the substantive and procedural requirements that an agency must meet to receive such certification for these purposes must be issued jointly by OPM and OMB. Consequently, those regulations will be promulgated separately. Those regulations also will address the requirements for setting a senior executive's rate of basic pay up to the rate for level II of the Executive Schedule.

The new section 5382 provides that, subject to regulations prescribed by OPM, there shall be established a range of rates of basic pay for the Senior Executive Service, and each senior executive shall be paid at one of the rates within the range, based on individual performance, contribution to the agency's performance, or both, as determined under a rigorous performance management system. In promulgating these regulations, OPM interprets this provision as permitting agencies to consider any unique skills, qualifications, or competencies that the individual possesses, and their significance to the agency's mission, as well as the individual's current responsibilities.

OPM has added a new § 534.406 to establish the structure of the new SES pay system, as well as the rules for conversion to the new pay system. In addition, new § 534.406 provides criteria for providing a pay adjustment to eligible senior executives on or after the first day of the first applicable pay period beginning on or after January 1, 2004. In these regulations, we refer to SES members as "senior executives."

As a general matter, senior executives paid above the minimum rate will no longer receive an automatic annual across-the-board pay adjustment. The minimum rate of basic pay in the SES rate range will increase consistent with any increase in the minimum rate of basic pay for senior-level positions under 5 U.S.C. 5376 and the maximum rate of basic pay in the SES rate range will increase with any increase in the rate for level III of the Executive Schedule.

Under the new SES pay system, individual SES members will no longer receive locality-based comparability payments. Section 5 U.S.C. 5304(h) has been amended to remove the SES pay system, as well as the Federal Bureau of Investigation (FBI) and Drug Enforcement Administration (DEA) SES pay system from the list of positions for which locality-based comparability payments may be extended. In addition, revised 5 U.S.C. 5304(h) prohibits other positions under a system equivalent to the SES pay system, as determined by the President's Pay Agent, from receiving locality-based comparability payments. We have made conforming amendments in 5 CFR part 531 to reflect the changes made by 5 U.S.C. 5304(h).

New SES Performance-Based Pay System

Conversion to the new SES pay system. Section 534.406 of OPM's interim regulations requires agencies to convert SES members to the new SES pay system on the first day of the first applicable pay period beginning on or after January 1, 2004. The senior executive's converted rate of basic pay is the employee's rate of basic pay, plus any applicable locality pay, in effect immediately prior to the first day of the first applicable pay period beginning on or after January 1, 2004. The newly converted SES rate will become the SES member's rate of basic pay for all pay computation purposes, and the existing pay plan code "ES" for SES members will be retained. Conversion to a new SES rate of basic pay is not considered a pay adjustment under § 534.401(c)(1) for the purpose of limiting an agency's flexibility to adjust pay more than once during a 12-month period.

Prohibition on reducing pay for 12 months. Consistent with section 1125(c)(2) of the Act, the interim regulations prohibit agencies from reducing a senior executive's rate of basic pay, including any applicable

locality payment, below the rate that was in effect on November 24, 2003, for 12 months following the effective date of the new SES pay system (January 11, 2004, for most employees).

FBI and DEA SES. Under 5 U.S.C. 3151, the Attorney General may provide rates of basic pay for the FBI and DEA SES that are not less than nor greater than the rates of basic pay established for the SES under 5 U.S.C. 5382, and the Attorney General may adjust the rates of basic pay for the FBI and DEA SES "at the same time and to the same extent as rates of basic pay for the [SES] are adjusted." As a result, the new minimum and maximum rates of basic pay for the SES under 5 U.S.C. 5382 also will apply to the FBI and DEA SES. In addition, on the first day of the first applicable pay period beginning on or after January 1, 2004, affected agencies are authorized to convert the rates of basic pay for FBI and DEA senior executives to include any applicable locality payment in effect for the employee immediately before that date. The newly converted rate of basic pay will become the individual's rate of basic pay for all pay computation purposes. Since the rates of basic pay for the FBI/DEA SES are adjusted "at the same time and to the same extent" as rates of basic pay for the SES are adjusted, conversion to a new rate of basic pay is not considered a pay adjustment for the purpose of applying § 534.401(c)(1).

Geographic assignments outside the 48 contiguous States and the District of Columbia. Certain members of the SES may be in positions that have geographic mobility requirements and are expected to serve abroad for portions of their careers. On the first day of the first applicable pay period beginning on or after January 1, 2004, these senior executives may be on assignment outside the 48 contiguous States or the District of Columbia to a position overseas or in Alaska, Hawaii, Guam and the Commonwealth of the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, or other U.S. territories and possessions where locality pay is not authorized. While these senior executives will convert to the new SES pay system at their rate of basic pay (exclusive of any locality rate of pay) on the first day of the first applicable pay period beginning on or after January 1, 2004, their converted rate of basic pay must be adjusted upon reassignment to a locality pay area. The adjustment will be equal to the amount of locality pay authorized for the applicable locality pay area upon reassignment. The adjustment will be prospective, not retroactive, and it will not be considered a pay adjustment for the purpose of applying § 534.401(c)(1).

SES Law Enforcement Officers. On the first day of the first applicable pay period beginning on or after January 1, 2004, a law enforcement officer (LEO) who is a member of the SES (including LEOs in the FBI and DEA SES) will continue to receive his or her rate of basic pay, plus any applicable special geographic pay adjustment established for LEOs under section 404(a) of the Federal Employees Pay Comparability Act of 1990 (Public Law 101–509) that he or she was entitled immediately before that date. Currently, a special geographic pay adjustment (16 percent) applies only to LEOs in the Boston-Worchester-Lawrence, MA-NH-ME-CT Consolidated Metropolitan Statistical Area (CMSA). When the special geographic pay adjustment for LEOs in Boston no longer applies (because a higher locality pay percentage becomes applicable to employees in the Boston locality pay area), the senior executive's rate of basic pay will be converted to his or her rate of basic pay, plus the special geographic pay adjustment for LEOs, in effect immediately before the effective date of the higher locality-based comparability payment. Conversion to a new SES rate of basic pay is not considered a pay adjustment for the purpose of applying § 534.401(c)(1).

Adjustments in Pay Prior to Any Certification Pursuant to 5 U.S.C. 5307(d)

The new § 534.406(c) authorizes agencies to increase a senior executive's converted rate of basic pay on the first day of the first applicable pay period beginning on or after January 1, 2004, or on any date thereafter. Prior to obtaining certification under 5 U.S.C. 5307(d), such increases may be made only up to the new rate for level III of the Executive Schedule, and only upon a determination that the senior executive's performance and/or contributions so warrant and that the senior executive is otherwise eligible for such a pay adjustment (*i.e.*, he or she has not received a pay adjustment in the previous 12-month period.)

In assessing an individual's performance and/or contribution to the agency's performance, the agency may consider such things as unique skills, qualifications, or competencies that the individual possesses and their significance to the agency's mission, as well as the individual's current responsibilities. Any such adjustment will be considered a pay adjustment for the purpose of applying § 534.401(c)(1) and will be reviewed for the purpose of granting certification under 5 U.S.C. 5307(d). If there is an additional increase in the rate for level III of the Executive Schedule in 2004, and if that increase becomes effective as of the first day of the first applicable pay period beginning on or after January 1, 2004, an agency may review the previous determination to increase the pay of a senior executive to determine whether, and to what extent, an additional pay increase may be warranted based on the same criteria used for the previous determination to increase pay. If the agency determines that an additional pay increase is warranted, that increase must be made effective as of the effective date of the previous increase.

In addition, new § 534.401(c)(2) allows an agency to request an exception from the Director of OPM to the rule that limits an agency's authority to adjust a senior executive's rate of basic pay more than once during a 12-month period.

Miscellaneous Changes

Section 1321 of the Homeland Security Act repealed the SES recertification requirements in 5 U.S.C. 3393a. As a result, OPM's regulations in § 317.504 are no longer needed and have been removed. In addition, we have made changes in 5 CFR parts 317 and 352 to remove references to the former six levels of SES pay.

Regulatory Flexibility Act

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

Waiver of Notice of Proposed Rulemaking

Pursuant to section 553(b)(3)(B) of title 5 of the United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking. Also, pursuant to 5 U.S.C. 553(d)(3), I find that good cause exists for making this rule effective in less than 30 days. These regulations implement Public Law 108–136, which became effective on November 24, 2003. The waiver of the requirements for proposed rulemaking and a delay in the effective date is necessary to ensure timely implementation of the law as intended by Congress.

E.O. 12866, Regulatory Review

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

List of Subjects in 5 CFR Parts 317, 352, 531, and 534

Decorations, Medals, Awards, Government employees, Law enforcement officers, Reporting and recordkeeping requirements, Wages, Hospitals, and Students.

Office of Personnel Management.

Kay Coles James,

Director.

■ Accordingly, OPM is amending parts 317, 352, 531, and 534 as follows:

PART 317—EMPLOYMENT IN THE SENIOR EXECUTIVE SERVICE

■ 1. The authority citation for part 317 is revised to read as follows:

Authority: 5 U.S.C. 3392, 3393, 3395, 3397,3592, 3593, 3595, 3596, 8414, and 8421.

Subpart C—Conversion to the Senior Executive Service

■ 2. In § 317.302, paragraphs (a)(2), (b)(3), and (d)(2) are revised to read as follows:

§ 317.302 Conversion procedures.

(a) * * *

(2) *Pay.* Upon conversion to the Senior Executive Service, an employee's SES rate will be determined under 5 CFR part 534, subpart D.

* * * * *

(b) * * *

(3) *Pay.* An employee's SES rate will be determined under 5 CFR part 534, subpart D.

* * * * *

(d) * * *

(2) *Pay.* An employee's SES rate will be determined under 5 CFR part 534, subpart D.

* * * * *

Subpart E—Career Appointments

§ 317.504 [Removed and Reserved]

■ 3. Section 317.504 is removed and reserved.

Subpart H—Retention of SES Provisions

§ 317.801 [Amended]

■ 4. In § 317.801, paragraph (b)(3) is removed.

PART 352—REEMPLOYMENT RIGHTS

■ 5. The authority citation for subpart B of part 352 continues to read as follows:

Authority: 5 U.S.C. 3101 note, 3301, 3131 *et seq.* 3302; E.O. 10577, 3 CFR 1954–1958 Comp., p. 218; sec. 352. 209 also issued under 5 U.S.C. 7701, *et seq.*

■ 6. In part 352, remove the phrase "SES pay level" and add in its place "SES rate of basic pay as determined under 5 CFR part 534, subpart D" wherever it occurs.

PART 531—PAY UNDER THE GENERAL SCHEDULE

■ 7. The authority citation for part 531 continues to read as follows:

Authority: 5 U.S.C. 5115, 5307, and 5338; sec. 4 of Pub. L. 103–89, 107 Stat. 981; and E.O. 12748, 56 FR 4521, 3 CFR, 1991 Comp., p. 316; Subpart B also issued under 5 U.S.C. 5303(g), 5333, 5334(a), and 7701(b)(2); Subpart C also issued under 5 U.S.C. 5304, 5305, and 5553; sections 302 and 404 of Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. 101–509, 104 Stat. 1462 and 1466; and section 3(7) of Pub. L. 102–378, 106 Stat. 1356; Subpart D also issued under 5 U.S.C. 5335(g) and 7701(b)(2); Subpart E also issued under 5 U.S.C. 5336; Subpart F also issued under 5 U.S.C. 5304, 5305(g)(1), and 5553; and E.O. 12883, 58 FR 63281, 3 CFR, 1993 Comp., p. 682 and E.O. 1306, 63 FR 68151, 3 CFR, 1998 Comp., p. 224; Subpart G also issued under 5 U.S.C. 5304, 5305, and 5553; section 302 of the FEPCA, Pub. L. 101–509, 104 Stat. 1462; and E.O. 12786, 56 FR 67453, 3 CFR, 1991 Comp., p. 376.

■ 8. In § 531.302, paragraph (c) is revised to read as follows:

§ 531.302 Determining special law enforcement adjusted rates of pay.

* * * * *

(c) The special law enforcement adjusted rate of pay for an employee in a position described in 5 U.S.C. 5304(h)(1)(A)–(C), in a senior executive position covered under 5 U.S.C. 3132, or in a senior executive position covered under 5 U.S.C. 3151 may not exceed the rate for level III of the Executive Schedule.

Subpart F—Locality-Based Comparability Payments

■ 9. In § 531.602, the definition of *employee* is revised and the definition of *scheduled annual rate of pay* is amended by revising paragraph (4) to read as follows:

§ 531.602 Definitions.

* * * * *

Employee means—

(1) An employee in a position to which 5 U.S.C. chapter 53, subchapter III, applies and whose official duty station is located in a locality pay area within the continental United States, including a GM employee (as defined in § 531.202); and

(2) An employee in a category of positions described in 5 U.S.C. 5304(h)(1)(A)–(D) for which the President (or designee) has authorized locality-based comparability payments under 5 U.S.C. 5304(h)(2) and whose official duty station is located in a locality pay area.

* * * * *

Scheduled annual rate of pay means—

* * * * *

(4) For an employee in a category of positions described in 5 U.S.C. 5304(h)(1)(A)–(D) for which the President (or designee) has authorized locality-based comparability payments under 5 U.S.C. 5304(h)(2), the rate of basic pay fixed by law or administrative action, exclusive of any locality-based adjustments (including adjustments equivalent to local special rate adjustments under 5 U.S.C. 5305) or other additional pay of any kind.

* * * * *

■ 10. In § 531.604, paragraph (c)(1) and the introductory language in paragraph (c)(2) are revised to read as follows:

§ 531.604 Determining locality rates of pay.

* * * * *

(c)(1) Locality rates of pay approved by the President (or designee) for employees in a category of positions described in 5 U.S.C. 5304(h)(1)(A)–(C) may not exceed the rate for level III of the Executive Schedule.

(2) Locality rates of pay approved by the President (or designee) for employees in a category of positions described in 5 U.S.C. 5304(h)(1)(D) may not exceed—

* * * * *

§ 531.606 [Amended]

■ 11. In § 531.606, paragraph (b)(6) is removed.

PART 534—PAY UNDER OTHER SYSTEMS

■ 12. The authority citation for part 534 is revised to read as follows:

Authority: 5 U.S.C. 1104, 3161(d), 5307, 5351, 5352, 5353, 5376, 5382, 5383, 5384, 5385, 5541, 5550a, and sec. 1125 of the "National Defense Authorization Act for FY 2004," Pub. L. 108–136.

Subpart D—Pay and Performance Awards Under the Senior Executive Service

■ 13. In § 534.401:

■ A. In paragraph (a), the definition of *ES rate* is removed and new definitions of *authorized agency official, SES* or *ES rate,* and *SES* or *ES rate range* are added in alphabetical order.

■ B. Paragraph (c) is revised.

The added and revised text reads as follows:

§ 534.401 Definitions and setting individual basic pay.

(a) *Definitions.* * * *

* * * * *

Authorized agency official means the head of an agency or an official who is authorized to act for the head of the agency in the matter concerned.

* * * * *

SES or *ES rate* means a rate of basic pay within the SES or ES rate range assigned to a member of the SES under § 534.406(a).

SES or *ES rate range* means the range of rates of basic pay established for the SES under 5 U.S.C. 5382 and § 534.406(a).

* * * * *

(c) *Adjusting pay while in the SES.* (1) An authorized agency official may adjust (*i.e.*, increase or reduce) the rate of basic pay of a senior executive not more than once in any 12-month period.

(i) The following pay actions are considered pay adjustments for this purpose:

(A) The setting of an individual's rate of basic pay upon initial appointment to the SES;

(B) The change from one SES rate of basic pay to another while employed in the SES;

(C) The assignment of an SES rate of basic pay upon reappointment to the SES following a break in SES service if the new SES rate of basic pay is different from the senior executive's former rate or if the break in service exceeds 12 months;

(D) An adjustment in pay granted in 2004 prior to any certification pursuant to 5 U.S.C. 5307(d), as provided in § 534.406(c)(i); and

(E) A determination by an authorized agency official to make a zero adjustment in pay or a reduction in pay for a senior executive, except as provided in paragraph (c)(1)(ii)(B) of this section.

(ii) The following pay actions are not considered pay adjustments for this purpose:

(A) Conversion of senior executives to the new SES pay system under § 534.406(b) and the conversion of other employees to equivalent senior executive positions; and

(B) A zero adjustment in pay during the 12-month period preceding the first day of the first applicable pay period beginning on or after January 1, 2004, caused by the former limitation on basic pay plus locality-based comparability payments under 5 U.S.C. 5304(g)(2) for a senior executive who was granted an increase in his or her rate of basic pay that did not result in an actual increase in pay.

(2) An authorized agency official may request an exception from the Director of OPM to the prohibition in paragraph (c)(1) of this section on adjusting a senior executive's rate of basic pay not more than once in any 12-month period.

(3) An authorized agency official may increase or reduce the rate of basic pay for a senior executive, consistent with the SES performance management requirements set forth in 5 CFR part 430, subpart C. Restrictions on reducing the rate of basic pay of a career senior executive are found in paragraph (f) of this section and in § 534.406(b)(2).

■ 14. In § 534.403, paragraph (a)(2)(i) is revised to read as follows:

(a) * * *

(2) * * *

(i) A former SES career appointee who elected to retain award eligibility under 5 CFR part 317, subpart H. If the salary of the individual is higher than the maximum rate of basic pay for the SES rate range, the maximum rate of the SES rate range is used for crediting the agency award pool under paragraph (b) of this section and the amount the individual may receive under paragraph (c) of this section.

* * * * *

■ 15. A new section 534.406 is added to subpart D to read as follows:

§ 534.406 Establishment of and conversion to SES pay system.

(a) *SES rate range.* On the first day of the first applicable pay period beginning on or after January 1, 2004, the minimum rate of basic pay of the SES rate range is set at an amount equal to the minimum rate of basic pay under 5 U.S.C. 5376 for senior-level positions (excluding any locality-based comparability payment under 5 U.S.C. 5304). An SES member may not receive less than the minimum rate of the SES rate range. The maximum rate of basic pay of the SES rate range is set at the rate for level III of the Executive Schedule. An SES member's rate of basic pay must be set at one of the rates within the SES rate range based on the senior executive's performance and/or contribution to the agency's performance. In assessing an individual's performance and/or contribution to the agency's performance, the agency may consider such things as unique skills, qualifications, or competencies that the individual possesses and their significance to the agency's mission, as well as the senior executive's current responsibilities.

(b) *Establishing an SES rate of basic pay upon conversion to the new SES pay system.*

(1) On the first day of the first applicable pay period beginning on or after January 1, 2004, agencies must convert an existing SES rate of pay for a senior executive to an SES rate of basic pay that is equal to the employee's rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 which the senior executive was receiving immediately before that date. The newly converted rate is the senior executive's SES rate of basic pay. An agency's establishment of an SES rate of basic pay for a senior executive under this paragraph is not considered a pay adjustment for the purpose of applying § 534.401(c)(1).

(2) An SES member's rate of basic pay, plus any applicable locality-based comparability payment under 5 U.S.C. 5304 to which the employee was entitled on November 24, 2003, may not be reduced for 1 year from the first day of the first applicable pay period beginning on or after January 1, 2004.

(3) Certain SES members in positions that have geographic mobility requirements and who are assigned outside the 48 contiguous States and the District of Columbia to a position overseas or in Alaska, Hawaii, Guam and the Commonwealth of the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, or other U.S. territories and possessions as of the first day of the first applicable pay period beginning on or after January 1, 2004, will be converted to a new rate of basic pay that equals their current rate of basic pay, plus the amount of locality pay authorized for the applicable locality pay area upon reassignment to a position in the 48 contiguous States or the District of Columbia. The adjustment will be prospective, not retroactive, and it will not be considered a pay adjustment for the purpose of applying § 534.401(c)(1).

(4) On the first day of the first applicable pay period beginning on or after January 1, 2004, a law enforcement officer (LEO), as defined in 5 CFR 531.301, who is a member of the SES will continue to receive his or her rate of basic pay, plus any applicable special geographic pay adjustment established for LEOs under section 404(a) of the Federal Employees Pay Comparability Act of 1990 (Public Law 101–509) to which he or she was entitled immediately before that date. When the special geographic pay adjustment for LEOs no longer applies (because a higher locality pay percentage applies to employees in the locality pay area), the senior executive's rate of basic pay will be converted to his or her rate of basic pay, plus the special geographic pay adjustment for LEOs to which he or she

was entitled immediately before the effective date of the higher locality-based comparability payments. Conversion to a new SES rate of basic pay is not considered a pay adjustment for the purpose of applying § 534.401(c)(1).

(c) *Adjustments in pay prior to any certification pursuant to 5 U.S.C. 5307(d).*

(1) An agency may increase a senior executive's rate of basic pay converted under paragraph (b) of this section on the first day of the first applicable pay period beginning on or after January 1, 2004, or on any date thereafter prior to obtaining certification under 5 U.S.C. 5307(d), but only up to the rate for level III of the Executive Schedule. An agency may provide such an increase only upon a determination that the senior executive's individual performance and/or contributions to agency performance so warrant and that the senior executive is otherwise eligible for such a pay adjustment (*i.e.*, he or she has not received a pay adjustment under § 534.402(c)(1)(i)(B) in the previous 12-month period). In assessing a senior executive's performance and/or contribution to the agency's performance, the agency may consider such things as unique skills, qualifications, or competencies that the individual possesses, and their significance to the agency's mission, as well as the senior executive's current responsibilities. An adjustment in pay made under this paragraph will be considered a pay adjustment for the purpose of applying § 534.401(c)(1).

(2) If there is an additional increase in the rate for level III of the Executive Schedule in 2004, and if that increase becomes effective as of the effective date prescribed in 5 U.S.C. 5318, an agency may review any determination made under paragraph (c)(1) of this section to determine whether, and to what extent, an additional pay increase may be warranted for a senior executive based on the same criteria used for the determination made under paragraph (c)(1) of this section. If the agency determines that an additional pay increase is warranted, that increase must be made effective as of the effective date of the increase made under paragraph (c)(1) of this section.

(3) Any adjustments in pay made under paragraphs (c)(1) and (2) of this section will be reviewed for the purpose of certification under 5 U.S.C. 5307(d).

[FR Doc. 04–733 Filed 1–9–04; 1:24 pm]

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Tuesday, January 13, 2004

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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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California; comments due by 1-20-04; published 11-21-03 [FR 03-29061]

AGRICULTURE DEPARTMENT
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