Federal Register

1–5–04
Vol. 69 No. 2

Monday
Jan. 5, 2004

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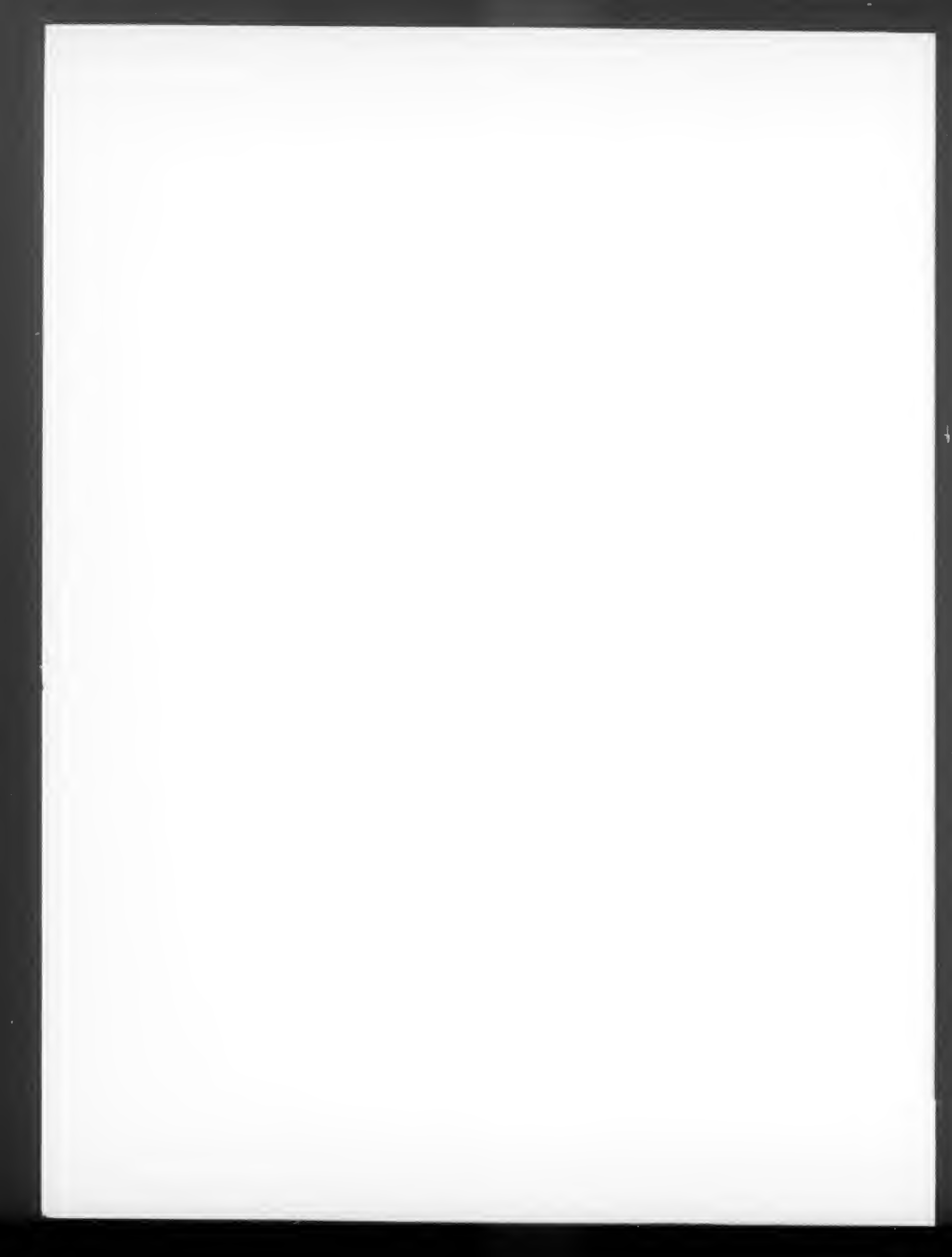

1–5–04
Vol. 69 No. 2

Monday
Jan. 5, 2004

Pages 243–484

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Contents

Federal Register
Vol. 69, No. 2
Monday, January 5, 2004

Agriculture Department
See Animal and Plant Health Inspection Service
See Commodity Credit Corporation
See Farm Service Agency
See Food Safety and Inspection Service
See Forest Service

Animal and Plant Health Inspection Service
RULES
Plant-related quarantine, domestic:
Golden nematode, 247–249
Karnal bunt, 245–247
Pine shoot beetle, 243–245
NOTICES
Environmental statements; availability, etc.:
Nonregulated status determinations—
Monsanto Co., et al: genetically engineered creeping bentgrass, 315–317

Antitrust Division
NOTICES
National cooperative research notifications:
Portland Cement Association, 374

Army Department
See Engineers Corps
NOTICES
Privacy Act:
Systems of records, 327–329

Centers for Disease Control and Prevention
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 363–364
Meetings:
Childhood Lead Poisoning Prevention Advisory Committee, 364–365
Radiation and Worker Health Advisory Board, 365

Civil Rights Commission
NOTICES
Meetings; Sunshine Act, 317

Coast Guard
RULES
Drawbridge operations:
Illinois, 267–268
Ports and waterways safety:
Port Hueneme Harbor, CA; security zone, 268–271

Commerce Department
See Industry and Security Bureau
See International Trade Administration
See National Institute of Standards and Technology
See National Oceanic and Atmospheric Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 317–318

Commodity Credit Corporation
RULES
Loan and purchase programs:
Acreage reporting and common provisions; correction, 249–250

Comptroller of the Currency
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 390–391

Defense Department
See Army Department
See Defense Logistics Agency
See Engineers Corps
See Navy Department
NOTICES
Meetings:
Electronic Devices Advisory Group, 327

Defense Logistics Agency
NOTICES
Privacy Act:
Systems of records, 329–330

Drug Enforcement Administration
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 375

Employee Benefits Security Administration
NOTICES
Employee benefit plans; individual exemptions:
United States Steel Corp., 375–383

Engineers Corps
RULES
Danger zones and restricted areas:
Hood Canal, Bangor, WA; Naval Submarine Base Bangor, 271–272
NOTICES
Environmental statements; notice of intent:
Maryland and Virginia tidal waters; oyster species introduction, 330–332
Yucaipa, San Bernardino County, CA; Wilson Creek/Oak Glen Creek Feasibility Study; correction, 332

Environmental Protection Agency
RULES
Air pollutants, hazardous; national emission standards:
Lime manufacturing plants, 393–433
PROPOSED RULES
Air quality implementation plans; approval and promulgation; various States:
Kentucky and Indiana, 302–307
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 336–339
Air pollution control:
State and local assistance—
Puerto Rico Environmental Quality Board; fiscal year 2002 Clean Air Act section 105 grant; intent to revoke, 339

Air programs:
State implementation plans; adequacy status for transportation conformity purposes—
Colorado, 339–340
Reports and guidance documents; availability, etc.:
Clean Water Act—
Nonylphenol; aquatic life criteria document; scientific views request, 340–342
Tributylin; final aquatic life criteria, 342–343
Superfund; response and remedial actions, proposed settlements, etc.:
Grant Warehouse Time-Critical Removal Site, OR, 343–344
Water pollution control:
National Pollutant Discharge Elimination System—
Massachusetts and New Hampshire; hydroelectric generating facilities discharges; general permits, 344

Farm Service Agency
RULES
Loan and purchase programs:
Acreage reporting and common provisions; correction, 249–250

Federal Aviation Administration
PROPOSED RULES
Air carrier certification and operations:
Multi-engine airplanes; extended operations; correction, 282
Airworthiness directives:
Airbus, 291–293
BAE Systems (Operations) Ltd., 289–291
Dornier, 287–289
Empresa Brasileira de Aeronautica S.A. (EMBRAER), 282–287
Saab, 293–295

Federal Communications Commission
NOTICES
Meetings:
Diversity for Communications in Digital Age Advisory Committee, 345

Federal Housing Finance Board
NOTICES
Federal home loan bank system:
Community support review; members selected for review; list, 345–361

Federal Maritime Commission
NOTICES
Meetings; Sunshine Act, 361–362

Federal Railroad Administration
NOTICES
Privacy Act:
Systems of records, 388

Federal Reserve System
NOTICES
Banks and bank holding companies:
Change in bank control, 362
Formations, acquisitions, and mergers, 362–363

Federal Transit Administration
NOTICES
Transit operations; prohibited drug use and alcohol misuse prevention:
Transit operators; random drug and alcohol testing rates, 389

Financial Management Service
See Fiscal Service

Fiscal Service
NOTICES
Surety companies acceptable on Federal bonds:
United Fire & Indemnity Co., 391

Food and Drug Administration
RULES
Biological products:
Bacteria vaccines and toxoids; efficacy review and implementation, 255–267
NOTICES
Human drugs:
Pediatric studies; use of intravenous morphine sulfate, 366
Memorandums of understanding:
United Kingdom Central Science Laboratory, Department of Environment, Food, and Rural Affairs and FDA; analytical methods in support of food safety, 366–371
Reports and guidance documents; availability, etc.:
Radioimmunoassay analysis of hair to detect presence of drugs; compliance policy guide; revoked, 371–372

Food Safety and Inspection Service
RULES
Organization, functions, and authority delegations:
Organizational and technical changes, 250–255

Forest Service
NOTICES
Meetings:
Resource Advisory Committees—
North Central Idaho, 317
Wrangell-Petersburg, 317

General Services Administration
NOTICES
Federal travel:
Federal travel regulation; electronic edition, 363

Health and Human Services Department
See Centers for Disease Control and Prevention
See Food and Drug Administration
See National Institutes of Health
See Public Health Service
RULES
Grants and cooperative agreements; availability, etc.:
National Institutes of Health; research grant applications and research and development contract projects; scientific peer review, 272–278

Homeland Security Department
See Coast Guard
RULES
United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT); Biometric Requirements; implementation, 467–481

NOTICES
Nonimmigrant classes:
Aliens—
U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT): requirements, 481–484

Industry and Security Bureau
NOTICES
Export privileges, actions affecting:
Kashani, Mahmoud Haghsheno, 318–319

Interior Department
See Land Management Bureau

Internal Revenue Service
RULES
Income taxes:
Expenditures; deduction and capitalization; guidance, 435–465

International Trade Administration
NOTICES
Antidumping:
Pasta from—
Italy, 319–323
Stainless steel wire rods from—
India; correction, 392

Justice Department
See Antitrust Division
See Drug Enforcement Administration

Labor Department
See Employee Benefits Security Administration

Land Management Bureau
NOTICES
Withdrawal and reservation of lands:
Nevada, 373–374

National Aeronautics and Space Administration
NOTICES
Patent licenses; non-exclusive, exclusive, or partially exclusive:
JFC Technologies, 383–384

National Archives and Records Administration
PROPOSED RULES
Public availability and use:
Federal records and donated historical materials containing restricted information; access restrictions, 295–301

National Highway Traffic Safety Administration
RULES
Motor vehicle safety standards:
Glazing materials—
Low-speed vehicles, etc., 279–281
PROPOSED RULES
Motor vehicle safety standards:
Small business entities; economic impacts, 307–309

National Institute of Standards and Technology
NOTICES
Meetings:
Fire test measurement needs, 323–324
Weights and Measures National Conference, 324

National Institutes of Health
NOTICES
Inventions, Government-owned; availability for licensing, 372

National Oceanic and Atmospheric Administration
PROPOSED RULES
Fishery conservation and management:
Caribbean, Gulf, and South Atlantic fisheries—
Gulf of Mexico reef fish resources, 310–314
South Atlantic Fishery Management Council; meetings, 309–310
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 324–325
Meetings:
Mid-Atlantic Fishery Management Council, 325–326
New England Fishery Management Council, 326
Permits:
Marine mammals, 326–327

Navy Department
NOTICES
Inventions, Government-owned; availability for licensing, 332
Privacy Act:
Systems of records, 333–336

Nuclear Regulatory Commission
NOTICES
Certificates of compliance:
United States Enrichment Corp.—
Paducah Gaseous Diffusion Plant, KY, et al., 384–385
Reports and guidance documents; availability, etc.:
Enforcement actions; general statement of policy and procedure, 385–386

Public Debt Bureau
See Fiscal Service

Public Health Service
NOTICES
Meetings:
National Toxicology Program—
Scientific Counselors Board; correction, 373

Railroad Retirement Board
NOTICES
Agency information collection activities; proposals, submissions, and approvals, 386

Securities and Exchange Commission
NOTICES
Meetings; Sunshine Act, 386–387

Social Security Administration
PROPOSED RULES
Social security benefits:
Federal old-age, survivors, and disability insurance and aged, blind, and disabled—
Disability benefits terminated due to work activity; reinstatement of entitlement, 307
NOTICES
Attorney fee assessment rate, 387

State Department
NOTICES
Art objects; importation for exhibition:
Art Deco 1910–1939, 387

Meetings:
International Telecommunications Advisory Committee, 387

Surface Transportation Board
NOTICES
Rail carriers:
Waybill data; release for use, 389
Railroad services abandonment:
Consolidated Rail Corp., 389–390

Transportation Department
See Federal Aviation Administration
See Federal Railroad Administration
See Federal Transit Administration
See National Highway Traffic Safety Administration
See Surface Transportation Board

Treasury Department
See Comptroller of the Currency
See Fiscal Service
See Internal Revenue Service

Separate Parts In This Issue

Part II
Environmental Protection Agency, 393–433

Part III
Treasury Department, Internal Revenue Service, 435–465

Part IV
Homeland Security Department, 467–484

Reader Aids

Consult the Reader Aids section at the end of this issue for phone numbers, online resources, finding aids, reminders, and notice of recently enacted public laws.

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CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

7 CFR
301 (3 documents) 243, 245, 247
718.......................................249
1480.....................................249

8 CFR
214.......................................468
215.......................................468
235.......................................468

9 CFR
300.......................................250
301.......................................250
306.......................................250
318.......................................250
320.......................................250
381.......................................250

14 CFR
Proposed Rules:
21...282
39 (6 documents) 282, 284, 287, 289, 291, 293
121.......................................282

21 CFR
201.......................................255
610.......................................255

26 CFR
1...436
602.......................................436

33 CFR
17...267
165.......................................268
334.......................................271

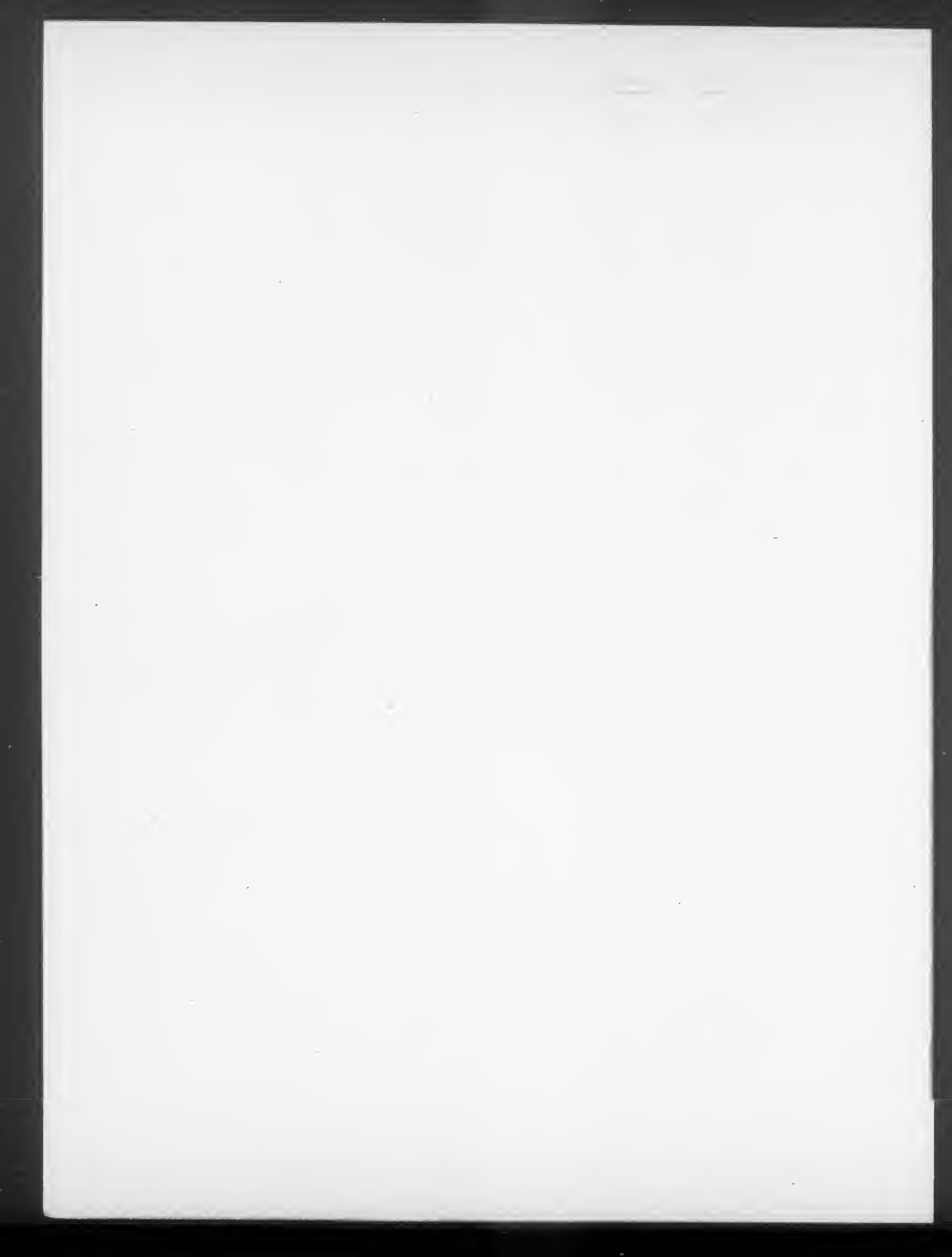
36 CFR
Proposed Rules:
1254.....................................295
1256.....................................295

40 CFR
63...394
Proposed Rules:
52...302
404.......................................307
416.......................................307

42 CFR
52h.......................................272

49 CFR
571.......................................279
Proposed Rules:
571.......................................307

50 CFR
Proposed Rules:
622 (2 documents) 309, 310



Rules and Regulations

Federal Register
Vol. 69, No. 2
Monday, January 5, 2004

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

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DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 03–102–1]

Pine Shoot Beetle; Additions to Quarantined Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the pine shoot beetle regulations by adding 37 counties in Illinois, Indiana, Maryland, New York, Ohio, Pennsylvania, Vermont, and Virginia to the list of quarantined areas. This action is necessary to prevent the spread of pine shoot beetle, a pest of pine products, into noninfested areas of the United States.

DATES: This interim rule is effective January 5, 2004. We will consider all comments that we receive on or before March 5, 2004.

ADDRESSES: You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your comment (an original and three copies) to: Docket No. 03–102–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 03–102–1. If you use e-mail, address your comment to *regulations@aphis.usda.gov*. Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and "Docket No. 03–102–1" on the subject line.

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

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

FOR FURTHER INFORMATION CONTACT: Mr. Weyman Fussell, Program Manager, Pest Detection and Management Programs, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1231; (301) 734–5705.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 7 CFR 301.50 through 301.50–10 (referred to below as the regulations) restrict the interstate movement of certain regulated articles from quarantined areas in order to prevent the spread of pine shoot beetle (PSB) into noninfested areas of the United States.

PSB is a pest of pine trees that can cause damage in weak and dying trees, where reproduction and immature stages of PSB occur. During "maturation feeding," young beetles tunnel into the center of pine shoots (usually of the current year's growth), causing stunted and distorted growth in host trees. PSB is also a vector of several diseases of pine trees. Factors that may result in the establishment of PSB populations far from the location of the original host tree include: (1) Adults can fly at least 1 kilometer, and (2) infested trees and pine products are often transported long distances. This pest damages urban ornamental trees and can cause economic losses to the timber, Christmas tree, and nursery industries.

PSB hosts include all pine species. The beetle has been found in a variety of pine species (*Pinus* spp.) in the United States. Scotch pine (*P. sylvestris*) is the preferred host of PSB. The Animal and Plant Health Inspection Service (APHIS) has determined, based on scientific data from European countries, that fir (*Abies* spp.,) larch (*Larix* spp.,) and spruce (*Picea* spp.) are not hosts of PSB.

Surveys conducted by State and Federal inspectors revealed areas within 37 additional counties infested with PSB in 8 States (Illinois, Indiana, Maryland, New York, Ohio, Pennsylvania, Vermont, and Virginia). Copies of the surveys may be obtained by writing to the individual listed under **FOR FURTHER INFORMATION CONTACT.**

The regulations in § 301.50–3 provide that the Administrator of APHIS will list as a quarantined area each State, or each portion of a State, in which PSB has been found by an inspector, in which the Administrator has reason to believe PSB is present, or that the Administrator considers necessary to regulate because of its inseparability for quarantine enforcement purposes from localities in which PSB has been found.

In accordance with these criteria, we are designating Carroll, Clark, Coles, Ford, Henry, Mason, Moultrie, Peoria, and Shelby Counties, IL; Bartholomew, Franklin, Monroe, Morgan, Putnam, and Union Counties, IN; Montgomery County, MD; Albany, Fulton, Greene, Hamilton, Herkimer, Montgomery, Saratoga, Schenectady, Schoharie, and Sullivan Counties, NY; Athens, Gallia, Pike, and Washington Counties, OH; Centre, Fulton, Lycoming, Susquehanna, and Wyoming Counties, PA; Washington County, VT; and Clarke County, VA, as quarantined areas, and we are adding them to the list of quarantined areas in § 301.50–3(c).

Entities affected by this interim rule may include nursery stock growers, Christmas tree farms, logging operations, and others who sell, process, or move regulated articles. As a result of this interim rule, any regulated articles to be moved interstate from a quarantined area must first be inspected and/or treated in order to qualify for a certificate or limited permit authorizing the movement.

Miscellaneous Change

We are removing paragraph (d) of § 301.50–3 from the regulations. Paragraph (d) contains a map that shows the quarantined counties listed in § 301.50–3(c). The map does not add any information to the regulations; therefore, we have decided not to recreate it each time the list of quarantined areas is changed.

Emergency Action

This rulemaking is necessary on an emergency basis to prevent PSB from spreading to noninfested areas of the United States. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this rule effective less than 30 days after publication in the **Federal Register**.

We will consider comments we receive during the comment period for this interim rule (see DATES above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we receive and any amendments we are making to the rule.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review under Executive Order 12866.

This emergency situation makes timely compliance with section 604 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) impracticable. We are currently assessing the potential economic effects of this action on small entities. Based on that assessment, we will either certify that the rule will not have a significant economic impact on a substantial number of small entities or publish a final regulatory flexibility analysis.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This interim rule contains no information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

■ Accordingly, we are amending 7 CFR part 301 as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

■ 1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 7701–7772; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 also issued under Sec. 204, Title II, Pub. L. 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 also issued under Sec. 203, Title II, Pub. L. 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

■ 2. Section 301.50–3 is amended as follows:

a. In paragraph (c), under Illinois, by adding new counties in alphabetical order.

b. In paragraph (c), under Indiana, by adding new counties in alphabetical order.

c. In paragraph (c), under Maryland, by adding a new county in alphabetical order.

d. In paragraph (c), under New York, by adding new counties in alphabetical order.

e. In paragraph (c), under Ohio, by adding new counties in alphabetical order.

f. In paragraph (c), under Pennsylvania, by adding new counties in alphabetical order.

g. In paragraph (c), under Vermont, by adding a new county in alphabetical order.

h. In paragraph (c), by adding an entry for Virginia.

i. By removing paragraph (d).

§ 301.50–3 Quarantined areas.

* * * * *

(c) * * *

ILLINOIS

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Carroll County. The entire county.

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Clark County. The entire county.
Coles County. The entire county.

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Ford County. The entire county.

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Henry County. The entire county.

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Mason County. The entire county.

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Moultrie County. The entire county.

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Peoria County. The entire county.

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Shelby County. The entire county.

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INDIANA

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Bartholomew County. The entire county.

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Franklin County. The entire county.

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Monroe County. The entire county.

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Morgan County. The entire county.

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Putnam County. The entire county.

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Union County. The entire county.

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MARYLAND

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Montgomery County. The entire county.

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NEW YORK

Albany County. The entire county.

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Fulton County. The entire county.

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Greene County. The entire county.
Hamilton County. The entire county.
Herkimer County. The entire county.

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Montgomery County. The entire county.

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Saratoga County. The entire county.
Schenectady County. The entire county.
Schoharie County. The entire county.

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Sullivan County. The entire county.

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OHIO

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Athens County. The entire county.

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Gallia County. The entire county.

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Pike County. The entire county.

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Washington County. The entire county.

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PENNSYLVANIA

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Centre County. The entire county.

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Fulton County. The entire county.

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Lycoming County. The entire county.

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Susquehanna County. The entire county.

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Wyoming County. The entire county.

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VERMONT

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Washington County. The entire county.

* * * * *

VIRGINIA

Clarke County. The entire county.

* * * * *

Done in Washington, DC, this 29th day of December, 2003.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–80 Filed 1–2–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 03–047–1]

Karnal Bunt; Regulated Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the Karnal bunt regulations to make changes to the list of areas or fields regulated because of Karnal bunt, a fungal disease of wheat. We are adding certain areas in Arizona to the list of regulated areas either because they were found during surveys to contain a bunted wheat kernel, or because they are within the 3-mile-wide buffer zone around fields or areas affected with Karnal bunt. We are also removing certain areas from the list of regulated areas in Riverside County, CA, because recently completed detection and delineating surveys show them to be free of Karnal bunt. These actions are necessary to prevent the spread of Karnal bunt into noninfected areas of the United States and to relieve restrictions that are no longer warranted.

DATES: This interim rule is effective January 5, 2004. We will consider all comments that we receive on or before March 5, 2004.

ADDRESSES: You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your comment (an original and three copies) to: Docket No. 03–047–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 03–047–1. If you use e-mail, address your comment to *regulations@aphis.usda.gov*. Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and "Docket No. 03–047–1" on the subject line.

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

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

FOR FURTHER INFORMATION CONTACT: Mr. Robert Spaide, Senior Program Advisor, Pest Detection and Management Programs, PPQ, APHIS, 4700 River Road Unit 137, Riverdale, MD 20737–1236; (301) 734–4387.

SUPPLEMENTARY INFORMATION:

Background

Karnal bunt is a fungal disease of wheat (*Triticum aestivum*), durum wheat (*Triticum durum*), and triticale (*Triticum aestivum X Secale cereale*), a hybrid of wheat and rye. Karnal bunt is caused by the smut fungus *Tilletia indica* (Mitra) Mundkur and is spread primarily through the movement of infected seed. Some countries in the international wheat market regulate Karnal bunt as a fungal disease requiring quarantine; therefore, without measures taken by the Animal and Plant Health Inspection Service (APHIS), United States Department of Agriculture, to prevent its spread, the presence of Karnal bunt in the United States could have significant consequences with regard to the export of wheat to international markets.

Upon detection of Karnal bunt in Arizona in March of 1996, Federal quarantine and emergency actions were imposed to prevent the interstate spread of the disease to other wheat producing areas in the United States. The quarantine continues in effect, although it has since been modified, both in terms of its physical boundaries and in terms of its restrictions on the production and movement of regulated articles from regulated areas. The regulations regarding Karnal bunt are set forth in 7 CFR 301.89–1 through 301.89–16 (referred to below as the regulations).

Regulated Areas

The regulations in § 301.89–3(e) provide that we will classify a field or area as a regulated area when it is:

- A field planted with seed from a lot found to contain a bunted wheat kernel;
- A distinct definable area that contains at least one field that was found during a survey to contain a bunted wheat kernel. The distinct definable area may include an area where Karnal bunt is not known to exist but where intensive surveys are required because of the areas's proximity to a field found during survey to contain a bunted wheat kernel; or
- A distinct definable area that contains at least one field that was found during survey to contain spores consistent with Karnal bunt and has been determined to be associated with grain at a handling facility containing a bunted wheat kernel. The distinct definable area may include an area where Karnal bunt is not known to exist but where intensive surveys are required because of that area's proximity to a field that has been associated with grain at a handling facility containing a bunted wheat kernel.

The boundaries of distinct definable areas are determined using the criteria in paragraphs (b) through (d) of § 301.89–3, which provide for the regulation of less than an entire State, the inclusion of noninfected acreage in a regulated area, and the temporary designation of nonregulated areas as regulated areas. Paragraph (c) of § 301.89–3 states that the Administrator may include noninfected acreage within a regulated area due to its proximity to an infestation or inseparability from the infected locality for regulatory purposes, as determined by:

- Projections of the spread of Karnal bunt along the periphery of the infestation;
- The availability of natural habitats and host materials within the noninfected acreage that are suitable for establishment and survival of Karnal bunt; and
- The necessity of including noninfected acreage within the regulated area in order to establish readily identifiable boundaries.

When we include noninfected acreage in a regulated area for one or more of the reasons previously listed, the noninfected acreage, along with the rest of the acreage in the regulated area, is intensively surveyed. Negative results from surveys of the noninfected acreage provide assurance that all infected acreage is within the regulated area. In effect, the noninfected acreage serves as

a buffer zone between fields or areas affected with Karnal bunt and areas outside of the regulated area.

The regulations in § 301.89–3(f) describe the boundaries of the regulated areas in Arizona, California, and Texas. Certain regulated areas include noninfected acreage that functions as a buffer zone to guard against the spread of Karnal bunt. Our current policy is to utilize a 3-mile-wide buffer zone around fields or areas affected with Karnal bunt. Based on over 7 years of experience surveying noninfected acreage included in regulated areas, we have determined that a buffer zone of no more than 3 miles is sufficient.

In this interim rule, we are amending § 301 89–3(f) by modifying the list of regulated areas associated with Karnal bunt. Specifically, we are adding certain areas in Arizona to the list of regulated areas either because the fields within those areas were found during detection and delineating surveys to contain a bunted wheat kernel, or because the fields within those areas fall within the 3-mile-wide buffer zone around fields affected with Karnal bunt. This action is necessary in order to help prevent the spread of Karnal bunt into noninfected areas of the United States.

As part of this same rule, we are also removing certain areas from the list of regulated areas in California because recently completed detection and delineating surveys show them to be free of Karnal bunt. This action relieves restrictions on those areas that are no longer warranted.

Arizona

The list of regulated areas in Arizona includes individual fields and other distinct definable areas located in La Paz, Maricopa, and Pinal Counties. In this interim rule, we are adding new regulated areas in Maricopa and Pinal Counties due to the detection of bunted wheat kernels there or as a result of the application of the 3-mile-wide buffer zone around fields affected with Karnal bunt. These additional regulated areas in Maricopa and Pinal Counties involve approximately 2,589 acres (57 fields).

California

We are removing from the list of regulated areas in California a total of 42,802 acres (1,093 fields) located in the Palo Verde Valley of eastern Riverside County. Bunted kernels have never been found in the fields of the Palo Verde Valley that we are deregulating; these fields had been designated as regulated areas based on the detection of spores in the fields and the fields' association with bunted kernels found in a storage facility. As an additional safeguard, the California Department of Food and Agriculture (CDFA) plant pathologists routinely perform size-selective sieving prior to examination for bunted kernels. CDFA has not found spores present in samples that had no bunted kernels. We believe that this data allows us to deregulate these 1,093 fields.

In addition, all 1,093 fields have been used to grow non-host, cultivated crops since the time they were placed under regulation. All of the fields have been cultivated no fewer than 9 times, with some having been cultivated 25 times over the course of 6 seasons.

Immediate Action

This rulemaking is necessary on an immediate basis to help prevent Karnal bunt from spreading to noninfected areas of the United States. This rule will also relieve restrictions on certain fields or areas that are no longer warranted. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this rule effective less than 30 days after publication in the **Federal Register**.

We will consider comments we receive during the comment period for this interim rule (see DATES above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we receive and any amendments we are making to the rule.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review under Executive Order 12866.

This emergency situation makes timely compliance with section 604 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) impracticable. We are currently assessing the potential economic effects of this action on small entities. Based on that assessment, we will either certify that the rule will not have a significant economic impact on a substantial number of small entities or publish a final regulatory flexibility analysis.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

■ Accordingly, we are amending 7 CFR part 301 as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

■ 1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 7701–7772; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 also issued under Sec. 204, Title II, Pub. L. 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 also issued under Sec. 203, Title II, Pub. L. 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

■ 2. In § 301.89–3, paragraph (f) is amended as follows:

■ a. Under the heading "Arizona," in the entry for Maricopa County, by revising paragraph (2) to read as set forth below, and in the entry for Pinal County, by revising paragraph (1) to read as set forth below.

■ b. Under the heading "California," by revising the entry for Riverside County to read as set forth below.

§ 301.89–3 Regulated areas.

* * * * *

(f) * * *

Arizona

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Maricopa County. * * *

(2) Beginning at the intersection of the Maricopa/Pinal County line and the southwest corner of sec. 31, T. 2 S., R. 5 E.; then north to the southeast corner of sec. 25, T. 2 S., R. 5 E.; then west to the southwest corner of sec. 25, T. 2 S., R. 5 E.; then north to the northwest corner of sec. 24, T. 2 S., R. 4 E.; then west to the southwest corner of sec. 15, T. 2 S., R. 4 E.; then north to the northwest corner of sec. 3, T. 2 S., R. 4

E.; then east to the southwest corner of sec. 35, T. 1 S., R. 4 E., then north to the northwest corner of sec. 35, T. 1 S., R. 4 E.; then east to the northeast corner of sec. 33, T. 1 S., R. 5 E.; then north to the northwest corner of sec. 22, T. 1 S., R. 5 E.; then east to the northeast corner of sec. 19, T. 1 S., R. 6 E.; then north to the northwest corner of sec. 8, T. 1 S., R. 6 E.; then east to the southwest corner of sec. 3, T. 1 S., R. 6 E.; then north to the northwest corner of sec. 3, T. 1 S., R. 6 E.; then east to the northeast corner of sec. 2, T. 1 S., R. 6 E.; then south to the southeast corner of sec. 2, T. 1 S., R. 6 E.; then east to the northeast corner of sec. 7, T. 1 S., R. 7 E.; then south to the northwest corner of sec. 5, T. 2 S., R. 7 E.; then east to the northeast corner of sec. 3, T. 2 S., R. 7 E.; then north to the northwest corner of sec. 35, T. 1 S., R. 7 E.; then east to the northeast corner of sec. 36, T. 1 S., R. 7 E. and the Maricopa/Pinal County line; then south along the Maricopa/Pinal County line to the southeast corner of sec. 36, T. 2 S., R. 7 E.; then east along the Maricopa/Pinal County line to the point of beginning.

* * * * *

Pinal County. (1) Beginning at the intersection of the Maricopa/Pinal County line and the northwest corner of sec. 31, T. 1 S., R. 8 E.; then east to the northeast corner of sec. 32, T. 1 S., R. 8 E.; then south to the northwest corner of sec. 4, T. 2 S., R. 8 E.; then east to the northeast corner of sec. 4, T. 2 S., R. 8 E., then south to the southeast corner of sec. 28, T. 2 S., R. 8 E.; then west to the northeast corner of sec. 32, T. 2 S., R. 8 E.; then south to the southeast corner of sec. 32, T. 2 S., R. 8 E.; then west to the Maricopa/Pinal County line; then north along the Maricopa/Pinal County line to the point of beginning.

* * * * *

California

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Riverside County. Beginning at the intersection of the Colorado River and 8th Avenue; then west on 8th Avenue to Lovekin Boulevard; then south on Lovekin Boulevard to 10th Avenue; then west on 10th Avenue to Arrowhead Avenue; then south on Arrowhead Avenue to Hobson Way; then west on Hobson Way to Neighbours Boulevard; then south on Neighbours Boulevard to 14th Avenue; then west on 14th Avenue approximately 0.84 mile to the edge of the irrigated production area; then south and west along the edge of the irrigated production area to a point on Keim Boulevard approximately 0.27 mile south of the intersection of Keim Boulevard and 16th Avenue; then south on Keim Boulevard to 28th Avenue; then east on 28th Avenue to Arrowhead Avenue; then south on Arrowhead Avenue to 30th Avenue; then east on 30th Avenue to the Colorado River; then north along the Colorado River to the point of beginning.

* * * * *

Done in Washington, DC, this 29th day of December, 2003.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–78 Filed 1–2–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

7 CFR Part 301

[Docket No. 03–082–1]

Golden Nematode; Regulated Areas

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Interim rule and request for comments.

SUMMARY: We are amending the golden nematode regulations by adding a field in Steuben County, NY, to the list of generally infested regulated areas. This action is necessary to prevent the artificial spread of golden nematode to noninfested areas of the United States.

DATES: This interim rule is effective January 5, 2004. We will consider all comments that we receive on or before March 5, 2004.

ADDRESSES: You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/commercial delivery, please send four copies of your comment (an original and three copies) to: Docket No. 03–082–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comment refers to Docket No. 03–082–1. If you use e-mail, address your comment to *regulations@aphis.usda.gov.* Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and "Docket No. 03–082–1" on the subject line.

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

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

FOR FURTHER INFORMATION CONTACT: Dr. Vedpal Malik, Agriculturalist, Invasive Species and Pest Management, PPQ, APHIS, 4700 River Road Unit 134, Riverdale, MD 20737–1236; (301) 734–6774.

SUPPLEMENTARY INFORMATION:

Background

The golden nematode (*Globodera rostochiensis*) is a destructive pest of potatoes and other solanaceous plants. Potatoes cannot be economically grown on land which contains large numbers of the nematode. The golden nematode has been determined to occur in the United States only in parts of New York.

The golden nematode regulations (contained in 7 CFR 301.85 through 301.85–10 and referred to below as the regulations) list two entire counties and portions of seven other counties in the State of New York as regulated areas and restrict the interstate movement of regulated articles from those areas. Such restrictions are necessary to prevent the artificial spread of the golden nematode to noninfested areas of the United States.

Regulated areas are those areas in which the golden nematode has been found or in which there is reason to believe that the golden nematode is present, or those areas which it is deemed necessary to regulate because of their proximity to infestation or their inseparability for quarantine enforcement purposes from infested localities. The regulations provide that less than an entire State may be designated as a regulated area only if the Deputy Administrator determines that the State has adopted and is enforcing a quarantine or regulation that imposes restrictions on the intrastate movement of the regulated articles that are substantially the same as those that are imposed with respect to the interstate movement of the articles and the designation of less than the entire State as a regulated area will otherwise be adequate to prevent the artificial interstate spread of the golden nematode.

Regulated areas are divided into suppressive areas and generally infested areas. Suppressive areas are regulated areas where eradication of the golden nematode is undertaken as an objective. Generally infested areas are regulated areas not designated as suppressive areas. Restrictions are imposed on the interstate movement of regulated articles from generally infested areas and suppressive areas in order to prevent the infestation of areas where the golden nematode does not occur.

Recent surveys conducted by inspectors of the Animal and Plant Health Inspection Service (APHIS) have revealed that an infestation of golden nematode has occurred in one field outside the regulated area in Steuben County, NY. New York has quarantined the infested area and is restricting the intrastate movement of regulated articles from that area to prevent the further spread of golden nematode. However, Federal regulations are necessary to restrict the interstate movement of regulated articles from the regulated areas to prevent the spread of golden nematode to other States and other countries.

In accordance with the criteria for listing regulated areas, we are amending the list of regulated areas in § 301.85–2a to include an additional part of Steuben County, NY, in response to the recent golden nematode findings described above. The regulated area is described in the rule portion of this document. Maps of the regulated area are available by writing to the person listed under **FOR FURTHER INFORMATION CONTACT** or from local offices of Plant Protection and Quarantine.

In addition to amending the entry for Steuben County, NY, to reflect the addition of a field to the regulated area, we have also divided that entry into subparagraphs so that it is easier to read.

Emergency Action

This rulemaking is necessary on an emergency basis to prevent the artificial spread of golden nematode to noninfested areas of the United States. Under these circumstances, the Administrator has determined that prior notice and opportunity for public comment are contrary to the public interest and that there is good cause under 5 U.S.C. 553 for making this rule effective less than 30 days after publication in the **Federal Register**.

We will consider comments we receive during the comment period for this interim rule (see **DATES** above). After the comment period closes, we will publish another document in the **Federal Register**. The document will include a discussion of any comments we receive and any amendments we are making to the rule.

Executive Order 12866 and Regulatory Flexibility Act

This rule has been reviewed under Executive Order 12866. For this action, the Office of Management and Budget has waived its review under Executive Order 12866.

We are amending the golden nematode regulations by adding a field in Steuben County, NY, to the list of generally infested regulated areas. This action is necessary to prevent the artificial spread of golden nematode to noninfested areas of the United States.

The Regulatory Flexibility Act requires that agencies consider the economic impact of their rules on small entities and to use flexibility to provide regulatory relief when regulations create economic disparities between different sized entities. According to the Small Business Administration's (SBA's) Office of Advocacy, regulations create economic disparities based on size when they have significant economic impact on a substantial number of small entities.

Potato farms are classified as small businesses if they receive less than $750,000 in annual sales receipts. The U.S. Department of Agriculture's National Agricultural Statistics Service does not publish data on farm size for New York potato farms. However, it is likely that the regulated 30-acre farm in Steuben County qualifies as a small business as defined by the SBA.

In the United States, the potato is the leading vegetable in terms of acreage and farm value. About 1.3 million acres are grown for a total production yield of 31.4 billion pounds, worth $2.5 billion in farm receipts. Over 60 percent of U.S. potato production is processed. Growth in the chip market alone has averaged about 11 percent per year over the past 8 years, resulting in a $4 billion industry. The market for exported, processed potatoes is a rapidly growing one.

Golden nematode infestation of potatoes and other solanaceous plants (*e.g.*, tomatoes, eggplants) poses a threat to New York's agricultural economy. New York State is the twelfth largest potato producer nationwide, with an average of 25,000 acres of potatoes harvested annually. According to the New York Agricultural Statistics Service, New York State had approximately 22,200 planted acres of potatoes with a production value totaling $64.9 million. About 55 percent of New York State's potato production is destined for the fresh market, 40 percent for processing, and 5 percent for seed and livestock feed. New York State potatoes and potato products are primarily consumed locally and within the northeastern portion of the United States. In 2001, the production value of major solanaceous plants in New York was $92.4 million.

The additional costs associated with our designation of the new regulated area in Steuben County are very small relative to the benefits gained from agricultural sales. For example, the treatment costs for the infected fields are borne by APHIS and not the farmer. The only inconvenience to the farm operator might be that potatoes or any other solanaceous plants may be planted only every other year until the infestation is determined to be over. In the years when potatoes and other solanaceous plants may be planted, farm operators may move such articles without treatment. In the event that the farm operator needs to move farm equipment outside the farm, that equipment must first be treated, either chemically or with steam. The costs of treatment are borne by APHIS. It takes one 8-hour day for a Plant Protection and Quarantine officer and a technician to steam treat farm equipment, including the time required to set up and tear down the treatment site. Since the farm operator does not have to pay for any aspect of this treatment, this rule will not have any adverse economic impact on this farm.

Under these circumstances, the Administrator of the Animal and Plant Health Inspection Service has determined that this action will not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR part 3015, subpart V.)

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are inconsistent with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This rule contains no new information collection or recordkeeping requirements under the Paperwork

Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 7 CFR Part 301

Agricultural commodities, Plant diseases and pests, Quarantine, Reporting and recordkeeping requirements, Transportation.

■ Accordingly, we are amending 7 CFR part 301 as follows:

PART 301—DOMESTIC QUARANTINE NOTICES

■ 1. The authority citation for part 301 continues to read as follows:

Authority: 7 U.S.C. 7701–7772; 7 CFR 2.22, 2.80, and 371.3.

Section 301.75–15 also issued under Sec. 204, Title II. Pub. L. 106–113, 113 Stat. 1501A–293; sections 301.75–15 and 301.75–16 also issued under Sec. 203, Title II, Pub. L. 106–224, 114 Stat. 400 (7 U.S.C. 1421 note).

■ 2. In § 301.85–2a, under the heading "New York", the entry for Steuben County is revised to read as follows:

§ 301.85–2a Regulated areas; suppressive and generally infested areas.

* * * * *

New York

(1) Generally infested area:

* * * * *

Steuben County. (A) The towns of Prattsburg and Wheeler;

(B) That area known as "Arkport Muck" located in the town of Dansville and bounded by a line beginning at a point where the Conrail right-of-way (Erie Lackawanna Railroad) intersects County Road 52 (known as Burns Road), then north and northeast along County Road 52 to its junction with New York Route 36, then south and southeast along New York Route 36 to its intersection with the Dansville Town line, then west along the Dansville Town line to its intersection with the Conrail right-of-way (Erie Lackawanna Railroad), then north and northwest along the Conrail right-of-way to the point of beginning;

(C) The Werth, Dale farm, known as the "Werthwhile Farm," located in the town of Cohocton on the north side of County Road 5 (known as Brown Hill Road), and 0.2 mile west of the junction of County Road 5 with County Road 58 (known as Wager Road); and

(D) The property located in the town of Fremont that is bounded as follows: Beginning at a point on Babcock Road that intersects a farm road marked by latitude/longitude coordinates 42°26′12.5″, −77°34′30.4″; then west along the farm road to coordinates 42°26′12.2″, −77°34′41.0″; then south to coordinates 42°26′09.6″, −77°34′40.9″; then west to coordinates 42°26′09.4″, −77°34′50.7″; then south to coordinates 42°26′00.7″, −77°34′50.3″; then east to coordinates 42°25′59.9″, −77°34′40.4″; then south to coordinates 42°25′54.7″, −77°34′40.0″; then east to coordinates 42°25′56.3″, −77°34′37.7″; then north to coordinates 42°25′58.9″, −77°34′35.0″; then east to coordinates 42°25′58.9″, −77°34′34.1″; then north to coordinates 42°26′05.8″, −77°34′32.5″; then east to coordinates 42°26′05.7″, −77°34′29.9″; then north to the point of beginning at coordinates 42°26′12.5″, −77°34′30.4″.

* * * * *

Done in Washington, DC, this 29th day of December, 2003.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–79 Filed 1–2–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 718

Commodity Credit Corporation

7 CFR Part 1480

RIN 0560–AG79 and 0560–AG95

Acreage Reporting and Common Provisions; 2001 and 2002 Crop Disaster Program; Correction

AGENCIES: Farm Service Agency, Commodity Credit Corporation, USDA.

ACTION: Final rule; correction.

SUMMARY: This document corrects final rules published on April 3, 2003, and June 26, 2003, that established provisions applicable to multiple programs of the agencies, and regulations for the 2001 and 2002 Crop Disaster Program. Corrections are necessary for provisions that conflict with statute or other program requirements and are intended to ensure that Agency regulations are properly written and implemented. These changes will apply retroactively to actions taken under the subject rules since their effective date.

DATES: Effective on December 30, 2003.

FOR FURTHER INFORMATION CONTACT: Virgil Ireland, at 202–720–5103 or *virgil.Ireland@usda.gov*, or Jan Jamrog, at 202–690–0926 or *jan.jamrog@usda.gov*.

SUPPLEMENTARY INFORMATION:

Discussion of Corrections

1. This document corrects the rule amending 7 CFR part 718, Provisions Applicable to Multiple Programs, published in the **Federal Register** on April 3, 2003 (68 FR 16170) under the Farm Security and Rural Investment Act of 2002 (Public Law 107–171) (the 2002 Act). 7 CFR part 718 governs how FSA monitors marketing quotas, allotments, base acres and acreage reports. The corrections are as follows:

A. *Crop definitions.* The first correction is in 7 CFR 718.2, adding to the definitions of Extra Long Staple (ELS) Cotton, Rice and Upland cotton the phrase "that follows the standard planting and harvesting practices for the [specific crop] for the area in which the [specific crop] is grown." This will make the definitions consistent with those for other crops. For example, the definition of corn in § 718.2 includes the phrase "that follows the standard planting and harvesting practices for corn for the area in which the corn is grown * * *" This change clarifies the provision that a program participant cannot receive planting credit for acreage that does not comply with minimum requirements and ensures that it is correctly applied Other clarifying changes are also made.

B. *Controlled Substance.* The second correction is in 7 CFR 718.6(b)(3), which provides that a person convicted of trafficking in or possession of a controlled substance shall be ineligible for any or all USDA benefits for stated periods of time. This provision is included pursuant to 21 U.S.C. 862, which provides that a court may deny eligibility for certain Federal benefits to an individual convicted of distribution or possession of a controlled substance. "Federal benefit" is defined in 21 U.S.C. 862(d) to mean "any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States" but "does not include any retirement, welfare, Social Security, health, disability, veterans benefit, public housing, or other similar benefit, or any other benefit for which payments or services are required for eligibility. The period of ineligibility under this provision is a determination of the court, not FSA. Therefore, section 718.6 is revised by combining paragraph 718.6(b)(3) with paragraph 718.6(b)(2), which already contains the correct provision.

C. *Signature Requirements.* The third correction is in 7 CFR 718.9(a), which states "When a program authorized by this chapter and parts 1410 and 1413 of

this title requires the signature of a producer; landowner; landlord; or tenant, a husband or wife may sign all such FSA or CCC documents on behalf of the other spouse, unless such other spouse has provided written notification to FSA and CCC that such action is not authorized. The notification must be provided to FSA with respect to each farm." This section is corrected to change "this chapter and parts 1410 and 1413 of" to "this chapter or Chapter XIV of" to insure full coverage in all commodity programs, unless exempted by more specific rules.

2. *Quality loss payments for hay.* This document corrects 7 CFR part 1480, Crop Disaster Program, published in the **Federal Register** on June 26, 2003, under the authority of the Agricultural Assistance Act of 2003 (Public Law 108–7) (2003 Act). Section 1480.17(m) states "Quantity adjustments for diminished quality shall also not apply under this section to: Hay, honey, maple sap, turfgrass sod, crops marketed for a use other than an intended use for which there is not an established county price or yield, or any other crop that the Deputy Administrator deems it appropriate to exclude." This section is being amended to remove the word "hay." The 2003 Act required CCC to follow section 815 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001 (Public Law 106–387; 114 Stat. 1549A–55) (2001 Act), stating that the new program shall use "the same loss thresholds for quantity and quality losses as were administered in that section." The 2001 Act did not exclude hay from payments for diminished quality. This document amends the rule accordingly.

These changes clarify and correct recently published regulations. Delay of their publication for public comment is unnecessary and contrary to the public interest. Further, 7 U.S.C. 7991(c)(2)(C), and section 217 of Title II, Division N, of Public Law 108–7, exempt these changes from notice and comment rulemaking. So that they may apply equally with existing regulations, these changes are effective as of the original filing of the rules they correct, as described below, implementing the 2002 Act.

List of Subjects

7 CFR Part 718

Acreage allotments, Agricultural commodities, Marketing quotas.

7 CFR Part 1480

Agricultural commodities, Disaster assistance, Emergency assistance, Reporting and record keeping requirements.

■ Accordingly, the **Federal Register** is corrected as follows:

■ 1. In the final rule FR Doc. 03–8025 published on April 3, 2003, (68 FR 16170–16185), make the following corrections:

■ a. On page 68 FR 16173, in the first column, in § 718.2, correct the introductory text of the definition of "Extra Long Staple Cotton,

■ b. On page 68 FR 16174, in the second column, in § 718.2, correct the definition of "Rice", and

■ c. On page 68 FR 16174, in the third column, in § 718.2, correct the definition of "Upland cotton," to read as follows:

§ 718.2 Definitions.

* * * * *

Extra Long Staple (ELS) Cotton means cotton that follows the standard planting and harvesting practices of the area in which the cotton is grown, and meets all of the following conditions: * * *

* * * * *

Rice means rice that follows the standard planting and harvesting practices of the area excluding sweet, glutinous, or candy rice such as Mochi Gomi.

* * * * *

Upland cotton means planted and stub cotton that is not considered extra long staple cotton, and that follows the standard planting and harvesting practices of the area and is produced from other than pure strain varieties of the Barbadense species, any hybrid thereof, or any other variety of cotton in which one or more of these varieties predominate. For program purposes, brown lint cotton is considered upland cotton.

■ d. On page 68 FR 16175, in the second column, correct § 718.6 by removing paragraph (b)(3) and correcting paragraph (b)(2) to read as follows:

§ 718.6 Controlled substance.

* * * * *

(b) * * *

* * * * *

(2) Possession of a controlled substance, or trafficking in a controlled substance, shall, in addition to any ineligibility under paragraph (b)(1) of this section, be ineligible for any or all USDA benefits, to the extent that a court shall determine to impose such ineligibility pursuant to applicable Federal law, in which case the ineligibility shall be for such period of time as is imposed by the court; pursuant to such law, at the discretion of the court.

■ e. On page 68 FR 16176 in the first column, correct § 718.9(a) to read as follows:

§ 718.9 Signature requirements.

(a) When a program authorized by this chapter or Chapter XIV of this title requires the signature of a producer; landowner; landlord; or tenant, a husband or wife may sign all such FSA or CCC documents on behalf of the other spouse, unless such other spouse has provided written notification to FSA and CCC that such action is not authorized. The notification must be provided to FSA with respect to each farm.

* * * * *

■ 2. In the final rule FR Doc. 03–16161, published on June 26, 2003 (68 FR 37936–37952) make the following correction. On page 68 FR 37951 in the first column, correct § 1480.17(m) to read as follows:

§ 1480.17 Quantity adjustments for diminished quality for certain crops.

* * * * *

(m) Quantity adjustments for diminished quality shall also not apply under this section to: honey, maple sap, turfgrass sod, crops marketed for a use other than an intended use for which there is not an established county price or yield, or any other crop that the Deputy Administrator deems it appropriate to exclude.

* * * * *

Signed in Washington, DC, on December 23, 2003.

James R. Little,

Administrator, Farm Service Agency, and Executive Vice President, Commodity Credit Corporation.

[FR Doc. 03–32324 Filed 12–30–03; 2:20 pm]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 300, 301, 306, 318, 320, and 381

[Docket No. 00–033F]

RIN 0583–AC78

Agency Organization

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: The Food Safety and Inspection Service is amending regulations adopted under the Federal Meat Inspection Act and the Poultry Products Inspection Act by updating

and consolidating organizational provisions.

EFFECTIVE DATE: January 5, 2004.

FOR FURTHER INFORMATION CONTACT: Lynn E. Dickey, Director, Regulations and Petitions Policy Staff, Office of Policy and Program Development, Food Safety and Inspection Service, Washington, DC 20250–3700; (202) 720–5627.

SUPPLEMENTARY INFORMATION: The Food Safety and Inspection Service (FSIS) is responsible for carrying out various functions of the Department of Agriculture. Chief among these are the administration of the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 *et seq.*), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451 *et seq.*), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031 *et seq.*). Each of these statutes includes provisions that provide for government inspection as part of a regulatory program designed to protect the health and welfare of consumers by preventing the distribution of meat, poultry, and egg products that are unwholesome, otherwise adulterated, or misbranded (21 U.S.C. 451, 455, 602–606, 1031, and 1034).

In this rulemaking, FSIS is continuing its work to update and consolidate various regulatory provisions. This work began with the issuance of a final rule on the organization of the Agency. This rule, for which the public was given an opportunity to submit comments, was published on December 31, 1998 (the 1998 rule) (63 FR 72352). The 1998 rule amended FSIS's regulations in chapter III of title 9 of the Code of Federal Regulations (9 CFR chapter III) by establishing a new part 300 that described FSIS's mission and organization. It also transferred regulations adopted under the EPIA from part 59 of title 7 of the Code of Federal Regulations to part 590 of title 9.

The Agency received only one comment on the 1998 rule. The United Egg Association (UEA) requested that FSIS undertake a more thorough review of the regulations promulgated pursuant to the EPIA. The UEA stated that the current regulatory system was antiquated.

FSIS is conducting a comprehensive review of the EPIA regulations. The Agency anticipates that the review will result in its proposing a number of substantive changes to the EPIA regulations.

In this final rule, the Agency is consolidating and updating various provisions of the regulations issued under the FMIA (9 CFR parts 300, 301, 306, 318, and 320) and the PPIA (9 CFR part 381, subparts A, B, F, O, and Q). The Agency is also adding a section, 300.4, "Organizational terminology; personnel" to part 300. With the addition of this section, part 300 "Agency Mission and Organization", will contain a description of the part (300.1), a statement about FSIS's responsibilities (300.2), a description of FSIS's organizational structure and personnel (300.3 and 300.4), and rules on the access of government employees to regulated places of business (300.6).

In § 300.1 (Purpose), FSIS is adding a sentence to reflect the fact that part 300 includes rules on the access of government employees to regulated places of business. In paragraph (a) of § 300.2 (FSIS responsibilities), FSIS is adding a sentence that references the Department's delegation of authority regulations (7 CFR 2.7, 2.18, and 2.53). These regulations reference the statutory provisions that the Administrator of FSIS is responsible for administering on behalf of the Secretary of Agriculture.

In § 300.3 (FSIS organization), FSIS is amending paragraph (a) by adding a sentence that states that FSIS implements the inspection provisions of the FMIA, the PPIA, and the EPIA through its field structure. FSIS is also amending paragraphs (b)(1) and (2), and (c)(1) of § 300.3 to reflect the changes that the Agency has made in its headquarters and field organization since publication of the 1998 rule.

FSIS has reorganized its headquarter's offices. FSIS now has eight principal components or offices instead of four. These offices are under the direction of an Assistant Administrator. The Assistant Administrators, along with their staffs and the Office of the Administrator, are still located at the U.S. Department of Agriculture Headquarters in Washington, DC.

FSIS has renamed one of the program offices listed in paragraph (b)(1) of § 300.3. The Office of Policy, Program Development, and Evaluation is now the Office of Policy and Program Development. The functions for this office have also changed. The Office of Policy and Program Development is charged with developing and articulating the Agency's policies regarding food safety and other consumer protections.

FSIS has added four program offices. These offices are the Office of Food Security and Emergency Preparedness (OFSEP), the Office of Program Evaluation, Enforcement, and Review (OPEER), the Office of Public Affairs, Education, and Outreach (OPAEO), and the Office of International Affairs (OIA).

The OFSEP's mission is to prevent or, if necessary, coordinate a response to an intentional attack on the food supply.

The OPEER's primary function is to perform as the Agency's quality assurance program. This staff continually acts as the Agency's eyes and ears to ensure that Agency programs are functioning in an efficient and effective manner.

The OPAEO is responsible for communicating with three main audiences: Congress, constituents, and the media. The OPAEO communications with Congress include everything from preparing testimony for hearings on Capitol Hill to briefing congressional staff on regulatory proposals affecting FSIS. The OPAEO also shares information with, and gathers feedback from, constituents of the Agency and provides newspaper, television and radio reporters accurate and timely information about FSIS's crucial role in protecting public health. The Staff Offices that are currently listed in paragraph (b)(2) of § 300.3 have been reorganized and incorporated into the new Office of Public Affairs, Education, and Outreach.

The OIA is responsible for developing policy and procedures to assure that meat, poultry, and egg products imported into the U.S. are safe, wholesome, unadulterated, properly labeled and packaged, and for facilitating the certification of U.S. meat, poultry, and egg products intended for export.

In addition to the four new program offices described above, the Administrator has created a position titled Special Assistant for Civil Rights. This individual reports directly to the Administrator. The Administrator also has an Executive Assistant and a Codex Manager.

As anticipated in the 1998 rule (63 FR 72352, footnote 1), FSIS has closed its district office in Boston, Massachusetts. The Agency has also reassigned the program responsibilities for the States of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont to the district office located in Albany, New York, and has reassigned the program responsibilities for Puerto Rico and the Virgin Islands to the district office located in Atlanta, Georgia.

In May 2002, FSIS realigned its district office structure. The realignment resulted in a reduction from 17 districts to 15 districts with 2 satellite offices. The Pickerington, Ohio district office will now be a satellite office and will be serviced by the Chicago, Illinois district office. The State of Kentucky will now be serviced by the Raleigh, North

Carolina district office and the State of West Virginia will be serviced by the Beltsville, Maryland district office.

The Salem, Oregon district office will become a satellite office and will be serviced by the Boulder, Colorado district office. The States and areas affected are Alaska, American Samoa, Guam, Hawaii, Idaho, Oregon, and Washington. The State of New Jersey, which was serviced by the Albany, New York district office will now be serviced by the Philadelphia, Pennsylvania district office. FSIS is amending paragraph (c)(1) of § 300.3 to reflect this fact and to correct the address listed for the district office in Maryland which is located in Beltsville, not Greenbelt.

FSIS is including, in paragraph (a) of § 300.4 (Organizational terminology; personnel), updated terminology that combines and replaces the current definitions in § 301.2 of Administrator, Circuit Supervisor, Inspector, Inspector in charge, Program, Program employee, and Secretary; and the current definitions in § 381.1(b) of Administrator, Circuit Supervisor, Inspection Service, Inspection Service employee, Inspection Service supervisor, Inspector, Inspector in Charge, and Secretary.

FSIS also is removing obsolete and unnecessary organizational information and terminology. Provisions that the Agency is deleting include: § 306.1 (Designation of circuit supervisors and assistants); the definitions in § 301.2 of Area, Area Supervisor, Circuit, the Department, Food Safety and Inspection Service, Import Field Office, Import Supervisor, and Regional Director; and the definitions in § 381.1(b) of Department, Import Field Office, and Import Supervisor.

FSIS is addressing several changes in the Agency's organization and the administration of its regulatory functions in paragraph (b) of § 300.4. Section 300.4(b) indicates that the Agency has replaced its regional office and import field office structure with a district office structure, that the authority previously delegated to Regional Directors now is delegated to district managers, and that the authority previously delegated to area supervisors and import supervisors now is delegated to inspection program supervisors in the successor district offices.

In paragraph (b) of § 300.6, FSIS is addressing access to places of business regulated under the FMIA or the PPIA. Paragraph (b)(1) addresses access to establishments that slaughter livestock or otherwise prepare meat products or slaughter poultry or otherwise process poultry products. It replaces the first sentence of § 306.2 and all of § 381.32. Paragraph (b)(2) addresses access to and examinations of facilities, inventories, and records authorized by section 202 of the FMIA and section 11(b) of the PPIA (21 U.S.C. 460(b) and 642). It replaces the first sentences of § 320.4 and § 381.178 (Access to and inspection of records, facilities and inventory; copying and sampling).

FSIS is updating its regulations on the accreditation of chemistry laboratories (§ 318.21 and § 381.53), a function performed by FSIS's Office of Public Health and Science (OPHS). An erroneous street address for the Accredited Laboratory Program is being removed and the OPHS Assistant Administrator is referred to instead of a former OPHS organizational unit.

In § 320.5 (Registration) and § 381.179 (Registration), FSIS is amending paragraph (a) in both sections by changing the office name from where registration forms are obtained and also providing another option for obtaining registration forms. The office name will be changed from Compliance Programs, Regulatory Programs, to Evaluation and Enforcement Division, Office of Program Evaluation, Enforcement and Review. The other option added for obtaining an application is to call the District Office.

FSIS has determined that the notice and comment and delayed effective date requirements of the Administrative Procedure Act (5 U.S.C. 553(b) and (d)) do not apply to this rule. The amendments made by this rule reflect the Agency's current responsibilities, the organization through which it carries out those responsibilities, and technical and minor changes in the organization of the Agency's regulations and organizational terminology. Therefore, FSIS has, for good cause, found that notice and public procedure thereon are unnecessary, and it is issuing these amendments as a final rule, effective upon publication.

Executive Order 12866 and Effect on Small Entities

The changes in this rule are organizational and technical. Their adoption will not affect the costs of regulated establishments or of FSIS, except to the extent that providing the public with current information on how the Agency operates should increase the Agency's efficiency and improve the delivery of inspection services to members of the regulated industries. Therefore, FSIS has determined that this rule is not a significant regulatory action under the criteria set forth in Executive Order 12866.

For the same reasons, FSIS certifies that this rule will not have a significant economic impact on a substantial number of small entities. Accordingly, as provided in section 605 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), sections 603 and 604 do not apply.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. No retroactive effect will be given to the rule and no administrative proceedings will be required before parties may file suit in court challenging the rule. States and local jurisdictions may not impose inconsistent requirements on federally inspected premises, facilities, or operations.

Paperwork Reduction Act

No collections of information will be affected by the adoption of this rule.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, in an effort to better ensure that minorities, women, and persons with disabilities are aware of this notice, FSIS will announce it and make copies of this **Federal Register** publication available through the FSIS Constituent Update. FSIS provides a weekly Constituent Update, which is communicated via Listserv, a free e-mail subscription service. In addition, the update is available on-line through the FSIS Web page located at *http://www.fsis.usda.gov*. The update is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, recalls, and any other types of information that could affect or would be of interest to our constituents/stakeholders. The constituent Listserv consists of industry, trade, and farm groups, consumer interest groups, allied health professionals, scientific professionals, and other individuals that have requested to be included. Through the Listserv and web page, FSIS is able to provide information to a much broader, more diverse audience.

For more information contact the Congressional and Public Affairs Office, at (202) 720–9113. To be added to the free e-mail subscription service (Listserv) go to the "Constituent Update" page on the FSIS Web site at *http://www.fsis.usda.gov/oa/update/update.htm*. Click on the "Subscribe to the Constituent Update Listserv" link, then fill out and submit the form.

List of Subjects in 9 CFR Chapter III

Part 300

Meat and meat products, Poultry and poultry products.

Part 301

Meat and meat products, Poultry and poultry products.

Part 306

Government employees, Meat inspection.

Part 318

Laboratories, Meat inspection, Reporting and recordkeeping requirements.

Part 320

Meat inspection, Reporting and recordkeeping requirements.

Part 381

Laboratories, Poultry and poultry products, Reporting and recordkeeping requirements.

■ For the reasons set forth above, the Food Safety and Inspection Service is amending 9 CFR Chapter III as follows:

PART 300—AGENCY MISSION AND ORGANIZATION

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

Authority: 21 U.S.C. 451–470, 601–695, 1031–1056; 7 U.S.C. 138–138i, 450, 1621–1627, 1901–1906; 7 CFR 2.7, 2.18, 2.53.

§ 300.1 [Amended]

■ 2. Section 300.1 is amended by adding, at the end, "It also includes rules on the access of government employees to regulated places of business."

■ 3. Paragraph (a) of § 300.2 is revised to read as follows:

§ 300.2 FSIS responsibilities.

(a) *Delegations of authority.* The Secretary of Agriculture and Under Secretary for Food Safety have delegated to the Administrator of the Food Safety and Inspection Service the responsibility for exercising the functions of the Secretary of Agriculture under various statutes (see 7 CFR 2.7, 2.18, and 2.53).

* * * * *

■ 4. Section 300.3 is amended as follows:

■ a. Paragraph (a) of § 300.3 is amended by adding, at the end, "FSIS implements the inspection provisions of the FMIA, the PPIA, and the EPIA through its field structure."

■ b. The introductory text of paragraph (b) of § 300.3 is amended by removing "four" in the first sentence of the introductory text and adding, in its place, "eight".

■ c. Paragraph (b)(1) of § 300.3 is amended and the table of district office locations and geographic boundaries in paragraph (c)(1) is revised to read as follows:

§ 300.3 FSIS organization.

* * * * *

(b) *Headquarters.* * * *

(1) *Program Offices.* FSIS's headquarters offices are the Office of Public Health and Science, which provides scientific analysis, advice, data, and recommendations on matters involving public health and science; the Office of Management, which provides centralized administrative and support services; the Office of Policy and Program Development, which develops and articulates the Agency's policies regarding food safety and other consumer protections; the Office of Field Operations, which manages regulatory oversight and inspection (see paragraph (c) of this section); the Office of Food Security and Emergency Preparedness, which works to prevent or, if necessary, coordinate a response to an intentional attack on the food supply; the Office of Program Evaluation, Enforcement, and Review, which acts to ensure that Agency programs are functioning in an efficient and effective manner; the Office of Public Affairs, Education, and Outreach, which is responsible for facilitating communications between FSIS and Congress, the Agency's constituents, and the media; and the Office of International Affairs, which is responsible for recommending and developing international policy activities.

(2) [Reserved]

(c) *Field.* * * *

(1) *District offices.* * * *

Alameda, CA	California.
Boulder, CO *Salem, OR (satellite office)*	Arizona, Colorado, Nevada, New Mexico, Utah, Alaska, American Samoa, Guam, Hawaii, Idaho, Northern Mariana Islands, Oregon, and Washington.
Minneapolis, MN	Minnesota, Montana, North Dakota, South Dakota, and Wyoming.
Des Moines, IA	Iowa and Nebraska.
Lawrence, KS	Kansas and Missouri.
Springdale, AR	Arkansas, Louisiana, and Oklahoma.
Dallas, TX	Texas.
Madison, WI	Michigan and Wisconsin.
Chicago, IL *Pickering, OH, (satellite office)*	Illinois, Ohio, and Indiana.
Philadelphia, PA	Pennsylvania and New Jersey.
Albany, NY	Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.
Beltsville, MD	Delaware, District of Columbia, Maryland, Virginia, and West Virginia.
Raleigh, NC	North Carolina, South Carolina, and Kentucky.
Atlanta, GA	Florida, Georgia, Puerto Rico, and the Virgin Islands.
Jackson, MS	Alabama, Mississippi, and Tennessee.

* * * * *

■ d. Paragraph (b)(2) of § 300.3 is removed and reserved.

■ 5. Part 300 is further amended by adding § 300.4 to read as follows:

§ 300.4 Organizational terminology; personnel.

(a) Unless otherwise specifically provided or required in the context of a particular part of the regulations:

Administrator means the Administrator of the Food Safety and Inspection Service or any other officer or employee of the Department to whom authority has been or may in the future be delegated to act in his or her stead.

Circuit Supervisor means the official of the Inspection Service who is assigned responsibility for supervising the conduct of inspection at a specific group of official establishments.

Inspection program, inspection service, or *program* means the organizational unit within the Department with responsibility for carrying out the FMIA, the PPIA, and the EPIA.

Inspection program employee, inspection service employee, or *program employee* means an inspector or other government employee who is authorized to conduct any inspection or perform any other duty in connection with the inspection program, inspection service, or program.

Inspection service supervisor or *Inspection program supervisor* means an inspection program or service employee

or program employee who is delegated authority to exercise supervision over one or more phases of the inspection program.

Inspector means an inspector of the inspection program, inspection service, and program. ("Inspector" includes an employee or official of the Federal government or the government of a State or territory or the District of Columbia who is authorized by the Administrator to inspect meat and meat products or poultry and poultry products under the authority of the FMIA or the PPIA, respectively, under an agreement entered into between the Administrator and the appropriate State or other agency.)

Inspector in charge or *IIC* means an inspection program employee, inspection service employee, or program employee who has primary responsibility for inspection program functions at a particular official establishment.

Secretary means the Secretary of Agriculture of the United States or his or her delegate.

(b) FSIS has replaced the regional office and import field office structure referenced in some parts of subchapter A of this chapter. Authority previously delegated to Regional Directors now is delegated to district managers; authority previously delegated to area supervisors and import supervisors now is delegated to inspection program supervisors in the successor district offices.

■ 6. Section 300.6 is amended by adding paragraph (b) to read as follows:

§ 300.6 Access to establishments and other places of business.

* * * * *

(b) *Meat and poultry establishments and related industries.*

(1) At all times, by day or night, whether the establishment is being operated or not, inspection program employees must have access to the premises and to every part of an establishment that slaughters livestock or otherwise prepares meat products or slaughters poultry or otherwise processes poultry products that are subject to inspection for the purpose of conducting an inspection or performing any other inspection program duty. The numbered official badge of an inspection program employee is sufficient identification to entitle him or her to admittance to all parts of such an establishment and its premises.

(2) At all ordinary business hours, upon presentation of credentials by a representative of the Secretary, any person (including any firm or corporation or other business unit) subject to recordkeeping requirements under section 202 of the FMIA or section 11(b) of the PPIA must permit such representative to enter his or her place of business to examine the facilities and inventory and to examine and copy the records specified in § 320.1 and § 381.175, respectively, of this chapter and, upon payment of the fair market value therefor, take reasonable samples of the inventory.

PART 301—TERMINOLOGY; ADULTERATION AND MISBRANDING STANDARDS

■ 7. The name for part 301 is revised as forth above.

■ 7a. The authority citation for part 301 is revised to read as follows:

Authority: 21 U.S.C. 601–695; 7 U.S.C. 138–138i, 450, 1901–1906; 7 CFR 2.7, 2.18, 2.53.

■ 8. Section 301.1 is revised to read as follows:

§ 301.1 General.

For purposes of this chapter and unless otherwise specifically provided by regulation or required in the context of particular regulations:

(a) Terms have the meanings set forth in this part;

(b) The singular form also imports the plural, and the masculine form also imports the feminine and vice versa.

■ 9. In § 301.2, the undesignated paragraphs that define the terms *Administrator, Area, Area Supervisor, Circuit, Circuit supervisor, The Department, Food Safety and Inspection Service, Import Field Office (IFO), Import Supervisor, Inspector, Inspector in charge, Program, Program employee, Regional Director,* and *Secretary* are removed.

PART 306—ASSIGNMENT AND AUTHORITIES OF PROGRAM EMPLOYEES

■ 10. The authority citation for part 306 is revised to read as follows:

Authority: 21 U.S.C. 601–695; 7 CFR 2.7, 2.18, 2.53.

■ 11. Section 306.1 is revised to read as follows:

§ 306.1 Designation of circuit supervisor and assistants. [See §§ 300.3 and 300.4 of this chapter regarding FSIS' organization and inspection program supervisors.]

■ 12. Section 306.2 is revised to read as follows:

§ 306.2 Program employees to have access to establishments. [See § 300.6 of this chapter regarding access to establishments and other places of business.]

§ 306.3 [Amended]

■ 13. The last sentence of § 306.3 is removed.

PART 318—ENTRY INTO OFFICIAL ESTABLISHMENTS; REINSPECTION AND PREPARATION OF PRODUCTS

■ 14. The authority citation for part 318 is revised to read as follows:

Authority: 21 U.S.C. 601–695; 7 U.S.C. 138f, 450, 1901–1906; 7 CFR 2.7, 2.18, 2.53.

§ 318.21 [Amended]

■ 15. Section 318.21 is amended to read as follows:

■ a. Paragraphs (b)(1), (b)(3)(vi), (c)(1), and (c)(3)(vi) are amended by removing "room 516–A, Annex Building," and "300 12th Street SW.,".

■ b. Paragraphs (b)(3)(i), (b)(3)(xi), and (c)(3)(xi) are amended by removing "Quality Systems Branch, FSIS Chemistry Division" and adding, in its place, "Assistant Administrator, Office of Public Health and Science".

PART 320—RECORDS, REGISTRATION, AND REPORTS

■ 16. The authority citation for part 320 is revised to read as follows:

Authority: 21 U.S.C. 601–695; 7 CFR 2.7, 2.18, 2.53.

■ 17. Section 320.4 is revised to read as follows:

§ 320.4 Access to and inspection of records, facilities and inventory; copying and sampling.

Representatives of the Secretary afforded access to a business specified in § 320.1 of this part (see § 300.6(b)(2) of this chapter) also must be afforded any necessary facilities (other than reproduction equipment) for the examination and copying of records and for the examination and sampling of inventory.

■ 18. Paragraph (a) of § 320.5 is amended by removing the phrase "the Compliance Programs, Regulatory Programs," in the last sentence and adding in its place "Evaluation and Enforcement Division, Office of Program Evaluation, Enforcement, and Review" and adding to the end of the sentence "or by calling the District Office."

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

■ 19. The authority citation for part 381 is revised to read as follows:

Authority: 7 U.S.C. 138f, 450; 21 U.S.C. 451–470; 7 CFR 2.7, 2.18, 2.53.

Subpart A—Definitions

■ 20. In § 381.1(b), the undesignated subordinate paragraphs that define the terms *Administrator, Circuit supervisor, Department, Import Field Office (IFO), Import Supervisor, Inspection Service, Inspection Service employee, Inspection Service supervisor, Inspector, Inspector in Charge,* and *Secretary* are removed.

Subpart B—Administration; Application of Inspection and Other Authorities

§ 381.3 [Amended]

■ 21. Section 381.3 is amended by removing and reserving paragraph (a).

Subpart F—Assignment and Authorities of Program Employees; Appeals

■ 22. Section 381.32 is revised to read as follows:

§ 381.32 Access to establishments. [See § 300.6 of this chapter regarding access to establishments and other places of business.]

§ 381.33 [Amended]

■ 23. The last sentence of § 381.33 is removed.

Subpart O—Entry of Articles into Official Establishments; Processing Inspection and Other Reinspections; Processing Requirements

§ 381.153 [Amended]

■ 24. Section 381.153 is amended to read as follows:

■ a. Paragraphs (b)(1), (b)(3)(vi), (c)(1), and (c)(3)(vi) are amended by removing "room 516–A, Annex Building," and "300 12th Street SW.,".

■ b. Paragraphs (b)(3)(i), (b)(3)(xi), and (c)(3)(xi) are amended by removing "Quality Systems Branch, FSIS Chemistry Division" and adding, in its place, "Assistant Administrator, Office of Public Health and Science".

Subpart Q—Records, Registration, and Reports

■ 25. Section 381.178 is revised to read as follows:

§ 381.178 Access to and inspection of records, facilities and inventory; copying and sampling.

Representatives of the Secretary afforded access to a business specified in § 381.175 of this part (see § 300.6(b)(2) of this chapter) also must be afforded any necessary facilities (other than reproduction equipment) for the examination and copying of records and the examination and sampling of inventory.

■ 26. Section 381.179 is amended to read as follows:

§ 381.179 Registration.

■ Paragraph (a) is amended by removing the phrase "the Compliance Programs, Regulatory Programs," in the last sentence and adding in its place "District Enforcement Operations, Field Operations" and adding to the end of the sentence "or by calling the District Office."

Done at Washington, DC, on December 24, 2003.

Garry L. McKee,

Administrator.

[FR Doc. 04–175 Filed 1–2–04; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 201 and 610

[Docket No. 1980N–0208]

Biological Products; Bacterial Vaccines and Toxoids; Implementation of Efficacy Review

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule and final order.

SUMMARY: The Food and Drug Administration (FDA) is amending the biologics regulations in response to the report and recommendations of the Panel on Review of Bacterial Vaccines and Toxoids with Standards of Potency (the Panel). The Panel reviewed the safety, efficacy, and labeling of bacterial vaccines and toxoids that have standards of potency, bacterial antitoxins, and immune globulins. On the basis of the Panel's findings and recommendations, FDA is classifying these products as Category I (safe, effective, and not misbranded), Category II (unsafe, ineffective, or misbranded), or Category IIIB (off the market pending completion of studies permitting a determination of effectiveness).

DATES: This rule is effective January 4, 2003. The final order on categorization of products is effective January 5, 2004.

FOR FURTHER INFORMATION CONTACT: Astrid Szeto, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210.

SUPPLEMENTARY INFORMATION:

I. Introduction

The purposes of this document are:

1. To categorize those bacterial vaccines and toxoids licensed before July 1972 according to the evidence of their safety and effectiveness, thereby determining whether they may remain licensed and on the market;
2. To issue a final response to recommendations made in the Panel's report. These recommendations concern conditions relating to active components, labeling, tests required before release of product lots, product standards, or other conditions considered by the Panel to be necessary or appropriate for assuring the safety and effectiveness of the reviewed products;
3. To revise the standard for potency of Tetanus Immune Globulin in § 610.21 (21 CFR 610.21); and
4. To apply the labeling requirements in §§ 201.56 and 201.57 (21 CFR 201.56 and 201.57) to bacterial vaccines and toxoids by amending the implementation dates in § 201.59 (21 CFR 201.59).

II. History of the Review

In the **Federal Register** of February 13, 1973 (38 FR 4319), FDA issued procedures for the review by independent advisory review panels of the safety, effectiveness, and labeling of biological products licensed before July 1, 1972. This process was eventually codified in § 601.25 (21 CFR 601.25) (38 FR 32048 at 32052, November 20, 1973). Under the panel assignments published in the **Federal Register** of June 19, 1974 (39 FR 21176), FDA assigned the biological product review to one of the following groups: (1) Bacterial vaccines and bacterial antigens with "no U.S. standard of potency," (2) bacterial vaccines and toxoids with standards of potency, (3) viral vaccines and rickettsial vaccines, (4) allergenic extracts, (5) skin test antigens, and (6) blood and blood derivatives.

Under § 601.25, FDA assigned responsibility for the initial review of each of the biological product categories to a separate independent advisory panel consisting of qualified experts to ensure objectivity of the review and public confidence in the use of these products. Each panel was charged with preparing an advisory report to the Commissioner of Food and Drugs which was to: (1) Evaluate the safety and effectiveness of the biological products for which a license had been issued, (2) review their labeling, and (3) identify the biological products that are safe, effective, and not misbranded. Each advisory panel report was also to

include recommendations classifying the products reviewed into one of three categories.

- Category I designating those biological products determined by the Panel to be safe, effective, and not misbranded.
- Category II designating those biological products determined by the Panel to be unsafe, ineffective, or misbranded.
- Category III designating those biological products determined by the Panel not to fall within either Category I or Category II on the basis of the Panel's conclusion that the available data were insufficient to classify such biological products, and for which further testing was therefore required. Category III products were assigned to one of two subcategories. Category IIIA products were those that would be permitted to remain on the market pending the completion of further studies. Category IIIB products were those for which the Panel recommended license revocation on the basis of the Panel's assessment of potential risks and benefits.

In its report, the Panel could also include recommendations concerning any condition relating to active components, labeling, tests appropriate before release of products, product standards, or other conditions necessary or appropriate for a biological product's safety and effectiveness.

In accordance with § 601.25, after reviewing the conclusions and recommendations of the review panels, FDA would publish in the **Federal Register** a proposed order containing: (1) A statement designating the biological products reviewed into Categories I, II, IIIA, or IIIB, (2) a description of the testing necessary for Category IIIA biological products, and (3) the complete panel report. Under the proposed order, FDA would propose to revoke the licenses of those products designated into Category II and Category IIIB.

After reviewing public comments, FDA would publish a final order on the matters covered in the proposed order.

In the **Federal Register** of December 13, 1985 (50 FR 51002), FDA issued a proposed rule responding to the recommendations of the Panel (the December 1985 proposal). In the December 1985 proposal, FDA proposed regulatory categories (Category I, Category II, or Category IIIB as defined previously in this document) for each bacterial vaccine and toxoid under review by the Panel, and responded to other recommendations made by the Panel. The public was offered 90 days to submit comments in response to the December 1985 proposal.

The above stated definition of Category IIIA was applied at the time of the Panel's review and served as the basis for the Panel's recommendations. In the **Federal Register** of October 5, 1982 (47 FR 44062), FDA revised § 601.25 and codified § 601.26, which established procedures to reclassify those products in Category IIIA into either Category I or Category II based on available evidence of effectiveness. The Panel recommended that a number of biological products be placed into Category IIIA. FDA assigned the review of those products previously classified into Category IIIA to the Vaccines and Related Biological Products Advisory Committee. FDA has addressed the review and reclassification of bacterial vaccines and toxoids classified into Category IIIA through a separate administrative procedure (see the **Federal Register** of May 15, 2000 (65 FR 31003), and May 29, 2001 (66 FR 29148)). Therefore, FDA does not further identify or discuss in this document any bacterial vaccines and toxoids classified into Category IIIA.

III. Comments on the December 1985 Proposal and Our Response

FDA received four letters of comments in response to the December 1985 proposal. One letter from a licensed manufacturer of bacterial vaccine and toxoid products concerned the confidentiality of information it had submitted for the Panel's review. As provided in § 601.25(b)(2), FDA considered the extent to which the information fell within the confidentiality provisions of 18 U.S.C. 1905, 5 U.S.C. 552(b) or 21 U.S.C. 331(j) before placing the information in the public docket for the December 1985 proposal. Another comment from a member of the Panel provided an update of important scientific information related to bacterial vaccines and toxoids that had accrued since the time of the Panel's review. The letter did not comment on the December 1985 proposal nor did it contend that the newly available information should result in modification of the Panel's recommendations or FDA's proposed actions. FDA's responses to the comments contained in the remaining two letters of comment follows.

(Comment 1) One comment from a licensed manufacturer of bacterial vaccines and toxoids objected to the proposed classification into Category IIIA of several of its products for use in primary immunization.

As described previously in this document, FDA is considering those products proposed for Category IIIA in a separate rulemaking process. This final rule does not take any action regarding the further classification of those products proposed for Category IIIA, including those proposed for Category IIIA for primary immunization. All manufacturers and others in the general public have been offered additional opportunity to comment on the final categorization of specific category IIIA products in the above-noted process.

(Comment 2) In response to FDA's proposal that Pertussis Immune Globulin (Human) be placed into category IIIA because of insufficient evidence of efficacy, one comment stated that FDA should permit manufacture of Pertussis Immune Globulin (Human) for export only. The comment noted that medical practices in other countries may differ from those in the United States and that in some countries Pertussis Immune Globulin (Human) plays an important role in the augmentation of therapy with antibiotics in young, very ill infants with pertussis.

Since that time, FDA has revoked all licenses for Pertussis Immune Globulin (Human) at the requests of the individual manufacturers. The FDA Export Reform and Enhancement Act of 1996 (Public Law 104–134, as amended by Public Law 104–180) amended provisions of the Federal Food, Drug, and Cosmetic Act (the act) pertaining to the export of certain unapproved products. Section 802 of the act (21 U.S.C. 382) contains requirements for the export of products not approved in the United States. Under these provisions, products such as Pertussis Immune Globulin (Human) could be exported to other countries, if the requirements of section 802 are met.

(Comment 3) One comment concerned the generic order and wording for product labeling recommended by the Panel and which FDA proposed to adopt in its response to the Panel recommendation. The comment recommended that a labeling section concerning "Overdose" be included only when circumstances dictate. The comment stated that because all biological products are prescription products administered by health care providers, the risk of overdose should be greatly reduced.

FDA agrees that in many cases a labeling section "Overdosage" is not necessary. Section 201.56(d)(3) of the labeling regulations provides that the labeling may omit any section or subsection of the labeling format (outlined in § 201.56) if clearly inapplicable. The "Overdosage" section,

provided for in § 201.57(i) of the regulations, is omitted for many bacterial vaccine and toxoid products.

(Comment 4) One letter of comment objected to several statements made by the Panel and provided in the written report but did not object to or comment on FDA's proposed responses to the Panel's recommendations.

FDA is not considering comments on the Panel's report in this rulemaking. The Panel's recommendations are not binding but represent the scientific opinions of a Panel of experts. FDA believes that the agency should not modify the statements and recommendations of the Panel as provided in its report, including through public comment. The purpose of the opportunity for comment was to allow comment on FDA's responses to the Panel's report and not on the Panel's report directly.

IV. Categorization of Products—Final Order

Category I. Licensed biological products determined to be safe and effective and not misbranded. Table 1 of this document is a list of those products proposed in December 1985 by FDA for Category I. Under the "Comments" column, FDA notes those products for which FDA's proposed category differs from that recommended by the Panel. Products for which the licenses were revoked before the December 1985 proposal are not listed but were identified in the December 1985 proposal. Products for which the licenses were revoked after the December 1985 proposal are identified in the "Comments" column. After review of the comments and finding no additional scientific evidence to alter the proposed categorizations, FDA adopts Category I as the final category for the following products.

TABLE 1.—CATEGORY I

Manufacturer/License No.	Products	Comments
Alpha Therapeutic Corp., License No. 744	Tetanus Immune Globulin (Human)	Although the Panel recommended that Tetanus Immune Globulin (Human), manufactured by Alpha Therapeutic Corp., be placed in category IIIB, FDA proposed that it be placed in Category I.[1]
Advance Biofactures Corp., License No. 383	Collagenase	
Armour Pharmaceutical Co., License No. 149	Tetanus Immune Globulin (Human)	Manufacturer's licensed name is now Centeon L. L. C. On July 26, 1999, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer.
Connaught Laboratories, Inc., License No. 711	Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed, and Diphtheria Antitoxin	On December 9, 1999, a name change to Aventis Pasteur, Inc. with an accompanying license number change to 1277 was granted to Connaught Laboratories, Inc. FDA revoked the licenses for these products at the request of the manufacturer on July 6, 2001, and August 2, 2001, respectively.
Connaught Laboratories, Ltd., License No. 73	BCG Vaccine, Botulism Antitoxin (Types A, B, and E), Botulism Antitoxin (Type E), Tetanus Toxoid	On February 24, 2000, a name change to Aventis Pasteur, Ltd. with an accompanying license number change to 1280 was granted. On December 21, 2000, FDA revoked the license for Tetanus Toxoid at the request of the manufacturer.
Cutter Laboratories, Inc., License No. 8	Plague Vaccine, Tetanus Immune Globulin (Human)	On October 5, 1994, the manufacturing facilities and process for Plague Vaccine were transferred to Greer Laboratories, Inc., License No. 308. On May 24, 1995, FDA revoked Cutter's license for Plague Vaccine at the request of Cutter, the previous manufacturer; the license for Greer Labs, Inc. remains in effect. Bayer Corp. now holds the license for Tetanus Immune Globulin (Human) under License No. 8.
Eli Lilly & Co., License No. 56	Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed	On December 2, 1985, FDA revoked the license for Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed at the request of the manufacturer. FDA inadvertently omitted this information in the December 1985 proposal.
Glaxo Laboratories, Ltd., License No. 337	BCG Vaccine	On July 17, 1990, FDA revoked the license for BCG Vaccine at the request of the manufacturer.
Istituto Sieroterapico Vaccinogeno Toscano Sclavo, License No. 238	Diphtheria Antitoxin, Diphtheria Toxoid Adsorbed, Tetanus Toxoid Adsorbed	On July 17, 1990, FDA revoked the license for Diphtheria Antitoxin at the request of the manufacturer. On July 27, 1993, FDA revoked the licenses for Diphtheria Toxoid Adsorbed and Tetanus Toxoid Adsorbed at the request of the manufacturer.
Lederle Laboratories, Division American Cyanamid Co., License No. 17	Cholera Vaccine, Tetanus Immune Globulin (Human)	On December 23, 1992, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer. On October 23, 1996, FDA revoked the license for Cholera Vaccine at the request of the manufacturer.

TABLE 1.—CATEGORY I—Continued

Manufacturer/License No.	Products	Comments
Massachusetts Public Health Biologic Laboratories, License No. 64	Diphtheria and Tetanus Toxoids Adsorbed, Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed, Tetanus and Diphtheria Toxoids Adsorbed (For Adult Use), Tetanus Antitoxin, Tetanus Immune Globulin (Human), Tetanus Toxoid Adsorbed, Typhoid Vaccine	Although the Panel recommended that Tetanus Antitoxin be placed in Category IIIB, FDA proposed that it be placed in Category I. On October 26, 1988, FDA revoked the license for Typhoid Vaccine at the request of the manufacturer. On January 10, 1994, FDA revoked the license for Tetanus Antitoxin at the request of the manufacturer. On December 22, 1998, FDA revoked the license for Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed at the request of the manufacturer. On August 3, 2000, FDA revoked the license for Diphtheria and Tetanus Toxoids Adsorbed at the request of the manufacturer.
Merck Sharp & Dohme, Division of Merck & Co., Inc, License No. 2	Tetanus Immune Globulin (Human)	The manufacturer is now known as Merck & Co., Inc. On January 31, 1986, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer.
Michigan Department of Public Health, License No. 99	Anthrax Vaccine Adsorbed, Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed, Pertussis Vaccine Adsorbed, Typhoid Vaccine	The license for Typhoid Vaccine was revoked on June 25, 1985, at the request of the manufacturer. FDA inadvertently omitted this information in the December 1985 proposal. On November 11, 1998, a name change to BioPort Corp. (BioPort) with an accompanying license number change to 1260 was granted. The license for Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed was revoked at the request of the manufacturer (BioPort) on November 20, 2000. The license for Pertussis Vaccine Adsorbed was revoked at the request of the manufacturer (BioPort) on April 22, 2003.
Parke-Davis, Division of Warner-Lambert Co., License No. 1	Tetanus Immune Globulin (Human)	On November 19, 1983, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer. FDA inadvertently omitted this information in the December 1985 proposal.
Swiss Serum and Vaccine Institute Berne, License No. 21	Tetanus Antitoxin	Although the Panel recommended that Tetanus Antitoxin be placed in Category IIIB, FDA proposed that it be placed in Category I. On March 13, 1980, FDA revoked the license for Tetanus Antitoxin at the request of the manufacturer; FDA inadvertently omitted this information in the December 1985 proposal.
Travenol Laboratories, Inc., Hyland Therapeutics Division, License No. 140	Tetanus Immune Globulin (Human)	The manufacturer is now known as Baxter Healthcare Corp. On July 27, 1995, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer.
University of Illinois, License No. 188	BCG Vaccine	On May 29, 1987, FDA revoked the license for BCG Vaccine at the request of the manufacturer.
Wyeth Laboratories, Inc, License No. 3	Cholera Vaccine, Tetanus Immune Globulin (Human), Typhoid Vaccine (acetone inactivated), Typhoid Vaccine (heat-phenol inactivated)	On December 23, 1992, FDA revoked the license for Tetanus Immune Globulin (Human) at the request of the manufacturer. On September 11, 2001, FDA revoked the licenses for Cholera Vaccine and Typhoid Vaccine (both forms) at the request of the manufacturer.

[1] The Panel recommended that Tetanus Immune Globulin (Human) manufactured by Alpha Therapeutic Corp. be placed in Category IIIB, products for which available data are insufficient to classify their safety and effectiveness and which should not continue in interstate commerce. The agency disagreed with the Panel's recommendation as the product was manufactured only as a partially processed biological product and was intended for export and further manufacture (50 FR 51002 at 51007). The agency continues to agree with this approach inasmuch as the manufacturer continues to export the product as a partially processed biological. The product is not available as a final product in the United States.

Category II. Licensed biological products determined to be unsafe or ineffective or to be misbranded and which should not continue in interstate commerce. FDA did not propose that any products be placed in Category II and in this final rule does not categorize any products in Category II.

Category IIIB. Biological products for which available data are insufficient to classify their safety and effectiveness and should not continue in interstate commerce. Table 2 of this document is a list of those products proposed by FDA for Category IIIB. We have not listed products for which FDA revoked the licenses before the December 1985 proposal but we identified them in the proposal. Products for which FDA revoked the licenses after the December 1985 proposal are identified in the "Comments" column.

FDA has revoked the licenses of all products proposed by FDA for Category IIIB. After review of the comments and finding no additional scientific evidence to alter the proposed categorization, FDA adopts Category IIIB as the final category for the listed products.

TABLE 2.—CATEGORY IIIB

Manufacturer/License No.	Products	Comments
Istituto Sieroterapico Vaccinogeno Toscano Sclavo, License No. 238	Diphtheria Toxoid	On July 27, 1993, FDA revoked the license for Diphtheria Toxoid at the request of the manufacturer.
Connaught Laboratories, Inc., License No. 711	Diphtheria Toxoid, Pertussis Vaccine	On June 21, 1994, FDA revoked the license for Diphtheria Toxoid and on December 19, 1997, FDA revoked the license for Pertussis Vaccine, in both cases at the request of the manufacturer.
Massachusetts Public Health Biologic Laboratories, License No. 64	Tetanus Toxoid	On October 11, 1989, FDA revoked the license for Tetanus Toxoid at the request of the manufacturer.
Merck Sharpe & Dohme, Division of Merke & Co., Inc., License No. 2	Cholera Vaccine, Diphtheria and Tetanus Toxoids and Pertussis Vaccine Adsorbed, Tetanus and Diphtheria Toxoids Adsorbed (For Adult Use), Tetanus Toxoid, Typhoid Vaccine	On January 31, 1986, FDA revoked the licenses for all the listed products at the request of the manufacturer.
Michigan Department of Public Health, License No. 99	Diphtheria Toxoid Adsorbed	On November 12, 1998, the name of the manufacturer was changed to BioPort, and the license number was changed to 1260. On November 20, 2000, FDA revoked the license for Diphtheria Toxoid Adsorbed at the request of the manufacturer.
Wyeth Laboratories, Inc., License No. 3	Diphtheria Toxoid, Diphtheria Toxoid Adsorbed, Pertussis Vaccine	On May 19, 1987, FDA revoked the licenses for all listed products at the request of the manufacturer.

V. Anthrax Vaccine Adsorbed

A. The Panel Recommendation that Anthrax Vaccine Adsorbed be Placed in Category I (Safe, Effective, and Not Misbranded)

In its report, the Panel found that Anthrax Vaccine Adsorbed (AVA), manufactured by Michigan Department of Public Health (MDPH now BioPort) was safe and effective for its intended use and recommended that the vaccine be placed in Category I. In the December 1985 proposal, FDA agreed with the Panel's recommendation. During the comment period for the December 1985 proposal, FDA received no comments opposing the placement of AVA into Category I[2].

The Panel based its evaluation of the safety and efficacy of AVA on two studies: A well controlled field study conducted in the 1950s, "the Brachman study," (Ref. 1) and an open-label safety study conducted by the National Center for Disease Control (CDC, now the Centers for Disease Control and Prevention) (50 FR 51002 at 51058). The Panel also considered surveillance data on the occurrence of anthrax disease in the United States in at-risk industrial settings as supportive of the effectiveness of the vaccine (50 FR 51002 at 51059). In its determination that the data support the safety and efficacy of AVA, FDA has identified points of disagreement with statements in the Panel report. However, FDA has determined that the data do support the safety and efficacy of the vaccine and, thus, the agency continues to accept the Panel's recommendation and places AVA in Category I.[3]

B. Efficacy of Anthrax Vaccine Adsorbed

The Brachman study included 1,249 workers in four textile mills in the northeastern United States that processed imported goat hair. Of these 1,249 workers, 379 received anthrax vaccine, 414 received placebo, 116 received incomplete inoculations of either vaccine or placebo, and 340 received no treatment but were monitored for the occurrence of anthrax disease as an observational group. The Brachman study used an earlier version of the protective antigen-based anthrax vaccine administered subcutaneously at 0, 2, and 4 weeks and 6, 12, and 18 months. During the trial, 26 cases of anthrax were reported across the four mills: 5 inhalation and 21 cutaneous anthrax cases. Prior to vaccination, the yearly average number of human anthrax cases was 1.2 cases per 100 employees in these mills. Of the five inhalation anthrax cases (four of which were fatal), two received placebo and three were in the observational group. Of the 21 cutaneous anthrax cases, 15 received placebo, 3 were in the observational group, and 3 received anthrax vaccine. Of the three cases in the vaccine group, one case occurred just prior to administration of the third dose, one case occurred 13 months after the individual received the third of the six doses (but no subsequent doses), and one case occurred prior to receiving the fourth dose of vaccine.

In its report, the Panel stated that the Brachman study results demonstrate "a 93 percent (lower 95 percent confidence limit = 65 percent) protection against cutaneous anthrax" and that "inhalation anthrax occurred too infrequently to assess the protective effect of vaccine against this form of the disease" (50 FR 51002 at 51058). On the latter point, FDA does not agree with the Panel report. Because the Brachman comparison of anthrax cases between the placebo and vaccine groups included both inhalation and cutaneous cases, FDA has determined that the calculated efficacy of the vaccine to prevent all types of anthrax disease combined was, in fact, 92.5 percent

[2] On October 12, 2001, a group of individuals filed a citizen petition requesting that FDA find AVA, as currently manufactured by BioPort, ineffective for its intended use, classify the product as Category II, and revoke the license for the vaccine. The petitioners complained that the December 1985 proposal that placed AVA in Category I had not been finalized. FDA responded separately in a written response to the petitioners and will not further address those issues in this final rule.

[3] In October 2000, the Institute of Medicine (IOM) convened the Committee to Assess the Safety and Efficacy of the Anthrax Vaccine. In March 2002, the Committee issued its report: The Anthrax Vaccine: Is It Safe? Does It Work? (Ref. 2). The report concluded that the vaccine is acceptably safe and effective in protecting humans against anthrax.

(lower 95 percent confidence interval = 65 percent). The efficacy analysis in the Brachman study includes all cases of anthrax disease regardless of the route of exposure or manifestation of disease. FDA agrees that the five cases of inhalation anthrax reported in the course of the Brachman study are too few to support an independent statistical analysis. However, of these cases, two occurred in the placebo group, three occurred in the observational group, and no cases occurred in the vaccine group. Therefore, the indication section of the labeling for AVA does not specify the route of exposure, and the vaccine is indicated for active immunization against *Bacillus anthracis*, independent of the route of exposure.[4]

As stated previously in this document, the Panel also considered epidemiological data—sometimes called surveillance data—on the occurrence of anthrax disease in at-risk industrial settings collected by the CDC and summarized for the years 1962–1974 as supportive of the effectiveness of AVA. In that time period, individuals received either vaccine produced by MDPH, now BioPort, or an earlier version of anthrax vaccine. Twenty-seven cases of anthrax disease were identified. Three cases were not mill employees but people who worked in or near mills; none of these cases were vaccinated. Twenty-four cases were mill employees; three were partially immunized (one with one dose, two with two doses); the remainder (89 percent) were unvaccinated (50 FR 51002 at 51058). These data provide confirmation that the risk of disease still existed for those persons who were not vaccinated and that those persons who had not received the full vaccination series (six doses) were susceptible to anthrax infection, while no cases occurred in those who had received the full vaccination series.

In 1998, the Department of Defense (DoD) initiated the Anthrax Vaccination Program, calling for mandatory vaccination of service members. Thereafter, concerns about the vaccine caused the U.S. Congress to direct DoD to support an independent examination of AVA by the IOM. The IOM committee reviewed all available data, both published and unpublished, heard from Federal agencies, the manufacturer, and researchers. The committee in its published report concluded that AVA, as licensed, is an effective vaccine to protect humans against anthrax including inhalation anthrax (Ref. 2). FDA agrees with the report's finding that studies in humans and animal models support the conclusion that AVA is effective against *B. anthracis* strains that are dependent upon the anthrax toxin as a mechanism of virulence, regardless of the route of exposure.[5]

C. Safety of Anthrax Vaccine Adsorbed

CDC conducted an open-label study under an investigational new drug application (IND) between 1967 and 1971 in which approximately 7,000 persons, including textile employees, laboratory workers, and other at-risk individuals, were vaccinated with anthrax vaccine and monitored for adverse reactions to vaccination. The vaccine was administered in 0.5 mL doses according to a 0, 2, and 4 week initial dose schedule followed by additional doses at 6, 12, and 18 months with annual boosters thereafter. Several lots, approximately 15,000 doses, of AVA manufactured by MDPH were used in this study period. In its report, the Panel found that the CDC data "suggests that this product is fairly well tolerated with the majority of reactions consisting of local erythema and edema. Severe local reactions and systemic reactions are relatively rare" (50 FR 51002 at 51059).

Subsequent to the publication of the Panel's recommendations, DoD conducted a small, randomized clinical study of the safety and immunogenicity of AVA. These more recent DoD data as well as post licensure adverse event surveillance data available from the Vaccine Adverse Event Reporting System (VAERS) further support the safety of AVA. These data were reviewed by FDA and provided the basis for a description of the types and severities of adverse events associated with administration of AVA included in labeling revisions approved by FDA in January 2002 (Ref. 6).

D. The Panel's General Statement: Anthrax Vaccine, Adsorbed, Description of Product

The Panel report states:

"Anthrax vaccine is an aluminum hydroxide adsorbed, protective, proteinaceous, antigenic fraction prepared from a nonproteolytic, nonencapsulated mutant of the Vollum strain of *Bacillus anthracis*" (50 FR 51002 at 51058).

FDA would like to clarify that while the *B. anthracis* strain used in the manufacture of BioPort's AVA is the nonproteolytic, nonencapsulated strain identified in the Panel report, it is not a mutant of the Vollum strain but was derived from a *B. anthracis* culture originally isolated from a case of bovine anthrax in Florida.

E. The Panel's Specific Product Review: Anthrax Vaccine Adsorbed: Efficacy

The Panel report states:

> 3. *Analysis*—a. *Efficacy*—(2) *Human*. The vaccine manufactured by the Michigan Department of Public Health has not been employed in a controlled field trial. A similar vaccine prepared by Merck Sharp & Dohme for Fort Detrick was employed by Brachman * * * in a placebo-controlled field trial in mills processing imported goat hair * * *. The Michigan Department of Public Health vaccine is patterned after that of Merck Sharp & Dohme with various minor production changes.

(50 FR 51002 at 51059).

FDA has found that contrary to the Panel's statement, the vaccine used in the Brachman study was not manufactured by Merck Sharp & Dohme, but instead this initial version was provided to Dr. Brachman by Dr. G. Wright of Fort Detrick, U.S. Army, DoD (Ref. 1). The DoD version of the anthrax vaccine used in the Brachman study was manufactured using an aerobic culture method (Ref. 7). Subsequent to the Brachman trial, DoD modified the vaccine's manufacturing process to, among other things, optimize production of a stable and immunogenic formulation of vaccine antigen and to increase the scale of manufacture. In the early 1960s, DoD entered into a contract with Merck Sharp & Dohme to standardize the manufacturing process for large-scale production of the anthrax vaccine and to produce anthrax vaccine using an anaerobic method. Thereafter, in the 1960s, DoD entered into a similar contract with MDPH to further standardize the manufacturing process and to scale up production for further clinical testing and immunization of persons at risk of exposure to anthrax spores. This DoD-MDPH contract resulted in the production of the anthrax vaccine that CDC used in the open-label safety study and that was licensed in 1970.

While the Panel attributes the manufacture of the vaccine used in the Brachman study to Merck Sharp & Dohme, FDA has reviewed the historical development of AVA and concluded that DoD's continuous involvement with, and intimate knowledge of, the formulation and manufacturing processes of all of these versions of the anthrax vaccine provide a foundation

[4] The Panel noted that it would be very difficult, if not impossible, to clinically study the efficacy of any anthrax vaccine (50 FR 51058). Further study raises ethical considerations, and the low incidence and sporadic occurrence of anthrax disease also makes further adequate and well-controlled clinical studies of effectiveness not possible.

[5] For example: The Brachman study (Ref. 1); the CDC epidemiological data described in the December 1985 proposal; Fellows (2001) (Ref. 3); Ivins (1996) (Ref. 4); Ivins (1998) (Ref. 5).

for a determination that the MDPH anthrax vaccine is comparable to the original DoD vaccine. See *Berlex Laboratories, Inc.* v. *FDA*, 942 F. Supp. 19 (D.D.C. 1996). The comparability of the MDPH anthrax vaccine to the DoD vaccine has been verified through potency data that demonstrate the ability of all three versions of the vaccine to protect guinea pigs and rabbits against challenge with virulent *B. anthracis*. In addition, there are data comparing the safety and immunogenicity of the MDPH vaccine with the DoD vaccine. These data, while limited in the number of vaccines and samples evaluated, reveal that the serological responses to the MDPH vaccine and the DoD vaccine were similar with respect to peak antibody response and seroconversion.

F. The Panel's Specific Product Review: Anthrax Vaccine Adsorbed: Labeling

The Panel report states:

3. *Analysis*—d. *Labeling*. The labeling seems generally adequate. There is a conflict, however, with additional standards for anthrax vaccine. Section 620.24(a) (21 CFR 620.24(a)) defines a total primary immunizing dose as 3 single doses of 0.5 mL. The labeling defines primary immunization as 6 doses (0, 2, and 4 weeks plus 6, 12, and 18 months).

(50 FR 51002 at 51059).

The labeling of AVA since at least 1978 has described the vaccination schedule as three "primary" doses followed by three "booster" doses for a total of six doses followed by annual boosters. This labeling is not inconsistent with § 620.24(a) before it was revoked by FDA in 1996 as part of a final rule that revoked 21 CFR part 620 and other biologics regulations because they were obsolete or no longer necessary (Ref. 8).

VI. FDA's Responses to Additional Panel Recommendations

In the December 1985 proposal, FDA responded to the Panel's general recommendations regarding the products under review and to the procedures involved in their manufacture and regulation. Below, FDA responds in final to the general recommendations.

A. Generic Order and Wording of Labeling; Amendment of § 201.59

The Panel recommended changes to the labeling of the biological products under review. The Panel also recommended a generic order and wording for information in the labeling of bacterial vaccines. FDA agreed with the labeling changes recommended by the Panel.

In the December 1985 proposal, FDA proposed that 6 months after publication of a final rule, manufacturers of products subject to this Panel review submit, for FDA's review and approval, draft labeling revised in conformance with the Panel's report and with the regulations. FDA proposed to require that the revised labeling accompany all products initially introduced or initially delivered for introduction into interstate commerce 30 months after the date of publication of the final rule. The proposed labeling review schedule was consistent with the scheduling provided in § 201.59 of the regulations.

Since the time of the Panel's recommendation, FDA has made a number of changes to the labeling regulations and related regulatory policies. FDA has added or revised the requirements in § 201.57 for including in the labeling, in standardized language, the information concerning use during pregnancy, pediatric use, and geriatric use. Section 201.57 requires a specific order and content for drug product labeling. A number of labeling sections included in § 201.57 were not included in the Panel's recommended ordering and wording of the labeling but are now required to help ensure clarity in the labeling. FDA has also provided guidance regarding the wording of sections in which the agency believes complete and consistent language is important. Because FDA regularly monitors labeling for the products subject to this Panel review to determine if the labeling is consistent with applicable labeling requirements, the agency does not believe that a labeling review is necessary at this time. Accordingly, FDA is amending the table in § 201.59 by providing that the labeling requirements in §§ 201.56, 201.57, and 201.100(d)(3) (21 CFR 201.100(d)(3)) become effective on the date 30 months after the date of publication of this final rule. Because FDA regularly monitors the labeling of all products on an ad hoc basis, FDA is also explaining in a footnote that specification of a date for submission of revised product labeling under § 201.59 is unnecessary.

Section 314 of the National Childhood Vaccine Injury Act (NCVIA) of 1986 required FDA to review the warnings, use instructions, and precautionary information that are distributed with each vaccine listed in section 2114 of the Public Health Service Act and to determine whether this information was adequate to warn health care providers of the nature and extent of the dangers posed by such vaccine. Since the December 1985 proposal, the agency has completed this review and labeling has been revised accordingly. FDA is also taking this opportunity to update the table in § 201.59(a)(3) to include the current mail codes for the review of labeling for various biological products.

B. Periodic Review of Product Labeling

In its report the Panel noted a number of labeling deficiencies. To improve the labeling, the Panel recommended that labeling be reviewed and revised as necessary at intervals of no more than every 2 years.

As discussed in the December 1985 proposal, FDA believes the current system of labeling review will adequately assure accurate labeling. Periodic review of labeling on a set schedule is unnecessary. Section 601.12(f) prescribes when revised labeling must be submitted, either as a supplement for FDA's review or, if changes are minor, in an annual report. In addition, the agency may request revision of labeling when indicated by current scientific knowledge. FDA believes that, by these mechanisms, product labeling is kept up to date, and a scheduled, routine review of labeling is unnecessary and burdensome for both the agency and manufacturers.

C. Improvement in the Reporting of Adverse Reactions

The Panel recommended that actions be taken to improve the reporting and documentation of adverse reactions to biological products. The Panel particularly noted the need to improve the surveillance systems to identify adverse reactions to pertussis vaccine.

Since publication of the Panel's report, the Vaccine Adverse Event Reporting System (VAERS) was created as an outgrowth of the National Childhood Vaccine Injury Act (NCVIA) and is administered by FDA and CDC. VAERS accepts from health care providers, manufacturers, and the public reports of adverse events that may be associated with U.S.-licensed vaccines. Health care providers must report certain adverse events included in a Reportable Events Table (Ref. 9) and any event listed in the vaccine's package insert as a contraindication to subsequent doses of the vaccine. Health care providers also may report other clinically significant adverse events. FDA and CDC receive an average of 800 to 1,000 reports each month under the VAERS program. A guidance document is available which explains how to complete the VAERS form (Ref. 10). To facilitate electronic reporting, FDA is currently revising the reporting form.

D. Periodic Review of Product Licenses

The Panel recommended that all licensed vaccines be periodically reviewed to assure that data concerning the safety and effectiveness of these products are kept current and that licenses be revoked for products which have not been marketed for years or which have never been marketed in the licensed form. The Panel noted that, by limiting the period for which specific vaccines may be licensed, older products would be assured periodic review, and new products for which additional efficacy data are required could be provisionally licensed for a limited time period during which additional data can be generated.

In its proposed response, FDA noted that licensing policies in effect at the time of the review resulted in licenses being held for some products which were never intended to be marketed as individual products or which were no longer being marketed as individual products. FDA had required that manufacturers licensed for a combination vaccine also hold a license for each individual vaccine contained in the combination. For example, a manufacturer of diphtheria, tetanus, and pertussis (DTP) vaccine would also be required to have a license for Diphtheria Toxoid, Tetanus Toxoid, and Pertussis Vaccines. Because this policy is no longer in effect, most licenses are for currently marketed products. In a few cases, there may be no current demand for a product but, for public health reasons, a license continues to be held for the product. There are some vaccines for which there is little current demand but continued licensure could expedite the manufacture and availability of the product in the event an outbreak of the targeted disease should occur. FDA believes that the routine inspection of licensed facilities adequately assures that the information held in product licenses is current and that a routine review of safety and efficacy data is unnecessary and burdensome. The Panel's recommendation that some new vaccines be provisionally licensed for only limited periods of time while additional data are generated is inconsistent with the law that requires a determination that a biologic product is safe, pure, and potent before it is licensed.

E. Compensation for Individuals Suffering Injury From Vaccination

The Panel recommended that compensation from public funds be provided to individuals suffering injury from vaccinations that were recommended by competent authorities, carried out with approved vaccines, and where the injury was not a consequence of defective or inappropriate manufacture or administration of the vaccines.

A compensation program has been implemented consistent with the Panel's recommendation. The NCVIA established the National Vaccine Injury Compensation Program (NVICP) designed to compensate individuals, or families of individuals, who have been injured by childhood vaccines, whether administered in the private or public sector. The NVICP, administered under the Health Resources and Services Administration, Department of Health and Human Services (DHHS), is a no-fault alternative to the tort system for resolving claims resulting from adverse reactions to routinely recommended childhood vaccines. The specific vaccines and injuries covered by NVICP are identified in a Vaccine Injury Table that may periodically be revised as new vaccines come into use or new types of potential injuries are identified. The NVICP has resulted in a reduction in the amount of litigation related to injury from childhood vaccines while assuring adequate liability coverage and protection. The NVICP applies only to vaccines routinely recommended for infants and children. Vaccines recommended for adults are not covered unless they are routinely recommended for children as well, e.g., Hepatitis B Vaccine.

F. Public Support for Immunization Programs

The Panel recommended that both FDA and the public support widespread immunization programs for tetanus, diphtheria, and pertussis.

The National Immunization Program is part of CDC and was established to provide leadership to health agencies in planning and implementing immunization programs, to identify unvaccinated populations in the United States, to assess vaccination levels in State and local areas, and to generally promote immunization programs for children, including vaccination against diphtheria, tetanus, and pertussis. A recent survey shows that nearly 95 percent of children 19 to 35 months of age have received 3 or more doses of diphtheria and tetanus toxoids (DTs) and the acellular pertussis vaccine (Ref. 11).

G. Assuring Adequate Supplies of Bacterial Vaccines and Toxoids; Establishment of a National Vaccine Commission

The Panel recommended that FDA work closely with CDC and other groups to assure that adequate supplies of vaccines and passive immunization products continue to be available. The Panel recommended establishment of a national vaccine commission to address such issues.

Since publication of the December 1985 proposal, the National Vaccine Program was created by Congress (Public Law 99–660) with the National Vaccine Program Office within DHHS designated to provide leadership and coordination among Federal agencies as they work together to carry out the goals of the National Vaccine Plan. The National Vaccine Plan provides a framework, including goals, objectives, and strategies, for pursuing the prevention of infectious diseases through immunizations. The National Vaccine Program brings together all of the groups that have key roles in immunizations, and coordinates the vaccine-related activities, including addressing adequate production and supply issues. Despite efforts to assure vaccine availability, short-term shortages may occur (Ref. 12) for a variety of reasons. FDA will continue to work with the National Institutes of Health, CDC, and vaccine manufacturers to assure continued vaccine availability making the establishment of a national vaccine commission unnecessary.

H. Consistency of Efficacy Protocols

The Panel recommended that the protocols for efficacy studies be reasonably consistent throughout the industry for any generic product. To achieve this goal, the Panel recommended the development of industry guidelines that provide standardized methodology for adducing required information.

FDA believes that the standardization of clinical testing methodology for a group of vaccines is often not practical or useful. Because of the variety of possible vaccine types, e.g., live vaccines, killed vaccines, toxoids, bioengineered vaccines, acellular vaccines, and the diversity of populations in which the vaccine may be studied, it is difficult to develop guidance that would apply to more than one or two studies. FDA routinely meets with manufacturers before the initiation of clinical studies to discuss the study and will comment on proposed protocols for efficacy studies. FDA intends to continue to allow flexibility in selecting appropriate tests, procedures, and study populations for a clinical study while assuring that the necessary data are generated to fulfill the intended objectives of the study.

I. The Effect of Regulations Protecting and Informing Human Study Subjects on the Ability to Conduct Clinical Trials

The Panel expressed concern that the regulations governing informed consent and the protection of human subjects involved in clinical investigations should not establish unnecessary impediments to the goal of obtaining adequate evidence for the safety and effectiveness of a product.

FDA believes that the regulations and policies applying to informed consent and the protection of human subjects do not inhibit the adequate clinical study of a product. FDA notes that whenever the regulations or guidance documents related to these subjects are modified or amended, FDA offers an opportunity for public comment on the revisions. FDA particularly welcomes comments on how appropriate informed consent and protection of human subjects can be maintained while assuring that the development and study of useful products is not inhibited.

J. Standards for Determining the Purity of DTs

The Panel recommended that standards should be established for purity of both DTs in terms of limits of flocculation (Lf) content per milligram (mg) of nitrogen.

In 1985, FDA agreed that standards should be set. FDA has since determined that this approach is overly restrictive and does not allow FDA to keep pace with advances in manufacturing and technology. The Center for Biologics Evaluation and Research (CBER) establishes the release specifications for the purity of DTs during the review of a Biologics License Application (BLA). The purity of diphtheria toxoids in currently licensed vaccines is usually at least 1,500 Lf/mg non-dialyzable nitrogen. While there are no general standards for tetanus toxoid purity in the United States, CBER has generally required a purity specification of at least 1,000 Lf/mg of non-dialyzable nitrogen for tetanus toxoids.

K. Immunogenic Superiority of Adsorbed Toxoids Over Fluid Toxoids

The Panel recommended that the immunogenic superiority of the adsorbed DTs over the fluid (plain) preparations be strongly emphasized in product labeling, especially with regard to the duration of protection.

Tetanus Toxoid fluid, manufactured by Aventis Pasteur, Inc., is the only fluid toxoid product that remains licensed in the United States in 2003. This product is licensed for booster use only in persons over 7 years of age. The current package insert for this product states that "although the rates of seroconversion are essentially equivalent with either type of tetanus toxoid, the adsorbed toxoids induce more persistent antitoxin titers than fluid products."

L. Laboratory Testing Systems for Determining Potency of Tetanus and Diphtheria Toxoids

The Panel noted a need for further studies with tetanus toxoids in a World Health Organization (WHO)-sponsored quantitative potency test in animals to establish the conditions under which the test results are reproducible, and to relate these results more closely to those obtained in the immunization of humans. The Panel also recommended the development of an animal or laboratory testing system for diphtheria toxoid that correlates consistently, and with acceptable precision, with primary immunogenicity in humans.

DT-containing vaccines are tested during the licensing process for their ability to induce acceptable levels of protective antibodies in clinical trials in the target populations. Properties of vaccines used in these clinical trials, including potency, also are determined during licensing. The acceptance criteria for commercial lots of these vaccines are set at licensing on the basis of the properties of the vaccines that induced acceptable quantitative/qualitative levels of antibodies. The establishment of a correlation between a specific antibody response and a given assay would require an efficacy trial designed specifically to establish this correlation. This may call for vaccination of humans with suboptimal doses of vaccine. Such an efficacy study is not feasible for ethical reasons.

The animal potency tests currently required by the WHO, the European Pharmacopoeia (EP), and FDA differ. Despite these differences, the potency tests have been adequate to ensure sufficient immunogenic activity of the vaccines to induce protective immunity in target populations. However, international efforts to harmonize the diphtheria and tetanus potency tests under development are based on immunogenicity in animals. CBER is currently participating in these international harmonization efforts.

M. Potency Testing of DTs for Pediatric Use

The Panel recommended that the agency require potency testing after combination of the individual toxoid components in DTs for pediatric use.

FDA agrees with the recommendation. All manufacturers and the FDA testing laboratory follow this procedure on products submitted to the agency for release.

N. Potency Requirements for Pertussis Vaccine

The Panel recommended that the regulations concerning the maximum pertussis vaccine dose should be updated to reflect current recommendations and practices. At the time of the Panel review, whole cell pertussis vaccines were in use. Specifically, the Panel recommended that pertussis vaccine have a potency of 4 protective units per single human dose with the upper estimate of a single human dose not to exceed 8 protective units. The Panel also recommended that the total immunizing dose be defined as 4 doses of 4 units each, compared to the 3 doses of 4 units each defined at the time of the recommendation in the regulations.

FDA has removed the additional standard regulations applicable to pertussis vaccine (61 FR 40153, August 1, 1996). As whole cell pertussis vaccines are no longer licensed for human use in the United States, this recommendation no longer applies to products available in the United States.

O. Weight-Gain Test in Mice for Pertussis Vaccine

The Panel recommended that the weight-gain test in mice used to determine toxicity of pertussis vaccines be revised to include a reference standard and specifications regarding mouse strains to be used.

At the time of the Panel's deliberations, only DTP vaccines containing a whole-cell pertussis component were licensed in the United States. The mouse weight-gain test was a toxicity test used for whole-cell pertussis vaccines. Whole-cell pertussis vaccines are no longer licensed in the United States for human use, thus the mouse weight-gain test is no longer in use. Currently, only DTP vaccines containing an acellular pertussis component (DTaP) are licensed in the United States. These vaccines are tested specifically for residual pertussis toxin activity.

Although not currently licensed in the United States, vaccines containing a whole-cell pertussis component are still in use in other countries. CBER continues to participate in international efforts to improve the tests used to assess toxicity of whole-cell pertussis vaccines, including the mouse weight-gain test. CBER is represented on WHO committees and working groups with the goal of improving regulation and testing of whole-cell pertussis vaccines.

P. Agglutination Test to Determine Pertussis Vaccine Response in Humans

The Panel recommended that the agglutination test used to determine pertussis vaccine response in humans be standardized and that a reference serum be used for comparison. It also recommended that a reference laboratory be available at FDA.

As stated previously in this document, at the time of the Panel's deliberations, only whole-cell pertussis vaccines were licensed in the United States. The agglutination test was used for the clinical evaluation of DTP vaccines. Under the Panel's recommendations, FDA (CBER) developed and distributed reference materials for the agglutination assay and served as a reference laboratory. Currently, only DTaP vaccines are licensed in the United States. For the clinical evaluation of DTaP vaccines, the agglutination test was replaced by antigen-specific immunoassays, specifically enzyme-linked immunosorbent assays (ELISAs). As had been done with the agglutination assay, CBER took an active role in standardization of the ELISAs used to measure the specific antibody to the pertussis components of DTaP vaccines. Specifically, CBER distributes reference and control materials for the antigen-specific pertussis ELISA and has served as a reference laboratory.

Q. Warnings in Labeling for Pertussis Vaccine

The Panel recommended that the pertussis vaccine label warn that if shock, encephalopathic symptoms, convulsions, or thrombocytopenia follow a vaccine injection, no additional injections with pertussis vaccine should be given. The Panel also recommended that the label include a cautionary statement about fever, excessive screaming, and somnolence.

FDA agrees with the recommendation except that such information should be included in product labeling, i.e., the package insert, rather than the product label. Labeling applicable to the whole-cell pertussis vaccine conformed to this recommendation. Because the acellular form of pertussis vaccine has a different profile of potential adverse events and contraindications, the product labeling is worded consistent with available data.

R. Field Testing of Fractionated Pertussis Vaccines

The Panel recommended that any fractionated pertussis vaccine that differs from the original whole cell vaccine be field tested until better laboratory methods for evaluating immunogenicity are developed. The Panel recommended that the field-testing include agglutination testing and, if possible, evaluation of clinical effectiveness.

The currently approved vaccines containing an acellular pertussis component were studied in the United States and abroad in human populations with the antibody response being measured and clinical effectiveness evaluated.

S. Use of Same Seed Lot Strain in Manufacturing Bacillus Calmette-Guerin (BCG) Vaccine

The Panel recommended that all BCG vaccines be prepared from the same seed lot strain with demonstrated efficacy, if available data justify such action.

BCG vaccines are not recommended for routine immunization in the United States. The two currently U.S.-licensed BCG vaccines are produced using different seed strains. Most BCG vaccines produced globally are manufactured using seed strains with a unique history. Recent evidence suggests that these different BCG strains do differ genetically and have slightly varying phenotypes. However, a meta analysis of the current human BCG vaccination data performed in 1994 by Harvard University concluded that no strain-to-strain differences in protection could be detected. Although there have been differences in immunogencity among strains demonstrated in animal models, no significant differences have been seen in human clinical trials (Ref. 13). Thus, FDA does not find that available human data justify requirement of a single BCG vaccine strain.

T. Development of an Improved Cholera Vaccine

The Panel recommended public support for development of an improved cholera vaccine because unsatisfactory sanitary conditions in many countries make it clear that control of the disease by sanitation alone cannot be realized in the foreseeable future.

Cholera is not an endemic disease in the United States. However, there is risk to U.S. travelers to certain countries where the disease is endemic. FDA continues to cooperate with international health agencies in efforts to evaluate new types of vaccines and to study the pathogenesis of the disease. CBER personnel have chaired and participated in the WHO Cholera Vaccine Standardization Committee and have participated in drafting new WHO guidelines for immune measurement of protection from cholera.

U. Plague Vaccine Immunization Schedule

The Panel recommended that the following plague vaccine immunization schedule be considered:

1. A primary series of 3 intramuscular (IM) injections (1 mL, 0.2 mL, and 0.2 mL), 1 and 6 months apart, respectively;
2. Booster IM injections of 0.2 mL at 12, 18, and 24 months; and,
3. For persons achieving a titer of 1:128 after the third and fifth inoculations, booster doses when the passive agglutination titer falls below 1:32 and empirically every 2 years when the patient cannot be tested serologically.

FDA agrees with the recommendation. The current recommendations of the Advisory Committee on Immunization Practices (ACIP) (Ref. 14) are consistent with the Panel's recommendation, and the currently licensed vaccine is labeled consistent with these recommendations.

VII. FDA's Response to General Research Recommendations

In its report, the Panel identified many areas in which there should be further investigation to improve existing products, develop new products, develop new testing methodologies, and monitor the population for its immune status against bacterial disease. In the December 1985 proposal, FDA responded to these recommendations in the responses identified as items 11, 17 (in part), 21, 25, and 27. As discussed in the December 1985 proposal, FDA considered the Panel's recommendations in defining its research priorities at the time the recommendations were made. Because a considerable amount of time has elapsed since these recommendations were made and FDA initially responded to the recommendations, FDA is not providing specific responses to each recommendation in this final rule. As in any area of scientific research, new discoveries and new concerns require a continual reevaluation of research priorities and objectives to assure their relevance to current concerns.

FDA recognizes the Panel's desire to have FDA's research program evolve with the significant issues and findings of medical science. In order to assure the continued relevance of its research program, CBER's research program for vaccines, including bacterial vaccines and related biological products, is subject to peer review by the Panel's successor, the Vaccines and Related Biological Products Advisory Committee (see, for example, the

transcripts from the meetings of June 11 (Ref. 15) and November 29, 2001 (Refs. 16 and 17), and March 6, 2002 (Ref. 18)). In addition, CBER has defined as part of its mission statement a strategic goal of assuring a high quality research program that contributes directly to its regulatory mission. This goal includes a plan to assure that CBER's research program continues to support the regulatory review of products and timely development of regulatory policy, and to have a significant impact on the evaluation of biological products for safety and efficacy.

Because of limited resources, FDA also supports the leveraging of resources to create effective collaborations in the advancement of science. FDA has issued a "Guidance for FDA Staff: The Leveraging Handbook, an Agency Resource for Effective Collaborations." (Ref. 19). Through cooperation with international, other Federal, and State health care agencies and the industry and academia, the agency intends that its research resources will reap the benefits of a wide range of experience, expertise, and energy from the greater scientific community while the agency maintains its legal and regulatory obligations. FDA invites comment at any time on ways it may improve its research program and set its objectives.

VIII. Proposed Amendment to the Regulations

In the December 1985 proposal, FDA proposed to amend § 610.21 (21 CFR 610.21), limits of potency, by revising the potency requirements for Tetanus Immune Globulin (Human) (TIG). FDA proposed to amend the regulations to require a minimum potency of 250 units of tetanus antitoxin per container for TIG. FDA advises that in this discussion and in the regulation "per container" means that amount of the contents of the container deliverable to the patient in normal use. The current regulation provides for a minimum potency of 50 units of tetanus antitoxin per milliliter of fluid. FDA proposed the change because the concentration of antitoxin per milliliter has varied widely in the past without any apparent effect on the performance of the product. TIG is routinely manufactured consistently at a concentration of 170 units per milliliter. However, there was no evidence upon which to establish a revised minimum potency on a per milliliter basis. Because the evidence of efficacy for TIG was based on use of product administered consistently at doses of 250 units or larger and the varying concentration of the product without any apparent adverse effect, FDA found it more appropriate to regulate the potency on a per vial basis, rather than by units per milliliter. The current licensed product continues to be marketed at a potency no less than the minimum dose (250 units), which historically has been shown to be clinically effective.

FDA received no comments opposing the proposed revision to § 610.21 and therefore is amending the regulations to require a minimum potency of 250 units of tetanus antitoxin per container for TIG.

IX. Analysis of Impacts

A. Review Under Executive Order 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act of 1995

FDA has examined the impacts of the final rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages: distributive impacts; and equity). The Regulatory Flexibility Act requires agencies to analyze whether a rule may have a significant economic impact on a substantial number of small entities and, if it does, to analyze regulatory options that would minimize the impact on small entities. The Unfunded Mandates Reform Act requires that agencies prepare a written statement under section 202(a) of anticipated costs and benefits before proposing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million (adjusted annually for inflation) in any one year.

The agency believes that this final rule is consistent with the regulatory philosophy and principles identified in the Executive order. In addition, this final rule is not a significant regulatory action as defined by the Executive order and so is not subject to review under the Executive order. Because this final rule does not impose new requirements on any entity it has no associated compliance costs, and the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Therefore, under the Regulatory Flexibility Act, no further analysis is required. Because this final rule does not impose mandates on State, local, or tribal governments, in the aggregate, or the private sector, that will result in an expenditure in any one year of $100 million or more, FDA is not required to perform a cost benefit analysis under the Unfunded Mandates Reform Act. The current inflation adjusted statutory threshold is approximately $110 million.

B. Environmental Impact

The agency has determined under 21 CFR 25.31(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

C. Paperwork Reduction Act of 1995

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

D. Federalism

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

X. References

The following references have been placed on display in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852, and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. Brachman, P. S., H. Gold, S. Plotkin, F. R. Fekety, M. Werrin, and N. R. Ingraham, "Field Evaluation of a Human Anthrax Vaccine," *American Journal of Public Health*, 52:632–645, 1962.

2. Lois M. Joellenbeck, Lee L. Zwanziger, Zane S. Durch, and Brian L. Strom, Editors, Committee to Assess the Safety and Efficacy of the Anthrax Vaccine, Medical Follow-Up Agency, *The National Academies Press*, Washington, DC, *http://www.nap.edu/catalog/10310.html*. (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**).

3. Fellows, P. F., M. K. Linscott, B. E. Ivins, M. L. Pitt, C. A. Rossi, P. H. Gibbs, and A. M. Friedlander, "Efficacy of a Human Anthrax Vaccine in Guinea Pigs, Rabbits, and Rhesus Macaques Against Challenge by Bacillus Anthracis Isolates of Diverse Geographical Origin," *Vaccine*, 19(23–24):3241–3247, 2001.

4. Irvins, B. E., P. F. Fellows, M. L. M. Pitt, J. E. Estep, S. L. Welkos, P. L.Worsham & A. M. Friedlander, "Efficacy of a Standard Human Anthrax Vaccine Against Bacillus Anthracis Aerosol Spore Challenge in Rhesus Monkeys," *Salisbury Medical Bulletin* 87(Suppl.):125–126, 1996.

5. Irvins, B. E., P. F. Fellows, J. W. Farchaus, B. E. Benner, D. M. Waag, S. F. Little, G. W. Anderson, P. H. Gibbs, and A. M. Friedlander, "Comparative Efficacy of Experimental Anthrax Vaccine Candidates Against Inhalation Anthrax in Rhesus Macaques," *Vaccine*, 16(11–12):1141–1148, 1998.

6. Anthrax Vaccine Adsorbed (BIOTHRAX) Package Insert (January 31, 2002).

7. Wright, G. G., et al, "Studies on Immunity in Anthrax: Immunizing Activity of Alum-Precipitated Protective Antigen," *Journal of Immunology*, 73:129–391, 1954.

8. 61 FR 40153, August 1, 1996.

9. "Table of Reportable Events Following Vaccination," *http://www.vaers.org/reportable.htm.* (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**).

10. Guidance for Industry: How to Complete the Vaccine Adverse Reporting System Form (VAERS–1) - 9/8/1998, *http://www.fda.gov/cber/gdlns/vaers-1.pdf.* (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**.)

11. "Estimated Vaccination Coverage with Individual Vaccines and Vaccination Series Among Children 10–35 Months of Age by Race/Ethnicity—U.S. National Immunization Survey; Q3:2000—Q2/2001," *http://www.cdc.gov/nip/coverage.* (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**).

12. "FDA's Role in Maintaining the Supply of Childhood Vaccines—Testimony Before the Committee of Governmental Affairs; June 12, 2002," *http://www.cdc.gov/nip/news/testimonies/vac-shortages-walt-6-12-2002.htm.* (FDA has verified the Web site address, but we are not responsible for subsequent changes to the Web site after this document publishes in the **Federal Register**).

13. Colditz, et al., "Efficacy of BCG Vaccine in the Prevention of Tuberculosis: Meta Analysis of the Published Literature," *Journal of the American Medical Association*, 271:698–702, 1994.

14. Centers for Disease Control and Prevention, "Prevention of Plague: Recommendations of the Advisory Committee on Immunization Practices (ACIP)," *Morbidity and Mortality Weekly Report*, 45 (No. RR–14), 1996.

15. *http://www.fda.gov/ohrms/dockets/ac/01/transcripts/3755t1.pdf*

16. *http://www.fda.gov/ohrms/dockets/ac/01/transcripts/3805t2__01.pdf*

17. *http://www.fda.gov/ohrms/dockets/ac/01/transcripts/3805t2__02.pdf*

18. *http://www.fda.gov/ohrms//dockets/ac/02/transcripts/3842t1.pdf*

19. *http://www.fda.gov/cber/gdlns/leverhnbk.pdf*

List of Subjects

21 CFR Part 201

Drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 610

Biologics, Labeling, Reporting and recordkeeping requirements.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act, the Public Health Service Act, and under authority delegated by the Commissioner of Food and Drugs, 21 CFR parts 201 and 610 are amended as follows:

PART 201—LABELING

■ 1. The authority citation for 21 CFR part 201 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 358, 360, 360b, 360gg–360ss, 371, 374, 379e; 42 U.S.C 216, 241, 262, 264.

■ 2. Amend § 201.59 in the table in paragraph (a)(3) to read as follows:

a. In the BIOLOGICS section of the table, under "Mail Routing Code" by removing "HFB–240" everywhere it appears and adding in its place "HFM–99";

b. In the BIOLOGICS section of the table, under the headings "Effective" and "Revised labeling due" by revising the entries for the drug classes "Bacterial vaccines and toxoids with standards of potency" and "Viral and rickettsial vaccines" to read as follows;

c. In the NEW DRUG AND ANTIBIOTIC DRUGS section of the table for the drug class "Sulfonylurea blood glucose regulators", under "Mail routing code," by removing "HFN–130" and adding in its place "HFM–99".

§ 201.59 Effective date of §§ 201.56, 201.57, 201.100(d)(3), and 201.100(e).

(a) * * *

(3) * * *

Effective	Revised labeling due	Drug class	Mail routing code
		Biologics	
July 5, 2006	See footnote[3]	Bacterial vaccines and toxoids with standards of potency	HFM–99
* *	* *	* * *	*
Nov. 1, 1982[1]	Nov. 1, 1980[2]	Viral and rickettsial vaccines	HFM–99
* *	* *	* * *	*
		New Drugs and Antibiotic Drugs	
* *	* *	* * *	*
Oct. 9, 1984	July 10, 1984	Sulfonylurea blood glucose regulators	HFM–99
* *	* *	* * *	*

[1] Except the effective date for all biological products reviewed generically by the advisory panel is 30 months after a final order is published under § 601.25(g) of this chapter.

[2] Except the due date for all biological products reviewed generically by the advisory panel is 6 months after a final order is published under § 601.25(g) of this chapter.

[3] FDA has determined that a review of product labeling under this section is unnecessary.

PART 610—GENERAL BIOLOGICAL PRODUCTS STANDARDS

■ 3. The authority citation for 21 CFR part 610 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 360, 360c, 360d, 360h, 360i, 371, 372, 374, 381; 42 U.S.C. 216, 262, 263, 263a, 264.

■ 4. Amend § 610.21 to revise the entry "Tetanus Immune Globulin (Human), 50 units of tetanus antitoxin per milliliter" under the heading "ANTIBODIES" to read as follows:

§ 610.21 Limits of potency.

* * * * *

ANTIBODIES

* * * * *

Tetanus Immune Globulin (Human), 250 units of tetanus antitoxin per container.

* * * * *

Dated: December 23, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 03–32255 Filed 12–30–03; 3:23 pm]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[CGD08–03–048]

RIN 1625–AA09

Drawbridge Operation Regulation; Mississippi River, Dubuque, IA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Commander, Eighth Coast Guard District, is temporarily changing the regulation governing the Illinois Central Railroad Drawbridge, Mile 579.9, Upper Mississippi River. From December 17, 2003, until March 15, 2004, the drawbridge shall open on signal if at least 24 hours advance notice is given. This temporary rule is issued to facilitate annual maintenance and repair on the bridge.

DATES: This temporary rule is effective 12:01 a.m. on December 17, 2003 until 9 a.m. on March 15, 2004.

ADDRESSES: Documents referred to in this rule are available for inspection or copying at room 2.107f in the Robert A. Young Federal Building at Eighth Coast Guard District, Bridge Branch, 1222 Spruce Street, St. Louis, MO 63103–2832, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays. The telephone number is (314) 539–3900, extension 2378. The Bridge Branch maintains the public docket for this rulemaking.

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

SUPPLEMENTARY INFORMATION:

Good Cause for Not Publishing an NPRM

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. This rule is being promulgated without an NPRM because the limited effect on vessel traffic makes notice and comment unnecessary. Maintenance on the bridge will not begin until after the closure of Lock 22 on the Mississippi River. After that time, only commercial vessels left in the pools above Lock 22 will be able to transit through the bridge. Both the bridge and lock closure recur at the same time each year, and local vessel operators plan for the closures in advance. Prompt publication of this rule is also necessary to protect the public from safety hazards associated with conducting maintenance on the bridge.

Background and Purpose

On November 17, 2003, the Canadian National/Illinois Central Railroad Company requested a temporary change to the operation of the Illinois Central Railroad Drawbridge across the Upper Mississippi River, Mile 579.9 at Dubuque, Iowa. Canadian National/Illinois Central Railroad Company requested that 24 hours advance notice be required to open the bridge during the maintenance period. The maintenance is necessary to ensure the continued safe operation of the drawbridge. Advance notice may be given by calling the Canadian National/Illinois Central Dispatcher's office at (800) 711–3477 at any time; or Mr. Mike McDermott, office (319) 236–9238 or cell phone (319) 269–2102.

The Illinois Central Railroad Drawbridge navigation span has a vertical clearance of 19.9 feet above normal pool in the closed to navigation position. Navigation on the waterway consists primarily of commercial tows and recreational watercraft. Presently, the draw opens on signal for passage of river traffic. The Canadian National/Illinois Central Railroad Company requested the drawbridge be permitted to remain closed to navigation from 12:01 a.m., December 17, 2004, until 9 a.m., March 15, 2004 unless 24 hours advance notice is given to open the drawbridge. Winter freezing of the Upper Mississippi River coupled with the closure of Army Corps of Engineer's Lock No. 22 (Mile 301.2 UMR) until 7:30 a.m. March 15, 2004 will reduce any significant navigation demands for the drawspan opening. The Illinois Central Railroad Drawbridge, Mile 579.9, Upper Mississippi River, is located upstream from Lock 22. Performing maintenance on the bridge during the winter when the number of vessels likely to be impacted is minimal is preferred to restricting vessel traffic during the commercial navigation season.

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).

Because vessel traffic in the area of Dubuque, Iowa will be greatly reduced by winter icing of the Upper Mississippi River and the closure of Lock 22, it is expected that this rule will have minimal economic or budgetary effects on the local community.

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. This temporary rule will have a negligible impact on vessel traffic. The primary users of the Upper Mississippi River in Dubuque, Iowa are commercial towboat operators. With the onset of winter conditions on the Upper Mississippi River coupled with the closure of Army Corps of Engineers' Lock No. 22 (Mile 301.2 UMR) until March 15, 2004, there will be few, if any, significant navigation demands for the drawspan opening. Vessels may still transit through the bridge with 24-hour advanced notification.

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 (Pub. L. 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. Any individual that qualifies or, believes he or she qualifies as a small entity and requires assistance with the provisions of this rule, may contact Mr. Roger K. Wiebusch, Bridge Administrator, Eighth Coast Guard District, Bridge Branch, at (314) 539–3900, extension 2378.

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Environment

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 documentation.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

■ For the reasons set out in the preamble, the Coast Guard is amending Part 117 of Title 33, Code of Federal Regulations, as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

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

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

■ 2. Effective 12:01 a.m., December 17, 2003, through 9 a.m., March 15, 2004, § 117.T408 is added to read as follows:

§ 117.T408 Upper Mississippi River.

Illinois Central Railroad Drawbridge, Mile 579.9, Upper Mississippi River. From 12:01 a.m., December 17, 2003 through 9 a.m., March 15, 2004, the drawspan requires 24 hours advance notice for bridge operation. Bridge opening requests must be made 24 hours in advance by calling the Canadian National/Illinois Central Dispatcher's office at (800) 711–3477 at any time or Mr. Mike McDermott, office (319) 236–9238 or cell phone (319) 269–2102.

Dated: December 19, 2003.

R.F. Duncan,

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

[FR Doc. 04–53 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[COTP Los Angeles–Long Beach 01–013]

RIN 1625–AA00

Security Zone; Port Hueneme Harbor, Ventura County, CA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule; change in effective period; request for comments.

SUMMARY: The Coast Guard is revising the effective period for a temporary security zone covering all waters within Port Hueneme Harbor in Ventura County, CA. This security zone is needed for national security reasons to protect Naval Base Ventura County and commercial port from potential subversive acts. Entry into this zone is prohibited unless specifically authorized by the Captain of the Port Los Angeles-Long Beach, the Commanding Officer of Naval Base Ventura County, or their designated representatives.

DATES: Effective December 15, 2003. Section 165.T11–060, added at 67 FR 1099, January 9, 2002, effective from 12:01 a.m. PST on December 21, 2001, to 11:59 p.m. PDT on June 15, 2002, extended June 10, 2003, at 68 FR 36747, June 19, 2003, until 11:59 p.m. PST on December 15, 2003, as amended by this

rule is effective through June 15, 2004. Comments and related material must reach the Coast Guard on or before February 4, 2004.

ADDRESSES: You may mail comments and related material to docket COTP Los Angeles-Long Beach 01–013, U.S. Coast Guard Marine Safety Office/Group Los Angeles-Long Beach, 1001 South Seaside Avenue, Building 20, San Pedro, California, 90731. The Marine Safety Office/Group Los Angeles-Long Beach, maintains the public docket for this rulemaking. 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 this address between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Ryan Manning, Chief of Waterways Management Division, at (310) 732–2020.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to comment on this rule. If you submit comments and related material, please include your name and address, identify the docket number for this rulemaking (COTP Los Angeles-Long Beach 01–013), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know they reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this rule in view of them.

Regulatory Information

On January 9, 2002, we published a temporary final rule for Port Hueneme Harbor entitled "Security Zone; Port Hueneme Harbor, Ventura County, CA" in the **Federal Register** (67 FR 1097) under § 165.T11–060. The effective period for this rule was from December 21, 2001, through June 15, 2002.

On June 18, 2002, we published a temporary final rule for Port Hueneme Harbor entitled "Security Zone; Port Hueneme Harbor, Ventura County, CA" in the **Federal Register** (67 FR 41341) under § 165.T11–060. The effective period was extended through June 15, 2003. On June 10, 2003, the Captain of the Port issued another temporary final rule extending the effective period until 11:59 p.m. PST on December 15, 2003 (68 FR 36745, June 19, 2003).

This temporary final rule further extends the effective period through June 15, 2004.

We did not publish a notice of proposed rulemaking (NPRM) for this regulation. Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM. Due to the terrorist attacks on September 11, 2001 and the warnings given by national security and intelligence officials, there is an increased risk that further subversive or terrorist activity may be launched against the United States. A heightened level of security has been established around Naval Facilities. The original TFR was urgently required to prevent possible terrorist strikes against the United States and more specifically the people, waterways, and properties in Port Hueneme Harbor and the Naval Base Ventura County. It was anticipated that we would assess the security environment at the end of the effective period to determine whether continuing security precautions were required and, if so, propose regulations responsive to existing conditions. We have determined the need for continued security regulations exists.

The Coast Guard has determined that designation of a restricted area by the Army Corps of Engineers (ACOE) under 33 CFR part 334 is a more appropriate regulation in this case. On January 13, 2003, ACOE published a notice of proposed rulemaking for Port Hueneme Harbor entitled "United States Navy Restricted Area, Naval Base Ventura County, Port Hueneme, CA" in the **Federal Register** (68 FR 1791) under 33 CFR 334.1127. The ACOE will utilize the extended effective period of this TFR to issue a final rule. This TFR preserves the status quo within the harbor while a permanent restricted area is implemented.

For the reasons stated in the paragraphs above under 5 U.S.C. 553(d)(3), the Coast Guard also finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**.

Background and Purpose

On September 11, 2001, terrorists launched attacks on commercial and public structures—the World Trade Center in New York and the Pentagon in Arlington, Virginia—killing large numbers of people and damaging properties of national significance. There is an increased risk that further subversive or terrorist activity may be launched against the United States based on warnings given by national security and intelligence officials. The Federal Bureau of Investigation (FBI) has issued warnings on October 11, 2001 and February 11, 2002 concerning the potential for additional terrorist attacks within the United States. In addition, the ongoing hostilities in Iraq and Afghanistan have made it prudent for important facilities and vessels to be on a higher state of alert because Osama Bin Ladin and his Al Qaeda organization, and other similar organizations, have publicly declared an ongoing intention to conduct armed attacks on U.S. interests worldwide.

These heightened security concerns, together with the catastrophic impact that a terrorist attack against a Naval Facility would have to the public interest, makes these security zones prudent on the navigable waterways of the United States. To mitigate the risk of terrorist actions, the Coast Guard has increased safety and security measures on the navigable waterways of U.S. ports and waterways as further attacks may be launched from vessels within the area of Port Hueneme Harbor and the Naval Base Ventura County.

In response to these terrorist acts, to prevent similar occurrences, and to protect the Naval Facilities at Port Hueneme Harbor and the Naval Base Ventura County, the Coast Guard has established a security zone in all waters within Port Hueneme Harbor. This security zone is necessary to prevent damage or injury to any vessel or waterfront facility, and to safeguard ports, harbors, or waters of the United States in Port Hueneme Harbor, Ventura County, CA.

As of today, the need for a security zone in Port Hueneme Harbor still exists. This temporary final rule will extend the current effective date of the current Port Hueneme security zone through June 15, 2004. This will allow the Army Corps of Engineers to utilize the extended effective period of this TFR to complete notice and comment rulemaking for permanent regulations tailored to the present and foreseeable security environment. This revision preserves the status quo within the Port Hueneme Harbor while permanent rules are finalized.

Discussion of Rule

This regulation that is extending the effective period of the current security zone, prohibits all vessels from entering Port Hueneme Harbor beyond the COLREGS demarcation line set forth in subpart 80.1120 of part 80 of Title 33 of the Code of Federal Regulations without first filing a proper advance notification of arrival as required by part 160 of Title 33 of the Code of Federal Regulations as well as obtaining clearance from

Commanding Officer, Naval Base Ventura County "Control 1".

In addition to revising paragraph (c) to extend the effective period of § 165.T11–060, we have also revised paragraph (b). Specifically, in § 165.T11–060(b)(1)(ii) we replaced references to temporary notification of arrival requirements with the corresponding permanent sections in 33 CFR part 160.

Vessels or persons violating this section would be subject to the penalties set forth in 33 U.S.C. 1232 and 50 U.S.C. 192. Pursuant to 33 U.S.C. 1232, any violation of the rule described herein, would be punishable by civil penalties (not to exceed $27,500 per violation, where each day of a continuing violation would be a separate violation), criminal penalties (imprisonment up to 6 years and a maximum fine of $250,000) and in rem liability against the offending vessel. Any person violating this section by using a dangerous weapon or by engaging in conduct that causes bodily injury or fear of imminent bodily injury to any officer authorized to enforce this regulation would also face imprisonment up to 12 years. Vessels or persons violating this section would also be subject to the penalties set forth in 50 U.S.C. 192: seizure and forfeiture of the vessel to the United States, a maximum criminal fine of $10,000, and imprisonment up to 10 years.

This rule will be enforced by the Captain of the Port Los Angeles-Long Beach, who may also enlist the aid and cooperation of any Federal, State, county, municipal, and private agencies to assist in the enforcement of this rule. Commanding Officer, Naval Base Ventura County "Control 1" will control vessel traffic entering Port Hueneme Harbor. This regulation is established under the authority of 33 U.S.C. 1226 in addition to the authority contained in 50 U.S.C. 191 and 33 U.S.C. 1231.

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) because this zone will encompass a small portion of the waterway.

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 because this zone will encompass a small portion of the waterway.

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 could better evaluate its effects on them and participate in the rulemaking process. If the rule will affect your small business, organization, or government jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT** for assistance in understanding this rule.

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

Collection of Information

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

Federalism

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

Unfunded Mandates Reform Act

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

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

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

Energy Effects

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

Environment

We have analyzed this rule under Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have concluded that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, this rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation because we are establishing a security zone.

A final "Environmental Analysis Check List" and a final "Categorical Exclusion Determination" are available in the docket where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Section 165.T11–060 is reinstated and revised to read as follows:

§ 165.T11–060 Security Zone; Port Hueneme Harbor, Ventura County, California.

(a) *Location.* The following area is a Security Zone: The water area of Port Hueneme Harbor inside of the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS) demarcation line.

(b) *Regulations.* (1) In accordance with the general regulations in § 165.33 of this part, the following rules apply to the security zone established by this section:

(i) No person or vessel may enter or remain in this security zone without the permission of the Captain of the Port Los Angeles-Long Beach, CA, or the Commanding Officer, Naval Base Ventura County CA, "Control 1,";

(ii) Vessels that are required to make advanced notifications of arrival under §§ 160.204 through 160.214 of part 160 of Title 33 of the Code of Federal Regulations continue to make such reports;

(iii) All vessels must obtain clearance from "Control 1" on VHF–FM marine radio 06 prior to crossing the COLREGS demarcation line at Port Hueneme Harbor;

(iv) Vessels without marine radio capability must obtain clearance in advance by contacting "Control 1" via telephone at (805) 982–3938 prior to crossing the COLREGS demarcation line at Port Hueneme Harbor;

(2) The Captain of the Port will notify the public of this Security Zone via broadcast and published notice to mariners.

(3) Nothing in this section shall be construed as relieving the owner or person in charge of any vessel from complying with the rules of the road and safe navigation practice.

(4) The regulations of this section will be enforced by the Captain of the Port Los Angeles-Long Beach, the Commanding Officer, Naval Base Ventura County or their authorized representatives.

(c) *Effective period.* This section is effective from 12:01 a.m. PST on December 21, 2001, through June 15, 2004.

Dated: December 15, 2003.

Peter V. Neffenger,

Captain, U.S. Coast Guard, Captain of the Port, Los Angeles-Long Beach, California.

[FR Doc. 04–30 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 334

United States Navy Restricted Area, Hood Canal, Naval Submarine Base Bangor, Bangor, WA

AGENCY: United States Army Corps of Engineers, Department of Defense.

ACTION: Final rule.

SUMMARY: The Corps of Engineers is amending existing regulations to expand the existing restricted area in the waters of Hood Canal adjacent to Naval Submarine Base Bangor, at Bangor, Washington. This amendment also changes the enforcement responsibility from Commander, Naval Base, Seattle, Washington (now Commander, Navy Region Northwest) to Commander, Naval Submarine Base Bangor. The purpose of the amendment is to increase the protection of Navy strategic assets moored at Naval Submarine Base Bangor.

EFFECTIVE DATE: February 4, 2004.

ADDRESSES: U.S. Army Corps of Engineers, ATTN: CECW–OR, 441 G Street, NW., Washington DC, 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. Frank Torbett, Headquarters Regulatory Branch at (202) 761–4618 or Mr. Jack Kennedy, Corps of Engineers Seattle District, at (206) 764–6907.

SUPPLEMENTARY INFORMATION: Pursuant to its authorities in section 7 of the Rivers and Harbors Act of 1917 (40 Stat. 266; 33 U.S.C. 1) and chapter XIX of the Army Appropriation Act of 1919 (40 Stat. 892; 33 U.S.C. 3) the Corps is amending the restricted area regulations in 33 CFR part 334 by amending § 334.1220 to enlarge the presently established naval restricted Area 1, in Hood Canal, adjacent to Naval Submarine Base Bangor, at Bangor, Washington.

Procedural Requirements

a. Review Under Executive Order 12866

This rule is issued with respect to a military function of the Defense Department and the provisions of Executive Order 12866 do not apply.

b. Review Under the Regulatory Flexibility Act

This rule has been reviewed under the Regulatory Flexibility Act (Pub. L. 96–354), which requires the preparation of a regulatory flexibility analysis for any regulation that will have a significant economic impact on a substantial number of small entities (*i.e.*, small businesses and small governments). The Corps expects that the economic impact of the enlargement of this restricted area would have practically no impact on the public, no anticipated navigational hazard or interference with existing waterway traffic, and accordingly, certifies that this proposal will have no significant economic impact on small entities.

c. Review Under the National Environmental Policy Act

The Seattle District has prepared an Environmental Assessment (EA) for this action. The District has concluded that this action will not have a significant impact on the quality of the human environment, and preparation of an Environmental Impact Statement is not required. The EA may be reviewed at the Seattle District Office listed at the end of **FOR FURTHER INFORMATION CONTACT**, above.

d. Unfunded Mandates Act

This rule does not impose an enforceable duty among the private sector and, therefore, is not a Federal private sector mandate and is not subject to the requirements of section 202 or 205 of the Unfunded Mandates Act. The District has also found under section 203 of the Act, that small governments will not be significantly and uniquely affected by this rulemaking

List of Subjects in 33 CFR Part 334

Danger zones, Marine safety, Restricted areas, Waterways.

■ For the reasons set out in the preamble, we are amending 33 CFR Part 334 to read as follows:

PART 334—DANGER ZONE AND RESTRICTED AREA REGULATIONS.

■ 1. The authority citation for part 334 continues to read as follows:

Authority: 40 Stat. 266; (33 U.S.C. 1) and 40 Stat. 892; (33 U.S.C. 3)

■ 2. Revise section 334.1220 to read as follows:

§ 334.1220 Hood Canal, Bangor; naval restricted areas.

(a) Hood Canal, Bangor; Naval restricted areas—(1) Area No. 1. That area bounded by a line commencing on the east shore of Hood Canal at latitude 47 deg.46′18″ N, longitude 122 deg.42′18″ W; thence latitude 47 deg.46′32″ N, longitude 122 deg.42′20″ W; thence to latitude 47 deg.46′38″ N, longitude 122 deg.42′52″ W; thence to latitude 47 deg.44′15″ N, longitude 122 deg.44′50″ W; thence to latitude 47 deg.43′53″ N, longitude 122 deg.44′58″ W; thence to latitude 47 deg.43′17'' N, longitude 122 deg.44′49″ W.

(2) Area No. 2. Waters of Hood Canal within a circle of 1,000 yards diameter centered on a point located at latitude 47 deg.46′26″ N, longitude 122 deg.42′49″ W.

(3) The regulations—(i) Area No. 1. No person or vessel shall enter this area without permission from the Commander, Naval Submarine Base Bangor, or his/her authorized representative.

(ii) Area No. 2. (A) The area will be used intermittently by the Navy for magnetic silencing operations.

(B) Use of any equipment such as anchors, grapnels, *etc.*, which may foul underwater installations within the restricted area, is prohibited at all times.

(C) Dumping of any nonbuoyant objects in this area is prohibited.

(D) Navigation will be permitted within that portion of this circular area not lying within Area No. 1 at all times except when magnetic silencing operations are in progress.

(E) When magnetic silencing operations are in progress, use of the area will be indicated by display of quick flashing red beacons on the pier located in the southeast quadrant of the area.

(4) Enforcement. The regulations in this subsection shall be enforced by the Commander, Naval Submarine Base Bangor, or his/her authorized representative.

Dated: December 29, 2003.

Lawrence A. Lang,

Deputy Chief, Operations Division, Directorate of Civil Works.

[FR Doc. 04–88 Filed 1–2–04; 8:45 am]

BILLING CODE 3710–92–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

42 CFR Part 52h

RIN 0925–AA

Scientific Peer Review of Research Grant Applications and Research and Development Contract Projects

AGENCY: National Institutes of Health, Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: The National Institutes of Health (NIH) is revising the regulations governing scientific peer review of research grant applications and research and development contract projects and project proposals to clarify the review criteria, revise the conflict of interest requirements to reflect the fact that members of Scientific Review Groups do not become Federal employees by reason of that membership, and make other changes necessary to update the regulations.

EFFECTIVE DATE: This final rule is effective on February 4, 2004.

FOR FURTHER INFORMATION CONTACT: Jerry Moore, NIH Regulations Officer, Office of Management Assessment, NIH, 6011 Executive Boulevard, Room 601, MSC 7669, Rockville, MD 20852, telephone 301–496–4607 (not a toll-free number).

SUPPLEMENTARY INFORMATION: Applications to NIH for grants for biomedical and behavioral research and NIH research and development contract project concepts and contract proposals are reviewed under a two-level scientific peer review system. This dual system separates the scientific assessment of proposed projects from policy decisions about scientific areas to be supported and the level of resources to be allocated, which permits a more objective and complete evaluation than would result from a single level of review. The review system is designed to provide NIH officials with the best available advice about scientific and technical merit as well as program priorities and policy considerations.

The review system consists of two sequential levels of review for each application that will be considered for funding. For most grant and cooperative agreement (hereafter referred to as grant) applications, the initial or first level review involves panels of experts established according to scientific disciplines or medical speciality areas, whose primary function is to evaluate the scientific merit of grant applications. These panels are referred to as Scientific Review Groups (SRGs), a generic term that includes both regular study sections and Special Emphasis Panels (SEPs). In some cases, SRGs in scientifically related areas are organizationally combined into Initial Review Groups (IRGs).

The second level of review of grant applications is performed by National Advisory Boards or Councils composed of both scientific and lay representatives. The recommendations made by these Boards or Councils are based not only on considerations of scientific merit as judged by the SRG but also on the relevance of a proposed project to the programs and priorities of NIH. In most cases, Councils concur with the SRG recommendations. If a Board or Council does not concur with the SRG's assessment of scientific merit, the Board or Council can defer the application for rereview. Subject to limited exceptions as described in Council operating procedures, unless an application is recommended by both the SRG and the Board or Council, no award can be made.

The first level of review of grant applications and both levels of review of contract project concepts and contract proposals are governed by the regulations codified at 42 CFR part 52h, Scientific Peer Review of Research Grant Applications and Research and Development Contract Projects.

The regulations at 42 CFR part 52h were last amended in November 1982. We are revising the regulations to incorporate changes that are necessary to update part 52h.

We are revising the regulations to: (1) Clarify the section pertaining to conflict of interest to reinforce the fact that non-Federal members of SRGs are not

appointed as Special Government Employees (SGEs) and therefore are not subject to the conflict of interest statutes and regulations applicable to Federal employees; in practical terms, this means that institutional conflicts as defined for SGEs do not automatically create conflicts of interest for peer reviewers; (2) provide a more practical view of the very complex relationships that occur in the scientific community; (3) clarify the applicability of the peer review rules to the review of grant applications and contract proposals; (4) clarify the review criteria applicable to grant applications; and (5) update references, add or amend definitions as necessary, and make appropriate editorial changes.

We developed the changes to § 52h.8 "What are the review criteria for grants?" after extensive input from and discussion with the scientific community during 1996–1997 in response to a report entitled "Rating of Grant Applications" that was shared with the scientific community. The report and rating criteria were discussed at four open meetings of the Peer Review Oversight Group, whose members include representatives from the peer review community. That group made recommendations to NIH on review criteria (minutes of these meetings are posted on the NIH homepage at (*http://grants.nih.gov/grants/peer/peer.htm*). There was extensive discussion of how to include the concepts of "innovativeness" and "impact" of the research. After due consideration, the Director of NIH decided on the revised review criteria for rating unsolicited research grant applications that we published in the *NIH Guide for Grants and Contracts* (*NIH Guide*) on June 27, 1997. These review criteria have been well received by the research community and by those involved in the review process, who view them as beneficial to the review process.

Section 52h.8 clarifies and rearranges the previous review criteria consistent with the criteria published in the *NIH Guide*. The term "originality" is moved from (a) to the new (c) where it becomes "innovativeness and originality of the proposed research." Criterion (b) is clarified from "methodology" to "approach and methodology." Criterion (e) is clarified as "the scientific environment and reasonable availability of resources" instead of only "reasonable availability of resources." The Scientific Review Group will assess the overall impact that the project could have on the field in light of the assessment of individual review criteria. Additionally, review criterion (f), concerning plans to include both genders, minorities, children and special populations, is added to reflect current statutes and NIH policies.

Additionally, the authority citation is amended to reflect the current authorities, and §§ 52h.2, 52h.3, 52h.5, and 52h.10 are amended to reflect the applicability of the regulations to NIH alone. In accordance with the changes in applicability, references to the Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA) and the Health Resources and Services Administration (HRSA) are deleted. Section 52h.2 is amended to include definitions for several additional terms, and minor editorial changes are made for several definitions and § 52h.6.

In the **Federal Register** of September 21, 2000 (65 FR 57133), NIH published a notice of proposed rulemaking (NPRM), "Scientific Peer Review of Research Grant Applications and Research and Development Contract Projects," that provided for a 60-day public comment period. NIH received 13 responses. NIH's consideration of and responses to the comments are discussed below.

Section 52h.4 Composition of Peer Review Groups

In § 52h.4(b) and (b)(4), the phrase "or upon their qualifications as authorities knowledgeable in the various disciplines and fields related to the scientific areas under review" was carried over from the § 52h.2(i) definition of peer review group to provide consistent language about the types of expertise needed to compose a peer review group.

Section 52h.4(c)

The Office of Government Ethics suggested that NIH explain the basis for its conclusion in § 52h.4(c) that members of its peer review groups are not Special Government Employees. A discussion of the statutory and other bases for that conclusion follows.

Pursuant to the Public Health Service (PHS) Act, as amended by the Health Research Extension Act of 1985, the Secretary of Health and Human Services (Secretary), acting through the Director of NIH, shall by regulation require appropriate technical and scientific peer review of applications for grants, cooperative agreements and contracts for biomedical and behavioral research. Section 402(b)(6), PHS Act, as amended, provides that the Director of NIH can establish peer review groups without regard to Title 5 U.S.C. It is further stipulated (section 492, PHS Act, as amended (42 U.S.C. 289a)) that such review is to be conducted in a manner consistent with the system for technical and scientific peer review applicable on November 20, 1985. On that date, and for many years prior, peer reviewers were not appointed as or considered to be Federal employees because this peer review was supported through an extramural award mechanism. As directed by the statute, this method of conducting peer review has continued since November 20, 1985.

In fact, the NIH process for peer review has varied little since its inception approximately 50 years ago. Members of the scientific research community have been selected for service on peer review groups, either as members for a specified period of time or on an ad hoc basis from time to time, on a per diem basis but not under the Civil Service (*e.g.*, not as Special Government Employees). There are no appointment papers prepared. These individuals are identified by the Federal employees who oversee the peer review process, the Scientific Review Administrators (SRAs). The SRAs identify potential peer review group members primarily through their knowledge of researchers in the various applicable scientific fields. The make-up of these peer review groups may be up to one-fourth Federal employees (§ 52h.4(c)), such as NIH intramural scientists, but in practice, historically approximately only 1 percent of peer reviewers are Federal employees. Other than the Federal employee reviewers (who cannot be paid any amount in excess of their salaries), peer reviewers are reimbursed through an extramural award mechanism for their services. The reimbursement includes a payment for actual expenses (transportation, room, and board) plus a modest consultant fee for the period of time they are involved in the review of applications at meetings, commonly held in the Bethesda, Maryland area.

The conduct of meetings is directed by the chairperson, although the SRA is the Designated Federal Official who must be present during the review of applications to ensure that the reviews are conducted according to regulations, which includes adherence to established review criteria. Although there is no supervisory relationship between the SRA and the peer reviewers, general guidance on the conduct of meetings has been developed over time through an agreement between the Federal employee overseeing the process and the peer reviewers.

Section 52h.5 Conflict of Interest

One commenter noted that § 52h.5 greatly improves upon current language

regarding how these rules apply to non-Federal employees serving on peer review panels, as distinct from other individuals to whom separate Federal regulations apply. Section 52h.5(a) was further clarified to state that the conflict of interest section applies only to conflict of interest involving members of peer review groups. Since it applies to all members, the phrase "who are not Federal employees" was deleted.

Section 52h.5(b)

One commenter noted that the distinction in the proposed rule between real and apparent conflicts of interest in § 52h.5(b) is artificial and misleading because a real conflict of interest is limited to financial interests and an apparent conflict of interest would encompass all other personal interests that might bias the reviewer. The commenter proposed a single definition of conflict of interest based on the prospect of a personal advantage to the reviewer, whether financial or nonfinancial. A conflict would exist if that personal advantage is strong enough to pose a realistic probability that the reviewer will not perform an unbiased review. As we understand the comment, a distinction would still be made between a conflict involving a direct financial benefit, from which an automatic recusal from the review would result, and other personal interests, which would result in a recusal only if the Scientific Review Administrator and the reviewers so determined.

In response to this comment, definitions of a real conflict of interest and the appearance of a conflict of interest are added to the definitions section of the regulation. However, the substance of the definitions is essentially the same as the meaning given those terms, respectively, in § 52h.5(b)(1) and § 52h.5(b)(2) of the proposed rule. The definition of a real conflict of interest makes it clear that a real conflict of interest exists when certain financial interests are present, when the reviewer acknowledges the presence of an interest that would likely bias his/her review, or when the official managing the review determines the reviewer has such an interest. Thus the definition of a real conflict of interest is not limited to financial interests. We have further highlighted the definition of other (nonfinancial) conflicts of interest by adding subpart (3) to the definition of real conflict of interest (§ 52h.2(q)); this also clarifies our expectation about the professionalism of each reviewer to identify real or apparent conflicts of interest known to the reviewer, as suggested by one comment. The definition of the appearance of a conflict of interest adopts a different test, the perception of a reasonable person regarding the reviewer's impartiality. This would encompass (1) a financial interest that does not meet the threshold for a real conflict of interest and (2) other personal interests that the official managing the review determines are not likely to bias the reviewer's evaluation of the application or proposal but would cause a reasonable person to question the reviewer's impartiality.

The distinction between a real conflict of interest and an appearance of a conflict of interest has important consequences. A reviewer with a real conflict of interest cannot participate in the review unless the Director of NIH determines that (1) the reviewer's interest arises from his/her ties to a component of a large or multicomponent organization that is independent of the component seeking the funding, (2) the Director makes the determination for a contract proposal that the reviewer is the only person available with the requisite expertise and that expertise is essential to ensure a competent and fair review, or (3) the official managing the review determines that the conflict can be obviated by having another review group review the application or proposal. If it is determined that there is an appearance of a conflict of interest, the reviewer must be recused unless the Director determines that it would be difficult or impractical to carry out the review without the reviewer and the integrity of the review process would not be impaired.

It is expected that examples of real and apparent conflicts of interest will be made available to review officials and reviewers through guidance documents noted in § 52h.5(g), but every instance of such conflicts cannot be anticipated. In addition, the application of the regulations will be reviewed periodically with a view toward any changes that would lessen administrative burdens without compromising the integrity of the review process.

Section 52h.5(b)(1)(i) (§ 52h.5(b)(1) in the Final Rule)

One commenter strongly supported the proposed new regulations, including § 52h.5(b)(1)(i), because they broaden the number of scientists who can serve as potential reviewers of a specific application and allow the Director to determine that components of a multicomponent organization are sufficiently independent so that an employee of one component can review an application/proposal from another component without a real or apparent conflict of interest. The commenter requested that his organization be recognized as analogous to separate campuses within the same university system; this request will be evaluated separately. Section 52h.5(b)(1) is retained and clarified so that it applies, provided that the reviewer has no multicampus responsibilities at the institution that would significantly affect the other component.

Section 52h.5(b)(1)(ii) (Incorporated in § 52h.2(q)(2) in the Final Rule)

There were several comments regarding § 52h.5(b)(1)(ii), which sets $5,000 for non-salaried direct financial benefit as the threshold for financial conflict of interest. One commenter stated that this is an improvement upon the current regulations by stipulating a threshold limit for honoraria received by a reviewer from an institution submitting a grant or proposal; however, it should be the same as the $10,000 threshold in 42 CFR 50.603. Another commenter stated that any association with monetary gain within the previous 12 months or within future 12 months could lead to the appearance of conflict, and that the amount proposed is immaterial. Another commenter asked whether the amount would be periodically adjusted for inflation.

We agree to setting the threshold at $10,000 (the same threshold as in 42 CFR 50.603), and agree that the amount may be adjusted periodically for inflation. Adjustments may be made by the Director, NIH, after public notice and provision for public comment. Furthermore, the definition of "real conflict of interest" in 52h.2(q)(2) has been clarified to include stock holdings. Consequently, the $10,000 threshold is a conservative one in that (1) it includes *all* sources of financial benefit, such as honoraria, fees and stock holdings, and (2) it includes both currently held assets as well as honoraria and other financial benefits accruing over a 12-month period. In all, these provisions are intended to allow for routine sharing and exchange of scientific information as a result of invitations to speak at seminars, scientific consultations, and similar events that would not automatically be considered a conflict of interest for the reviewer. At the same time, it would relieve excessive administrative burdens for the potential reviewer and NIH staff for reporting low levels of activity by a reviewer. If there was any concern, it could be treated as an apparent conflict of interest.

Section 52h.5(b)(1)(iii) (§ 52h.5(b)(2) in the Final Rule)

We received several comments regarding proposed § 52h.5(b)(1) that the definition of conflict of interest that involved attributing real conflicts of interest of close relatives or professional associates to the reviewer was too broad. It was noted that the reviewer may not reasonably be expected to know all of the financial or nonfinancial interests that a close relative or professional associate has with an organization or other individuals and would not normally ask them about all of their financial or nonfinancial interests. If the reviewer does not know about a particular interest of the professional associate, then it is not clear how this lack of knowledge could bias the reviewer's evaluation of an application or proposal.

We accepted the comments. Accordingly, we modified the new definitions of real and apparent conflict of interest in § 52h.2 to state that the financial or other interests are "known to the reviewer."

Section 52.5(b)(3) (§ 52h.5(d) in the Final Rule)

Two commenters objected to § 52h.5(b)(3), which provides that when a peer review group meets regularly, it is assumed that a relationship among individual members of the group exists that requires review of a member's application or proposal by a different qualified review group. The commenters suggested that this provision is too restrictive, implies that review groups are biased toward one of their own and cannot be objective, disadvantages members, and will cause potential reviewers to refuse service on standing peer review groups.

Such concerns and perceptions are long-standing. Particularly pervasive has been the assumption that members are disadvantaged by the practice of having their applications reviewed by a different review group, a practice that the NIH has followed for many years. To the contrary, all available data indicate that this assumption is not accurate. The Center for Scientific Review, NIH, has published the available data on this issue on its Web site. This information can be accessed at *http://www.csr.nih.gov/reviewmems.htm*. Because the requirement of § 52h.5(b)(3) corrects a perceived conflict of interest without any disadvantage to the reviewer-applicant, we have made no change in response to this comment.

We provide the following as public information.

Executive Order 12866

Executive Order 12866, Regulatory Planning and Review, requires that regulatory actions reflect consideration of the costs and benefits they generate, and that they meet certain standards, such as avoiding the imposition of unnecessary burdens on the affected public. If a regulatory action is deemed to fall within the scope of the definition of the term "significant regulatory action" contained in section 3(f) of the Order, prepublication review by the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) is necessary. OIRA reviewed this rule and deemed it significant. Therefore, OMB reviewed this rule prior to publication.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. chapter 6) requires that agencies analyze regulatory actions to determine whether they will create a significant impact on a substantial number of small entities. The Secretary certifies that this rule will not have any such impact.

Executive Order 13132

Executive Order 13132, Federalism, requires that Federal agencies consult with State and local government officials in the development of regulatory policies with federalism implications. We reviewed the rule as required under the Order and determined that it does not have any federalism implications. The Secretary certifies that this rule will not have an effect on the States or on the distribution of power and responsibilities among the various levels of government.

Paperwork Reduction Act

This rule does not contain any information collection requirements that are subject to review by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35).

List of Subjects in 42 CFR Part 52h

Government contracts, Grant programs—health, Medical research.

Dated: April 25, 2003.

Elias A. Zerhouni,

Director, National Institutes of Health.

Approved: September 16, 2003.

Tommy G. Thompson,

Secretary.

■ For the reasons stated in the preamble, part 52h of title 42 of the Code of Federal Regulations is revised to read as set forth below.

PART 52h—SCIENTIFIC PEER REVIEW OF RESEARCH GRANT APPLICATIONS AND RESEARCH AND DEVELOPMENT CONTRACT PROJECTS

Sec.

52h.1 Applicability.
52h.2 Definitions.
52h.3 Establishment and operation of peer review groups.
52h.4 Composition of peer review groups.
52h.5 Conflict of interest.
52h.6 Availability of information.
52h.7 What matters must be reviewed for grants?
52h.8 What are the review criteria for grants?
52h.9 What matters must be reviewed for unsolicited contract proposals?
52h.10 What matters must be reviewed for solicited contract proposals?
52h.11 What are the review criteria for contract projects and proposals?
52h.12 Other regulations that apply.

Authority: 42 U.S.C. 216; 42 U.S.C. 282 (b)(6); 42 U.S.C. 284 (c)(3); 42 U.S.C. 289a.

§ 52h.1 Applicability.

(a) This part applies to:

(1) Applications of the National Institutes of Health for grants or cooperative agreements (a reference in this part to grants includes cooperative agreements) for biomedical and behavioral research; and

(2) Biomedical and behavioral research and development contract project concepts and proposals for contract projects administered by the National Institutes of Health.

(b) This part does not apply to applications for:

(1) Continuation funding for budget periods within an approved project period;

(2) Supplemental funding to meet increased administrative costs within a project period; or

(3) Construction grants.

§ 52h.2 Definitions.

As used in this part:

(a) *Act* means the Public Health Service Act, as amended (42 U.S.C. 201 *et seq.*).

(b) *Appearance of a conflict of interest* means that a reviewer or close relative or professional associate of the reviewer has a financial or other interest in an application or proposal that is known to the reviewer or the government official managing the review and would cause a reasonable person to question the reviewer's impartiality if he or she were to participate in the review; the government official managing the review (the Scientific Review Administrator or equivalent) will evaluate the appearance of a conflict of

interest and determine, in accordance with this subpart, whether or not the interest would likely bias the reviewer's evaluation of the application or proposal.

(c) *Awarding official* means the Secretary of Health and Human Services and any other officer or employee of the Department of Health and Human Services to whom the authority involved has been delegated; except that, where the Act specifically authorizes another official to make awards in connection with a particular program, the awarding official shall mean that official and any other officer or employee of the Department of Health and Human Services to whom the authority involved has been delegated.

(d) *Budget period* means the interval of time (usually 12 months) into which the project period is divided for budgetary and reporting purposes.

(e) *Close relative* means a parent, spouse, domestic partner, or son or daughter.

(f) *Contract proposal* means a written offer to enter into a contract that is submitted to the appropriate agency official by an individual or nonfederal organization which includes, at a minimum, a description of the nature, purpose, duration, and cost of the project, and the methods, personnel, and facilities to be utilized in carrying it out. A contract proposal may be unsolicited by the federal government or submitted in response to a request for proposals.

(g) *Development* means the systematic use of knowledge gained from research to create useful materials, devices, systems, or methods.

(h) *DHHS* means the Department of Health and Human Services.

(i) *Director* means the Director of the National Institutes of Health and any other official or employee of the National Institutes of Health to whom the authority involved has been delegated.

(j) *Grant* as used in this part, includes cooperative agreements.

(k) *Peer review group* means a group of primarily nongovernment experts qualified by training and experience in particular scientific or technical fields, or as authorities knowledgeable in the various disciplines and fields related to the scientific areas under review, to give expert advice on the scientific and technical merit of grant applications or contract proposals, or the concept of contract projects, in accordance with this part.

(l) *Principal investigator* has the same meaning as in 42 CFR part 52.

(m) *Professional associate* means any colleague, scientific mentor, or student with whom the peer reviewer is currently conducting research or other significant professional activities or with whom the member has conducted such activities within three years of the date of the review.

(n) *Project approach* means the methodology to be followed and the resources needed in carrying out the project.

(o) *Project concept* means the basic purpose, scope, and objectives of the project.

(p) *Project period* has the same meaning as in 42 CFR part 52.

(q) *Real conflict of interest* means a reviewer or a close relative or professional associate of the reviewer has a financial or other interest in an application or proposal that is known to the reviewer and is likely to bias the reviewer's evaluation of that application or proposal as determined by the government official managing the review (the Scientific Review Administrator, or equivalent), as acknowledged by the reviewer, or as prescribed by this part. A reviewer shall have a real conflict of interest if he/she or a close relative or professional associate of the reviewer:

(1) Has received or could receive a direct financial benefit of any amount deriving from an application or proposal under review;

(2) Apart from any direct financial benefit deriving from an application or proposal under review, has received or could receive a financial benefit from the applicant institution, offeror or principal investigator that in the aggregate exceeds $10,000 per year; this amount includes honoraria, fees, stock or other financial benefit, and additionally includes the current value of the reviewer's already existing stock holdings. The Director, NIH, may amend the dollar threshold periodically, as appropriate, after public notice and comment; or

(3) Has any other interest in the application or proposal that is likely to bias the reviewer's evaluation of that application or proposal. Regardless of the level of financial involvement or other interest, if the reviewer feels unable to provide objective advice, he/she must recuse him/herself from the review of the application or proposal at issue. The peer review system relies on the professionalism of each reviewer to identify to the designated government official any real or apparent conflicts of interest that are likely to bias the reviewer's evaluation of an application or proposal.

(r) *Request for proposals* means a Government solicitation to prospective offerors, under procedures for negotiated contracts, to submit a proposal to fulfill specific agency requirements based on terms and conditions defined in the request for proposals. The request for proposals contains information sufficient to enable all offerors to prepare proposals, and is as complete as possible with respect to: nature of work to be performed; descriptions and specifications of items to be delivered; performance schedule; special requirements clauses, or other circumstances affecting the contract; format for cost proposals; and evaluation criteria by which the proposals will be evaluated.

(s) *Research* has the same meaning as in 42 CFR part 52.

(t) *Research and development contract project* means an identified, circumscribed activity, involving a single contract or two or more similar, related, or interdependent contracts, intended and designed to acquire new or fuller knowledge and understanding in the areas of biomedical or behavioral research and/or to use such knowledge and understanding to develop useful materials, devices, systems, or methods.

(u) *Scientific review group* has the same meaning as peer review group, which is defined in paragraph (k) of this section.

(v) *Solicited contract proposal* has the same meaning as the definition of offer in 48 CFR 2.101.

(w) *Unsolicited contract proposal* has the same meaning as unsolicited proposal in 48 CFR 15.601.

§ 52h.3 Establishment and operation of peer review groups.

(a) To the extent applicable, the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2) and chapter 9 of the DHHS General Administration Manual[1] shall govern the establishment and operation of peer review groups.

(b) Subject to § 52h.5 and paragraph (a) of this section, the Director will adopt procedures for the conduct of reviews and the formulation of recommendations under §§ 52h.7, 52h.9, and 52h.10.

§ 52h.4 Composition of peer review groups.

(a) To the extent applicable, the selection and appointment of members

[1] The DHHS General Administration Manual is available for public inspection and copying at the Department's information centers listed in 45 CFR 5.31 and may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

of peer review groups and their terms of service shall be governed by chapter 9 of the DHHS General Administration Manual.

(b) Subject to paragraph (a) of this section, members will be selected based upon their training and experience in relevant scientific or technical fields, or upon their qualifications as authorities knowledgeable in the various disciplines and fields related to the scientific areas under review, taking into account, among other factors:

(1) The level of formal scientific or technical education completed or experience acquired by the individual;

(2) The extent to which the individual has engaged in relevant research, the capacities (*e.g.*, principal investigator, assistant) in which the individual has done so, and the quality of the research;

(3) Recognition as reflected by awards and other honors received from scientific and professional organizations; and

(4) The need for the group to have included within its membership experts from various areas of specialization within relevant scientific or technical fields, or authorities knowledgeable in the various disciplines and fields related to the scientific areas under review.

(c) Except as otherwise provided by law, not more than one-fourth of the members of any peer review group to which this part applies may be officers or employees of the United States. Being a member of a scientific peer review group does not make an individual an officer or employee of the United States.

§ 52h.5 Conflict of interest.

(a) This section applies only to conflicts of interest involving members of peer review groups. This section does not cover individuals serving on National Advisory Councils or Boards, Boards of Scientific Counselors, or Program Advisory Committees who, if not already officers or employees of the United States, are special Government employees and covered by title 18 of the United States Code, the Office of Government Ethics Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR part 2635), and Executive Order 11222, as amended. For those federal employees serving on peer review groups, in accordance with § 52h.4, the requirements of title 18 of the United States Code, 5 CFR part 2635 and Executive Order 12674, as modified by Executive Order 12731, apply.

(b) A reviewer with a real conflict of interest must recuse him/herself from the review of the application or proposal, except as otherwise provided in this section.

(1) A reviewer who is a salaried employee, whether full-time or part-time, of the applicant institution, offeror, or principal investigator, or is negotiating for employment, shall be considered to have a real conflict of interest with regard to an application/proposal from that organization or principal investigator, except that the Director may determine there is no real conflict of interest or an appearance of a conflict of interest where the components of a large or multicomponent organization are sufficiently independent to constitute, in effect, separate organizations, provided that the reviewer has no responsibilities at the institution that would significantly affect the other component.

(2) Where a reviewer's real conflict of interest is based upon the financial or other interest of a close relative or professional associate of the reviewer, that reviewer must recuse him/herself, unless the Director provides a waiver in accordance with paragraph (b)(4) of this section.

(3) For contract proposal reviews, an individual with a real conflict of interest in a particular proposal(s) is generally not permitted to participate in the review of any proposals responding to the same request for proposals. However, if there is no other qualified reviewer available having that individual's expertise and that expertise is essential to ensure a competent and fair review, a waiver may be granted by the Director to permit that individual to serve as a reviewer of those proposals with which the reviewer has no conflict, while recusing him/herself from the review of any particular proposal(s) in which there is a conflict of interest.

(4) The Director may waive any of the requirements in paragraph (b) of this section relating to a real conflict of interest if the Director determines that there are no other practical means for securing appropriate expert advice on a particular grant or cooperative agreement application, contract project, or contract proposal, and that the real conflict of interest is not so substantial as to be likely to affect the integrity of the advice to be provided by the reviewer.

(c) Any appearance of a conflict of interest will result in recusal of the reviewer, unless the Director provides a waiver, determining that it would be difficult or impractical to carry out the review otherwise, and the integrity of the review process would not be impaired by the reviewer's participation.

(d) When a peer review group meets regularly it is assumed that a relationship among individual reviewers in the group exists and that the group as a whole may not be objective about evaluating the work of one of its members. In such a case, a member's application or proposal shall be reviewed by another qualified review group to ensure that a competent and objective review is obtained.

(e) When a member of a peer review group participates in or is present during the concept review of a contract proposal that occurs after release of the solicitation, as described under § 52h.10(b), but before receipt of proposals, the member is not considered to have a real conflict of interest as described in paragraph (b) of this section, but is subject to paragraph (c) of this section concerning appearance of conflict of interest if the member is planning to respond to the solicitation. When the concept review occurs after receipt of proposals, paragraph (b) applies.

(f) No member of a peer review group may participate in any review of a specific grant application or contract project for which the member has had or is expected to have any other responsibility or involvement (whether pre-award or post-award) as an officer or employee of the United States.

(g) The Director may periodically issue guidance to the government officials responsible for managing reviews and reviewers on what interests would constitute a real conflict of interest or an appearance of a conflict of interest.

§ 52h.6 Availability of information.

(a) Transcripts, minutes, and other documents made available to or prepared for or by a peer review group will be available for public inspection and copying to the extent provided by the Freedom of Information Act, as amended (5 U.S.C. 552), the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), the Privacy Act of 1974, as amended (5 U.S.C. 552a), and implementing DHHS regulations (45 CFR parts 5, 5b).

(b) Meetings of peer review groups reviewing grant applications or contract proposals are closed to the public in accordance with sections 552b(c)(4) and 552b(c)(6) of the Government in the Sunshine Act, as amended (5 U.S.C. 552b(c)(4) and 552b(c)(6)) and section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2). Documents made available to, or prepared for or by peer review groups that contain trade secrets or commercial or financial information obtained from a person that is privileged or confidential, and personal

information concerning individuals associated with applications or proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, are exempt from disclosure in accordance with the Freedom of Information Act, as amended (5 U.S.C. 552(b)(4) and 552(b)(6)).

(c) Meetings of peer review groups reviewing contract project concepts are open to the public in accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2) and the Government in the Sunshine Act, as amended (5 U.S.C. 552b).

§ 52h.7 What matters must be reviewed for grants?

(a) Except as otherwise provided by law, no awarding official shall award a grant based upon an application covered by this part unless the application has been reviewed by a peer review group in accordance with the provisions of this part and the group has made recommendations concerning the scientific merit of that application. In addition, where under applicable law an awarding official is required to secure the approval or advice of a national council or board concerning an application, the application may not be considered by the council or board unless it has been reviewed by the appropriate peer review group, in accordance with the provisions of this part, and the group has made recommendations concerning the scientific merit of the application, except where the council or board is the peer review group.

(b) Except to the extent otherwise provided by law, recommendations by peer review groups are advisory only and not binding on the awarding official or the national advisory council or board.

§ 52h.8 What are the review criteria for grants?

In carrying out its review under § 52h.7, the scientific peer review group shall assess the overall impact that the project could have on the research field involved, taking into account, among other pertinent factors:

(a) The significance of the goals of the proposed research, from a scientific or technical standpoint;

(b) The adequacy of the approach and methodology proposed to carry out the research;

(c) The innovativeness and originality of the proposed research;

(d) The qualifications and experience of the principal investigator and proposed staff;

(e) The scientific environment and reasonable availability of resources necessary to the research;

(f) The adequacy of plans to include both genders, minorities, children and special populations as appropriate for the scientific goals of the research;

(g) The reasonableness of the proposed budget and duration in relation to the proposed research; and

(h) The adequacy of the proposed protection for humans, animals, and the environment, to the extent they may be adversely affected by the project proposed in the application.

§ 52h.9 What matters must be reviewed for unsolicited contract proposals?

(a) Except as otherwise provided by law, no awarding official shall award a contract based upon an unsolicited contract proposal covered by this part unless the proposal has been reviewed by a peer review group in accordance with the provisions of this part and the group has made recommendations concerning the scientific merit of that proposal.

(b) Except to the extent otherwise provided by law, peer review group recommendations are advisory only and not binding on the awarding official.

§ 52h.10 What matters must be reviewed for solicited contract proposals?

(a) Subject to paragraphs (b) and (c) of this section, no awarding official shall issue a request for contract proposals with respect to a contract project involving solicited contract proposals, unless the project concept has been reviewed by a peer review group or advisory council in accordance with this part and the group has made recommendations concerning the scientific merit of the concept.

(b) The awarding official may delay carrying out the requirements for peer review of paragraph (a) of this section until after issuing a request for proposals if the official determines that the accomplishment of essential program objectives would otherwise be placed in jeopardy and any further delay clearly would not be in the best interest of the Government. The awarding official shall specify in writing the grounds on which this determination is based. Under these circumstances, the awarding official will not award a contract until peer review of the project concept and the proposals has been completed. The request for proposals shall state that the project concept will be reviewed by a peer review group and that no award will be made until the review is conducted and recommendations made based on that review.

(c) The awarding official may determine that peer review of the project concept for behavioral or biomedical research and development contracts is not needed if one of the following circumstances applies: the solicitation is to re-compete or extend a project that is within the scope of a current project that has been peer reviewed, or there is a Congressional authorization or mandate to conduct specific contract projects. If a substantial amount of time has passed since the concept review, the awarding official shall determine whether peer review is required to ensure the continued scientific merit of the concept.

(d) Except to the extent otherwise provided by law, the recommendations referred to in this section are advisory only and not binding on the awarding official.

§ 52h.11 What are the review criteria for contract projects and proposals?

(a) In carrying out its review of a project concept under § 52h.10(a) or § 52h.10(b), the peer review group shall take into account, among other pertinent factors:

(1) The significance from a scientific or technical standpoint of the goals of the proposed research or development activity;

(2) The availability of the technology and other resources necessary to achieve those goals;

(3) The extent to which there are identified, practical uses for the anticipated results of the activity; and

(4) Where the review includes the project approach, the adequacy of the methodology to be utilized in carrying out the activity.

(b) In carrying out its review of unsolicited contract proposals under § 52h.9, the peer review group shall take into account, among other pertinent factors, the criteria in § 52h.8 which are relevant to the particular proposals.

(c) In carrying out its review of solicited proposals under § 52h.10(a) or (b), the peer review group shall evaluate each proposal in accordance with the criteria set forth in the request for proposals.

§ 52h.12 Other regulations that apply.

The regulations in this part are in addition to, and do not supersede other regulations concerning grant applications, contract projects, or contract proposals set forth elsewhere in this title, title 45, or title 48 of the Code of Federal Regulations.

[FR Doc. 03–32109 Filed 12–31–03; 9:46 am]

BILLING CODE 4140–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 03–15712; Notice 2]

RIN No. 2127–AJ25

Federal Motor Vehicle Safety Standards; Glazing Materials; Low Speed Vehicles

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Final rule, partial response to petitions for reconsideration.

SUMMARY: This final rule delays the effective date for compliance with the amended requirements of Federal Motor Vehicle Safety Standard (FMVSS) No. 205, *Glazing Materials.* The final rule amending FMVSS No. 205 was published on July 25, 2003.[1]

This final rule delays the date on which manufacturers must meet the amended requirements of FMVSS No. 205, from January 22, 2004, until September 1, 2004. The agency received six petitions for reconsideration, requesting that NHTSA consider modifying certain requirements of the amended FMVSS No. 205. Specifically, petitioners are asking that the agency reconsider: (a) The up-angle value of the windshield shade band; (b) the definition of the term "most difficult part or pattern" and the term "day light opening;" (c) the fracture testing procedure with respect to soldered terminals; (d) the effective date of the final rule; and (e) the applicability of the amended requirements to aftermarket parts. Petitioners have indicated that compliance with the amended requirements of FMVSS No. 205, prior to resolution of petitions for reconsideration, would cause substantial economic hardship to vehicle and glazing manufacturers. This rulemaking partially responds to the petitions for reconsideration by delaying the date on which the manufacturers must meet the amended requirements of FMVSS No. 205.

DATES: This final rule becomes effective January 5, 2004.

FOR FURTHER INFORMATION CONTACT: For non-legal issues, you may call John Lee, Office of Crashworthiness Standards, at (202) 366–2264, facsimile (202) 366–4329 or Patrick Boyd, Office of Crash Avoidance Standards, at (202) 366–6346, facsimile (202) 493–2739.

For legal issues, you may call George Feygin, Office of the Chief Counsel, at (202) 366–2992, facsimile (202) 366–3820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. Petitions For Reconsideration
III. Final Rule
IV. Regulatory Analyses and Notices

I. Background

FMVSS No. 205 specifies performance requirements for glazing installed in motor vehicles. It also specifies the vehicle locations in which the various types of glazing may be installed. On July 25, 2003, NHTSA issued a final rule (July 25 final rule) updating FMVSS No. 205 so that it incorporates by reference the 1996 version of the American Standards Institute (ANSI) standard on motor vehicle glazing. Prior to the July 25 final rule, FMVSS No. 205 referenced the 1977 version of ANSI Standard Z26.1, "Safety Code for Safety Glazing Materials for Glazing Motor Vehicles Operating on Land Highways," and the 1980 supplement to that standard.[2] Since 1977, the ANSI Standard Z26.1 has been periodically revised, however the newer versions of the standard were not incorporated into the FMVSS No. 205.

The July 25 final rule has simplified and amended the glazing performance requirements. Amendments to the standard over the past 20 years have resulted in a patchwork of requirements that must be read alongside the industry standard in order to gain a comprehensive understanding of the overall requirements of FMVSS No. 205. By incorporating by reference the 1996 version of the ANSI standard, the agency is now able to delete most of the existing text in FMVSS No. 205.

In addition to incorporating the 1996 ANSI standard, the final rule addressed several issues not covered by that standard. For example, the final rule limited the size of the shade band located at the top of the windshield and clarified the meaning of the term "the most difficult part or pattern" for the fracture test in the 1996 ANSI standard. The final rule also made minor conforming amendments to the standard on low speed vehicles. The July 25 final rule was to become effective on January 22, 2004.[3] For further details on the subject final rule, please see 68 FR 43964 (July 25, 2003).

II. Petitions For Reconsideration

In response to the July 25 final rule, the agency received six petitions for reconsideration. Petitions were submitted by DaimlerChrysler, General Motors (GM), Alliance for Automobile Manufacturers (Alliance), PPG Industries (PPG), Pilkington North America (PNA), and Visteon. Petitioners have asked the agency to reconsider the following issues.

1. The Up-Angle of the Windshield Shade Band

DaimlerChrysler, GM, PPG, PNA, and Visteon have asked that the agency reconsider its decision to change the visibility up-angle from 5 degrees to 7 degrees. Specifically, petitioners note that NHTSA has not demonstrated a safety need for this technical modification, and that the up-angle change was not discussed in the NPRM. DaimlerChrysler estimates that 25% of vehicles currently in production would not comply with the 7-degree up-angle requirement. Accordingly, petitioners contend that the change in the up-angle would place a significant burden on the manufacturers. Additionally, Visteon commented that the change in up-angle would necessitate a costly redesign of aftermarket replacement glazing.

2. The Terms "Most Difficult Part or Pattern" and "Day Light Opening"

GM, DaimlerChrysler, PPG and PNA have asked the agency to clarify or reconsider the meaning of the phrase "most difficult part or pattern" in the context of the fracture test provisions of ANSI Z26. Specifically, petitioners contend that the preamble to the final rule, S5.2 of the regulatory text, and NHTSA's previous interpretations on the issue, are inconsistent as to the use of the phrase.

DaimlerChrysler and PPG have also asked the agency to formally define the term "Day Light Opening" and rescind a previously issued interpretation letter on the subject.

3. Soldered Terminals

DaimlerChrysler, GM, PPG, PNA and Alliance have asked the agency to reconsider its position with respect to soldered terminals. Specifically, petitioners ask that compliance fracture testing be conducted without soldered terminals being attached to glazing. According to petitioners, a prior interpretation letter on the issue,

[1] *See* 68 FR 43964.

[2] The most recent revision we incorporated into FMVSS No. 205 was ANSI Z26.1a–1980, which supplemented the 1977 version. It was incorporated by a final rule published in February 23, 1984 (49 FR 6732).

[3] The effective date for the July 25 final rule was originally incorrectly stated as September 23, 2003. Subsequently, we published a correction indicating that the July 25 final rule would become effective on January 22, 2004 (68 FR 55544).

coupled with the language in the final rule created confusion as to whether fracture testing would be conducted with the terminals attached. Petitioners ask that NHTSA clarify both the new testing procedure and also a distinction between conductors and terminals.

4. Effective Date

Petitioners, including PNA, GM, DaimlerChrysler, PPG and Visteon, have asked the agency to delay the effective date of the updated FMVSS No. 205 by up to 3 years. In support of their request, DaimlerChrysler argued that glazing manufacturers would need to perform extensive testing to demonstrate compliance with the updated requirements of FMVSS No. 205. Further, some glazing manufacturers might need to add additional equipment in order to perform the necessary testing.

Because NHTSA would not be able to respond to the petitions prior the January 22, 2004 effective date, petitioners requested that NHTSA extend the compliance deadline to a date after NHTSA completes the pending rulemaking.

5. Aftermarket Parts

DaimlerChrysler, PNA, GM and PPG have asked that the agency also consider permitting compliance with the old requirements of FMVSS No. 205 for the manufacture of aftermarket replacement glazing. According to the petitioners, it would not be feasible to redesign replacement glazing such that it would meet the updated requirements of FMVSS No. 205. Similarly, Visteon commented that the final rule necessitates a redesign of aftermarket glazing that may be time-consuming because the necessary vehicle data is not readily available to glazing manufacturers.

III. Final Rule

The agency has set a January 22, 2004, effective date for the July 25 final rule. The petitions filed by DaimlerChrysler, GM, Alliance, PPG, PNA, and Visteon have asked the agency to reconsider several aspects of that rulemaking. NHTSA is currently considering all six petitions. Unfortunately, NHTSA's consideration of the petitions has not yet concluded. The effective date set by our July 25 final rule and subsequent correction (January 22, 2004) is now a month away.

Given the imminence of the January 22, 2004, effective date, the agency has determined that it is appropriate to first partially respond to petitions concerning the effective date of the July 25 final rule. Accordingly, the agency is delaying the effective date of the July 25 final rule until September 1, 2004, after which the manufacturers will be required to meet the new requirements of FMVSS No. 205. Other issues raised in the petitions for reconsideration will be addressed by the agency in a separate document.

The agency believes that a partial response to the petitions for reconsideration is necessary to insure that glazing and automobile manufacturers do not face substantial economic hardship associated with certain new requirements of the amended FMVSS No. 205. As discussed in the petitions, the updated requirements of FMVSS No. 205 may necessitate extensive testing and retooling by glazing manufacturers. Given the number of issues raised in these petitions, NHTSA has determined that six months was an inadequate period of time to meet the new requirements. The agency also notes that extending the effective date to September 1, 2004, would permit vehicle manufacturers to avoid mid-model year product changes that would otherwise result from the July 25 final rule, coming into effect on January 22, 2004.

NHTSA expects that all other issues raised in the petitions will be fully addressed prior to the new, September 1, 2004, effective date. In the event, however, that these issues have not been resolved, all affected manufacturers will be required to meet the new requirements. Effective dates of agency final rules are not stayed due to outstanding petitions for reconsideration of those rules.

IV. Regulatory Analyses and Notices

A. Economic Impacts

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), provides for making determinations whether a regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and to the requirements of the Executive Order. The Order defines a "significant regulatory action" as one that is likely to result in a rule that may:

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

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

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

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

This rulemaking document was not reviewed under Executive Order 12866. It is not significant within the meaning of the DOT Regulatory Policies and Procedures. It does not impose any burden on manufacturers and extends the compliance date for existing regulatory requirements for an additional seven and a half months. The agency believes that this impact is so minimal as to not warrant the preparation of a full regulatory evaluation.

B. Environmental Impacts

We have not conducted an evaluation of the impacts of this final rule under the National Environmental Policy Act. This rulemaking action extends the date by which the manufacturers must comply with the newly upgraded requirements of FMVSS No. 205. This rulemaking does not impose any change that would have any environmental impacts. Accordingly, no environmental assessment is required.

C. Impacts on Small Entities

Pursuant to the Regulatory Flexibility Act, we have considered the impacts of this rulemaking action will have on small entities (5 U.S.C. 601 *et seq.*). I certify that this rulemaking action will not have a significant economic impact upon a substantial number of small entities within the context of the Regulatory Flexibility Act.

The following is our statement providing the factual basis for the certification (5 U.S.C. 605(b)). The final rule affects manufacturers of motor vehicles and motor vehicle glazing. According to the size standards of the Small Business Association (at 13 CFR part 121.601), manufacturers of glazing are considered manufacturers of "Motor Vehicle Parts and Accessories" (SIC Code 3714). The size standard for SIC Code 3714 is 750 employees or fewer. The size standard for manufacturers of "Motor Vehicles and Passenger Car Bodies" (SIC Code 3711) is 1,000 employees or fewer. This Final Rule will not have any significant economic impact on a small business in these industries because it makes no significant substantive change to the requirements specified in FMVSS No. 205. Instead, this rulemaking delays the effective date of the previously published final rule by seven and a half

months. Small organizations and governmental jurisdictions that purchase glazing will not be significantly affected because this rulemaking will not cause price increases. Accordingly, we have not prepared a Regulatory Flexibility Analysis.

D. Federalism

E.O. 13132 requires NHTSA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications" to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under E.O. 13132, NHTSA may not issue a regulation that has federalism implication, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or NHTSA consults with State and local officials early in the process of developing the proposed regulation.

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

E. The Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local or tribal governments, in the aggregate, or by the private sector, of more than $100 million annually. This action, which extends the compliance date by which the manufacturers must meet the upgraded requirements of FMVSS No. 205, will not result in additional expenditures by state, local or tribal governments or by any members of the private sector. Therefore, the agency has not prepared an economic assessment pursuant to the Unfunded Mandates Reform Act.

F. Paperwork Reduction Act

There are no information collection requirements in this rule.

G. Regulation Identifier Number (RIN)

The Department of Transportation assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda.

H. Plain Language

Executive Order 12866 requires each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

• Have we organized the material to suit the public's needs?

• Are the requirements in the rule clearly stated?

• Does the rule contain technical language or jargon that is not clear?

• Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?

• Would more (but shorter) sections be better?

• Could we improve clarity by adding tables, lists, or diagrams?

• What else could we do to make the rule easier to understand?

If you have any responses to these questions, please forward them to George Feygin, Office of Chief Counsel, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590.

I. National Technology Transfer and Advancement Act

Under the National Technology and Transfer and Advancement Act of 1995 (NTTAA) (Pub. L. 104–113), "all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments."

Certain technical standards developed by the American National Standards Institute (ANSI) and Society of Automotive Engineers (SAE) have been considered and incorporated by reference in the final rule published on July 25, 2003, which upgraded the requirements of FMVSS No. 205. This final rule extends the effective date of that final rule to September 1, 2004.

J. 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 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.*

Authority: 49 U.S.C. 322, 21411, 21415, 21417, and 21466; delegation of authority at 49 CFR 1.50.

Issued on: December 29, 2003.

Otis G. Cox,

Deputy Administrator.

[FR Doc. 04–29 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–59–M

Proposed Rules

Federal Register

Vol. 69, No. 2

Monday, January 5, 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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 21 and 121

[Docket No. FAA–2002–6717; Notice No. 03–11]

RIN 2120–AI03

Extended Operations (ETOPS) of Multi-engine Airplanes; Correction

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Proposed rule; correction.

SUMMARY: This document makes corrections to the proposed rule published in the **Federal Register** on November 14, 2003 (68 FR 64730), which proposes to issue regulations governing the design, maintenance, and operation of airplanes and engines for flights that go beyond certain distances from an adequate airport. This correction is necessary to correct an inadvertent omission and incorrect numbering.

FOR FURTHER INFORMATION CONTACT: Eric vanOpstal, (202) 267–3774; or E-mail: *eric.vanopstal@faa.gov*.

Correction

In proposed rule FR Doc. 03–28407, published on November 14, 2003 (68 FR 64730), make the following corrections:

1. On page 64786, in the second column, correct § 21.4 by adding paragraph (c) to read as follows:

§ 21.4 ETOPS reporting requirements.

* * * * *

(c) *Corrective action if in-flight shutdown rates are exceeded.* If the in-flight shutdown rate exceeds the requirements in paragraph (b)(2) of this section, the certificating office of the FAA will review the in-flight shut down rate to determine if an unsafe condition that requires mandatory corrective action as specified by part 39 of this chapter exists. The rates contained in paragraph (b)(2) of this section are worldwide fleet rates applicable to ETOPS type design holders for a given airplane-engine type combination, and are not air carrier or operator specific.

§ 121.646 [Corrected]

2. On page 64794, in the second column, correct § 121.646(b)(3) by revising the reference "(b)(1)(i)" to read "(b)(1)" each place it appears.

3. On page 64794, in the second column, correct § 121.646 (b)(4) by revising the reference "(b)(1)(i)" to read "(b)(1)'.

4. On page 64794, in the second column, correct § 121.646 by redesignating paragraphs (b)(4)(C) and (b)(4)(D) as paragraphs (c) and (d), respectively.

Issued in Washington, DC, on December 30, 2003.

Donald P. Byrne,

Assistant Chief Counsel for Regulations.

[FR Doc. 04–71 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–165–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135 and EMB–145 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain EMBRAER Model EMB–135 and EMB–145 series airplanes. This proposal would require replacement of the nose landing gear wheel nuts and associated inner and outer seals; and reidentification of the landing gear strut. This action is necessary to prevent separation of the wheels from the nose landing gear due to the failure of the outer wheel bearings, and consequent loss of control of the airplane during takeoff and landing. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by February 4, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–165–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2002–NM–165–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer; International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a

request to change the service bulletin reference as two separate issues.

- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2002–NM–165–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–165–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Departamento de Aviacao Civil (DAC), which is the airworthiness authority for Brazil, notified the FAA that an unsafe condition may exist on certain EMBRAER Model EMB–135 and –145 series airplanes. The DAC advises that it has received reports that the outer wheel bearings of certain nose landing gear wheels have failed. This condition, if not corrected, could result in separation of the wheels from the nose landing gear strut and consequent loss of control of the airplane during takeoff and landing.

Explanation of Relevant Service Information

EMBRAER has issued Service Bulletin 145–32–0068, Change 04, dated January 20, 2003; and Service Bulletin 145LEG–32–0006, Change 01, dated January 20, 2003; which describe procedures for replacement of the nose landing gear wheel nuts and the associated inner and outer seals; and reidentification of the landing gear strut. Accomplishment of the actions specified in the service bulletins is intended to adequately address the identified unsafe condition. The DAC classified these service bulletins as mandatory and issued Brazilian airworthiness directive 2002–03–01R2, dated April 22, 2003, in order to assure the continued airworthiness of these airplanes in Brazil.

FAA's Conclusions

These airplane models are manufactured in Brazil and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the service bulletins described previously.

Cost Impact

The FAA estimates that 365 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to accomplish the proposed actions, and that the average labor rate is $65 per work hour. Required parts would be provided free of charge by the airplane manufacturer. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $23,725, or $65 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Empresa Brasileira de Aeronautica S.A. (Embraer): Docket 2002–NM–165–AD.

Applicability: Model EMB–135 and –145 series airplanes having serial numbers (S/N) 145003 through 145373, 146375, 145377 through 145391 inclusive, and 145393 through 145408 inclusive; certificated in any category; equipped with nose landing gear struts, part number (P/N) 1170C0000–01 (including all modifications), P/N 1170C0000–02, or P/N 1170C0000–03.

Compliance: Required as indicated, unless accomplished previously.

To prevent separation of the wheels from the nose landing gear due to the failure of the outer wheel bearings, and consequent loss of control of the airplane during takeoff and landing, accomplish the following:

Replacement and Reidentification

(a) Within 12 months from the effective date of this AD, replace the nose landing gear

wheel nuts, P/N 1170–0007, with new wheel nuts, P/N 170–0082; the associated inner and outer seals, P/N 68–1157 or P/N 72–290, with new seals, P/N 68–1498; and reidentify the struts; in accordance with the Accomplishment Instructions of EMBRAER Service Bulletin 145–32–0068, Change 04, dated January 20, 2003; or EMBRAER Service Bulletin 145LEG–32–0006, Change 01, dated January 20, 2003; as applicable.

(b) Actions accomplished before the effective date of this AD per EMBRAER Service Bulletins as listed in the following table are considered acceptable for compliance with the corresponding actions specified in this AD:

TABLE—SERVICE BULLETINS

EMBRAER Service Bulletin	Change level	Date
145–32–0068	Original	May 4, 2001.
145–32–0068	01	January 14, 2002.
145–32–0068	02	April 16, 2002.
145–32–0068	03	November 25, 2002.
145LEG–32–0006	Original	November 26, 2002.

Parts Installation

(c) As of the effective date of this AD, no person may install nose landing gear wheel nuts, P/N 1170–0007, or the associated inner and outer seals, P/N 68–1157 or P/N 72–290, on any airplane.

Alternative Methods of Compliance

(d) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, FAA, is authorized to approve alternative methods of compliance for this AD.

Note 1: The subject of this AD is addressed in Brazilian airworthiness directive 2002–03–01R2, dated April 22, 2003.

Issued in Renton, Washington, on December 29, 2003.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–47 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–89–AD]

RIN 2120–AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB–135 and –145 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain EMBRAER Model EMB–135 and –145 series airplanes. This proposal would require repetitive inspections for cracks, ruptures, or bends in certain components of the elevator control system, and replacement of discrepant components. This proposal also would require eventual modification of the elevator gust lock system to replace the mechanical system with an electromechanical system, which would terminate the repetitive inspections. This action is necessary to prevent discrepancies in the elevator control system, which could result in reduced control of the elevator and consequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by February 4, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–89–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2002–NM–89–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Empresa Brasileira de Aeronautica S.A. (EMBRAER), P.O. Box 343—CEP 12.225, Sao Jose dos Campos—SP, Brazil. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Submit comments using the following format:

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2002–NM–89–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–89–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Departmento de Aviacao Civil (DAC), which is the airworthiness authority for Brazil, notified the FAA that an unsafe condition may exist on certain EMBRAER Model EMB–135 and –145 series airplanes. The DAC advises that cracks have been found in certain components of the elevator control system in the horizontal stabilizer area of several airplanes equipped with a mechanical gust lock system. These cracks have been attributed to damage from strong wind gusts on the ground. Such cracking, if not corrected, could result in discrepancies in the elevator control system, which could result in reduced control of the elevator and consequent reduced controllability of the airplane.

Explanation of Relevant Service Information

EMBRAER has issued Service Bulletin 145–27–0087, Change 03, dated September 27, 2002, which describes procedures for repetitive detailed inspections for cracks, ruptures, or bends in components of the elevator control system. Components subject to inspection include the limiter tubes, bellcrank assemblies, elevator control rod assemblies, quadrant bellcrank assemblies, quadrant support, stop plates, elevator primary backstops, spring tab backstops, elevator surface near the hinge points and spring tab fairings, servo tab fail-safe actuation link, spring tab attachment link, and various components of the gust lock mechanism. If any discrepancy is found, the service bulletin specifies to replace the discrepant part with a new part.

EMBRAER has also issued Service Bulletin 145–27–0075, Change 06, dated July 16, 2002. Parts I and II of that service bulletin apply to airplanes in various configurations and describe procedures for replacing the mechanical gust lock system with an electromechanical gust lock system. Specific procedures include replacing the control stand with a reworked control stand; installing a support for the reworked control stand that has a return spring system; adjusting the thrust lever resolver and microswitch contact point; reworking the forward elevator torque tube by installing a cam, support, and microswitch, as applicable; installing the spring pin position indicating mechanism and the spring cartridge assembly (including performing a detailed inspection of the area of the spring cartridge assembly to ensure that certain parts have been removed previously), as applicable; installing a gust lock alerting indication system; and accomplishing electrical connections. Part III of that service bulletin applies to airplanes modified per a previous revision of service bulletin 145–27–0075, and describes procedures for replacing the return spring and spring terminal of the gust lock control lever with improved parts.

EMBRAER has also issued Service Bulletin 145–27–0086, Change 01, dated July 3, 2002, which describes procedures for replacing the mechanical gust lock system with an electromechanical gust lock system. Part I of that service bulletin describes procedures for reworking the tail carbon box, installing the gust lock cartridge pin supports, performing an ultrasonic inspection to detect delaminations of the tail carbon box, making certain measurements using a feeler gauge and making consequent necessary adjustments, installing certain bushings, reworking horizontal stabilizer channels, installing wire supports, and reidentifying the horizontal stabilizer. Part II of that service bulletin describes procedures for installing wiring for the electromechanical gust lock system. Part IV of that service bulletin describes procedures for installing and activating the electromechanical gust lock system, including replacing the existing control stand with a control stand reworked per instructions in Part III of the service bulletin, installing a control stand support that has a return spring system, reworking the forward elevator torque tube, installing cartridge spring pins and a position-indicating mechanism at the horizontal stabilizer, and installing a gust lock alerting indication system. (The rework instructions in Part III of the service bulletin refer to EMBRAER Service Bulletin 145–22–0007 as an additional source of service information for accomplishment of the rework.)

Accomplishment of the actions specified in the applicable service bulletins is intended to adequately address the identified unsafe condition. The DAC classified this service bulletin as mandatory and issued Brazilian airworthiness directive 2002–01–01R3, dated November 8, 2002, to ensure the continued airworthiness of these airplanes in Brazil.

FAA's Conclusions

These airplane models are manufactured in Brazil and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the applicable service bulletins described previously, except as discussed below.

Differences Between Proposed AD and Service Information

EMBRAER Service Bulletin 145–27–0087, Change 03, specifies to return discrepant parts and report inspection results to the manufacturer. The proposed AD would not require these actions.

Figure 14 of the Accomplishment Instructions of EMBRAER Service Bulletin 145–27–0075, Change 06, which is referenced in the Accomplishment Instructions of that service bulletin, refers to a detailed inspection in the area of the spring cartridge assembly to ensure that certain parts have been removed previously per EMBRAER Service Bulletin 145–27–0076. The service bulletin does not specify the corrective actions that are necessary if any of these parts are installed. Thus, this proposed AD specifies that, if any parts are found in the area of the spring cartridge assembly that should have been removed per EMBRAER Service Bulletin 145–27–0076, those parts must be removed before further flight.

Similarly, Part I of the Accomplishment Instructions of EMBRAER Service Bulletin 145–27–0086, Change 01, refers to an ultrasonic inspection to detect delaminations of the tail carbon box. However, that service bulletin contains no instructions for corrective action if any delamination is found that is outside the limits specified in the service bulletin. Thus, this proposed AD specifies that any delamination outside the limits specified in the service bulletin must be

repaired per a method approved by either the FAA or the DAC (or its delegated agent).

Clarification of Requirements of Proposed AD

Where Parts I and II of the Accomplishment Instructions of EMBRAER Service Bulletin 145–27–0075, Change 06, and Part IV of the Accomplishment Instructions of EMBRAER Service Bulletin 145–27–0086, Change 01, specify to remove and "send the control stand to be reworked in a workshop," this proposed AD specifies to replace the control stand with a control stand reworked as specified in the applicable service bulletin.

Cost Impact

The FAA estimates that 300 airplanes of U.S. registry would be affected by this proposed AD.

It would take approximately 1 work hour per airplane, per inspection cycle, to accomplish the proposed inspection, at an average labor rate of $65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $19,500, or $65 per airplane, per inspection cycle.

For airplanes subject to EMBRAER Service Bulletin 145–27–0075, Change 06, it would take up to 55 work hours to accomplish the proposed modification in that service bulletin, at an average labor rate is $65 per work hour. Required parts would cost up to $9,554 per airplane. Based on these figures, the cost impact of this proposed action is estimated to be up to $13,129 per airplane.

For airplanes subject to EMBRAER Service Bulletin 145–27–0086, Change 01, it would take approximately 120 work hours to accomplish the proposed modification in that service bulletin, at an average labor rate is $65 per work hour. Required parts would cost up to $22,708 per airplane. Based on these figures, the cost impact of this proposed action is estimated to be $30,508 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Empresa Brasileira de Aeronautica S.A. (Embraer): Docket 2002–NM–89–AD.

Applicability: Model EMB–135 and EMB–145 series airplanes, certificated in any category; serial numbers 145001 through 145189 inclusive, 145191 through 145362 inclusive, 145364 through 145373 inclusive, 145375, 145377 through 145411 inclusive, 145413 through 145424 inclusive, 145426 through 145430 inclusive, 145434 through 145436 inclusive, 145440 through 145445 inclusive, 145448, 145450, and 145801; equipped with a mechanical gust lock system.

Compliance: Required as indicated, unless accomplished previously.

To prevent discrepancies in the elevator control system, which could result in reduced control of the elevator and consequent reduced controllability of the airplane, accomplish the following:

Repetitive Inspections

(a) Within 800 flight hours after the effective date of this AD, do a detailed inspection of the elevator control system for any crack, rupture, or bend in any component, per the Accomplishment Instructions of EMBRAER Service Bulletin 145–27–0087, Change 03, dated September 27, 2002. Where this service bulletin specifies to return discrepant parts and report inspection results to the manufacturer, this AD does not require these actions. Repeat the inspection thereafter at intervals not to exceed 2,500 flight hours or 15 months, whichever is first.

Note 1: For the purposes of this AD, a detailed inspection is defined as: "An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required."

Replacement of Discrepant Parts

(b) If any discrepant part is found during any inspection required by paragraph (a) of this AD, before further flight, replace the discrepant part with a new part having the same part number, per the Accomplishment Instructions of EMBRAER Service Bulletin 145–27–0087, Change 03, dated September 27, 2002.

Modification

(c) Within 10,000 flight hours or 60 months after the effective date of this AD, whichever is first, modify the elevator gust lock by accomplishing paragraph (c)(1) or (c)(2) of this AD, as applicable. This modification terminates the repetitive inspections required by paragraph (a) of this AD.

(1) For airplanes listed in EMBRAER Service Bulletin 145–27–0075, Change 06, dated July 16, 2002: Do paragraph (c)(1)(i) or (c)(1)(ii) of this AD, as applicable.

(i) Replace the mechanical gust lock system with an electromechanical gust lock system, and replace the control stand with a reworked control stand, by doing all the actions (including a detailed inspection to ensure that certain parts have been removed previously per EMBRAER Service Bulletin 145–27–0076) in and per section 3.A. (Part I) or 3.B. (Part II) of the Accomplishment Instructions of the service bulletin, as applicable. If the inspection reveals that certain subject parts have not been removed previously, before further flight, remove the subject parts per the service bulletin. Where Parts I and II of the Accomplishment Instructions of the service bulletin specify to remove and "send the control stand to be reworked in a workshop," replace the control

stand with a control stand reworked as specified in the service bulletin.

(ii) Replace the return spring and spring terminal of the gust lock control lever with improved parts by doing all the actions in and per section 3.C. (Part III) of the Accomplishment Instructions of the service bulletin.

(2) For airplanes listed in EMBRAER Service Bulletin 145–27–0086, Change 01, dated July 3, 2002: Do paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii) of this AD.

(i) Rework the tail carbon box and the horizontal stabilizer by doing all the actions (including the inspection for delamination) in and per section 3.A. (Part I) of the Accomplishment Instructions of the service bulletin. If any delamination is found that is outside the limits specified in the service bulletin, before further flight, repair per a method approved by either the FAA or the Departmento de Aviacao Civil (or its delegated agent).

(ii) Install wiring and electrical components by doing all the actions in and per section 3.B. (Part II) of the Accomplishment Instructions of the service bulletin.

(iii) Install and activate the electromechanical gust lock system by doing all actions in section 3.D. (Part IV) of the Accomplishment Instructions of the service bulletin. Where Part IV of the Accomplishment Instructions of the service bulletin specifies to remove and "send the control stand to be reworked in a workshop," replace the control stand with a control stand reworked as specified in Part III of the service bulletin.

Note 2: Part III of the Accomplishment Instructions of EMBRAER Service Bulletin 145–27–0086, Change 01, refers to EMBRAER Service Bulletin 145–22–0007 as an additional source of instructions for accomplishing the rework of the control stand.

Alternative Methods of Compliance

(d) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, is authorized to approve alternative methods of compliance for this AD.

Note 3: The subject of this AD is addressed in Brazilian airworthiness directive 2002–01–01R3, dated November 8, 2002.

Issued in Renton, Washington, on December 29, 2003.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–48 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–400–AD]

RIN 2120–AA64

Airworthiness Directives; Dornier Model 328–100 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Dornier Model 328–100 series airplanes. This proposal would require replacement of the existing main landing gear (MLG) leg assembly with a modified assembly. This action is necessary to prevent fatigue damage of the MLG leg, which could result in collapse of the MLG. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by February 4, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–400–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2001–NM–400–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from AvCraft Aerospace GmbH, P.O. Box 1103, D–82230 Wessling, Germany. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Tom Groves, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1503; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Submit comments using the following format:

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2001–NM–400–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–400–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Luftfahrt-Bundesamt (LBA), which is the airworthiness authority for Germany, notified the FAA that an unsafe condition may exist on certain Dornier Model 328–100 series airplanes. The LBA advises that shot-peening, a manufacturing process used to improve fatigue strength, was not done on the main body of certain main landing gear

(MLG) leg assemblies. This condition, if not corrected, could lead to fatigue damage of the MLG leg assembly, which could result in collapse of the MLG.

Explanation of Relevant Service Information

Dornier has issued Service Bulletin SB–328–32–344, Revision 1, dated June 11, 2001, which describes procedures for replacement of the existing MLG leg assembly with an MLG assembly having a shot-peened main body. That service bulletin refers to Messier-Dowty Service Bulletin 800–32–028, dated November 27, 2000, as the appropriate source of service information for shot-peening the main body of the MLG leg. The Dornier Service Bulletin also specifies that Messier-Dowty Service Bulletin 800–32–014, dated January 18, 1999, must be accomplished on the MLG leg assembly at the same time as the other Messier-Dowty service bulletin (unless accomplished previously). Messier-Dowty Service Bulletin 800–32–014 describes procedures for replacing existing bushings on the main body and trailing arm of the MLG with improved bushings and installing the new bushings using the heat-and-shrink method instead of bonding.

Accomplishment of the actions specified in Dornier Service Bulletin SB–328–32–344, Revision 1, is intended to adequately address the identified unsafe condition. The LBA classified Dornier Service Bulletin SB–328–32–344, Revision 1, as mandatory and issued German airworthiness directive 2002–001, dated January 10, 2002, to ensure the continued airworthiness of these airplanes in Germany.

FAA's Conclusions

This airplane model is manufactured in Germany and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the LBA has kept the FAA informed of the situation described above. We have examined the findings of the LBA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the service bulletin described previously.

Cost Impact

We estimate that 53 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 8 work hours per airplane to accomplish the proposed replacement, and that the average labor rate is $65 per work hour. Required parts would be provided by the manufacturer at no charge. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $27,560, or $520 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Fairchild Dornier GmbH (Formerly Dornier Luftfahrt GmbH): Docket 2001–NM–400AD.

Applicability: Model 328–100 series airplanes, certificated in any category, serial numbers (S/Ns) 3005 through 3119 inclusive, equipped with a main landing gear (MLG) leg assembly, main body, or main machined body having a part number (P/N) and S/N listed in Table 1 of this AD.

TABLE 1.—MLG LEG ASSEMBLY, MAIN BODY, AND MAIN MACHINED BODY P/NS AND S/NS

MLG part name	P/N	S/Ns
Leg assembly	22730–000–02	U16 through U22 inclusive.
Leg assembly	22731–000–02	U16 through U22 inclusive.
Main body	22415–000–01	U16 through U22 inclusive.
Main body	22416–000–01	U16 through U22 inclusive.
Main machined body	24284–000–00	U56, U62, U64, U66, U68, U70, U74.
Main machined body	22286–000–00	U51, U57, U59, U65, U67, U73, U85.

Compliance: Required as indicated, unless accomplished previously.

To prevent fatigue damage of the MLG leg, which could result in collapse of the MLG, accomplish the following:

Replacement of MLG Leg Assembly

(a) Prior to the accumulation of 16,000 total landings on the MLG body, or within 300 flight hours after the effective date of this AD, whichever occurs later, replace the existing MLG leg assembly with a modified leg assembly per Dornier Service Bulletin SB–328–32–344, Revision 1, dated June 11, 2001.

Note 1: Dornier Service Bulletin SB–328–32–344, Revision 1, refers to Messier-Dowty Service Bulletins 800–32–028, dated November 27, 2000; and 800–32–014, dated January 18, 1999; as appropriate sources of service information for modifying the MLG leg assembly.

Alternative Methods of Compliance

(b) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, is authorized to approve alternative methods of compliance for this AD.

Note 2: The subject of this AD is addressed in German airworthiness directive 2002–001, dated January 10, 2002.

Issued in Renton, Washington, on December 29, 2003.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–49 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–317–AD]

RIN 2120–AA64

Airworthiness Directives; BAE Systems (Operations) Limited Model Avro 146–RJ Series Airplanes; and BAE Systems (Operations) Limited Model BAe 146 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain BAE Systems (Operations) Limited Model Avro 146–RJ and Model BAe 146 series airplanes. This proposal would require a test to determine the torque setting for the collar cap screw of the differential box for the nose landing gear, and follow-on actions. This action is necessary to prevent uncommanded inputs to the nosewheel steering, which could result in reduced controllability of the airplane during takeoff and landing. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by February 4, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–317–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2001–NM–317–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from British Aerospace Regional Aircraft American Support, 13850 Mclearen Road, Herndon, Virginia 20171. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Todd Thompson, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1175; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Submit comments using the following format:

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2001–NM–317–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–317–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, notified the FAA that an unsafe condition may exist on certain BAE Systems (Operations) Limited Model Avro 146–RJ and Model BAe 146 series airplanes. The CAA advises that there have been twenty incidents of uncommanded inputs to the nosewheel steering. These incidents involved five different nose landing gears and six different airplanes. Investigation determined that, on all the gears involved in incidents, the torque setting for the collar cap screw of the differential box was significantly lower than the original design standard. This condition, if not corrected, could lead to uncommanded inputs to the nosewheel steering, which could result in reduced controllability of the airplane during takeoff and landing.

Explanation of Relevant Service Information

BAE Systems (Operations) Limited has issued Service Bulletin ISB.32–168, dated August 6, 2001, which describes procedures for a check to determine the torque setting for the collar cap screw of the differential box, and follow-on actions. The follow-on actions involve torquing the collar cap screw to a

specified limit and performing a functional test of the nosewheel. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition. The CAA classified this service bulletin as mandatory and issued British Airworthiness Directive 004–08–2001, to ensure the continued airworthiness of these airplanes in the United Kingdom.

BAE Systems (Operations) Limited Service Bulletin ISB.32–168 references Messier-Dowty Service Bulletin 146–32–154, dated August 3, 2001, as an additional source of service information for accomplishment of the detailed inspection and follow-on actions.

FAA's Conclusions

These airplane models are manufactured in the United Kingdom and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the CAA has kept the FAA informed of the situation described above. The FAA has examined the findings of the CAA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the service bulletin described previously, except as discussed below.

Difference Between the Proposed AD and the Messier-Dowty Service Bulletin

Although the Messier-Dowty service bulletin specifies to report inspection results to the manufacturer, this proposed AD does not require that action.

Difference Between the Proposed AD and the BAE Service Bulletin

Although the BAE service bulletin specifies that operators may contact the manufacturer for disposition if the steering mechanism will not return to the neutral position following a functional test, this proposed AD would require operators to repair this condition per a method approved by either the FAA or the CAA (or its delegated agent). In light of the type of repair that would be required to address the unsafe condition, and consistent with existing bilateral airworthiness agreements, we have determined that, for this proposed AD, a repair approved by either the FAA or the CAA would be acceptable for compliance with this proposed AD.

Cost Impact

The FAA estimates that 55 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 2 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $7,150, or $130 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Bae Systems (Operations) Limited (Formerly British Aerospace Regional Aircraft): Docket 2001–NM–317–AD.

Applicability: Model Avro 146–RJ series airplanes; and Model BAe 146 series airplanes; equipped with a nose landing gear having a part number listed under paragraph 1.A.(1) of BAE Systems (Operations) Limited Service Bulletin ISB.32–168, dated August 6, 2001; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent uncommanded inputs to the nosewheel steering, which could result in reduced controllability of the airplane during takeoff and landing, accomplish the following:

Note 1: BAE Systems (Operations) Limited Service Bulletin ISB.32–168, dated August 6, 2001, references Messier-Dowty Service Bulletin 146–32–154, dated August 3, 2001, as an additional source of service information for accomplishment of the detailed inspection and follow-on actions. Although the Messier-Dowty service bulletin specifies to submit certain information to the manufacturer, this AD does not include such a requirement.

Torque Test and Follow-on Actions

(a) Within 6 months after the effective date of this AD: Perform a torque test of the collar cap screw of the differential box for the nose landing gear, and do all applicable follow-on actions before further flight in accordance with the Accomplishment Instructions of BAE Systems (Operations) Limited Service Bulletin ISB.32–168, dated August 6, 2001.

(b) If the steering mechanism will not return to the neutral position following the functional test in paragraph 2.C. of the Accomplishment Instructions of BAE Systems (Operations) Limited Service Bulletin ISB.32–168, dated August 6, 2001, before further flight: Repair per a method approved by either the Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate; or the CAA (or its delegated agent).

Parts Installation

(c) As of the effective date of this AD, no person may install on any airplane a nose landing gear assembly unless the torque test and follow-on actions have been accomplished in accordance with the paragraph 2.B. of BAE Systems (Operations) Limited Service Bulletin ISB.32–168, dated August 6, 2001.

Alternative Methods of Compliance

(d) In accordance with 14 CFR 39.19, the Manager, International Branch, FAA, Transport Airplane Directorate, is authorized to approve alternative methods of compliance for this AD.

Note 2: The subject of this AD is addressed in British airworthiness directive 004–08–2001.

Issued in Renton, Washington, on December 29, 2003.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–50 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–339–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Model A319 and A320 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the supersedure of an existing airworthiness directive (AD), applicable to certain Airbus Model A319 and A320 series airplanes, that currently requires repetitive inspections to detect cracking and delamination of the containers in which the off-wing emergency evacuation slides are stored, and corrective actions if necessary. That AD also requires eventual modifications of the slides, which terminates the requirement for repetitive inspections. This action would remove the currently required repetitive inspections, and would require an additional modification of the off-wing emergency evacuation slides. The actions specified by the proposed AD are intended to prevent the loss of the emergency evacuation slides during flight, which could result in damage to the fuselage, and to prevent incorrect inflation of the emergency evacuation slides, which could result in the emergency exits being unusable during an emergency evacuation. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by February 4, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–339–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov.* Comments sent via fax or the Internet must contain "Docket No. 2001–NM–339–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Tom Groves, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–1503; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Submit comments using the following format:

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2001–NM–339–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–339–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

On December 17, 1999, the FAA issued AD 99–26–22, amendment 39–11481 (64 FR 72533, December 28, 1999), applicable to certain Airbus Model A319 and A320 series airplanes. That AD requires repetitive inspections to detect cracking and delamination of the containers in which the off-wing emergency evacuation slides are stored, and corrective actions if necessary. That AD also requires eventual modifications of the slides, which terminates the requirement for repetitive inspections. That action was prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The requirements of that AD are intended to prevent the loss of the escape slides during flight, which could make the emergency exits located over each wing unusable and result in damage to the fuselage.

Actions Since Issuance of Previous Rule

Since the issuance of AD 99–26–22, further evaluation of the inspections required by that AD has revealed that the inspections are not sufficient to ensure the continued safety of the affected airplane fleet. In fact, maintenance actions, such as those associated with the required

inspections, may increase the likelihood of loss of the emergency evacuation slides during flight, rather than preventing such loss. Thus, it has been determined that continued operating safety can best be ensured by modification of the off-wing emergency evacuation slides. AD 99–26–22 already requires such a modification of the off-wing emergency evacuation slides in accordance with Airbus Service Bulletin A320–25–1156, Revision 01, dated February 2, 1999. The parallel French airworthiness directive provided for that action as optional.

Also since the issuance of AD 99–26–22, the DGAC has notified us that an additional unsafe condition may exist on certain Model A319 and A320 series airplanes. The DGAC advises that there have been several incidents of incorrect deployment of the overwing emergency evacuation slides. These incidents have been attributed to migration of the aspirator within the slide pack. This condition, if not corrected, could lead to incorrect inflation of the overwing emergency evacuation slide, which could result in the emergency exits being unusable during an emergency evacuation.

Explanation of Relevant Service Information

Airbus has issued Service Bulletin A320–25–1156, Revision 02, dated October 26, 1999. The modification of the off-wing emergency evacuation slides described in Revision 02 is essentially the same as that described in Revision 01 of the service bulletin, which AD 99–26–22 refers to as an appropriate source of service information for the modification required by that AD. (The procedures for the modification include performing an inspection for delamination of the containers and container doors of the off-wing emergency evacuation slides, and repair of any delamination that is found.) Airbus Service Bulletin A320–25–1156, Revision 02, refers to Air Cruisers Service Bulletins 004–25–37, Revision 02, dated May 29, 1996; and 004–25–42, dated September 16, 1996; as additional sources of service information for accomplishment of the modification of the off-wing emergency evacuation slides.

Airbus also has issued Service Bulletin A320–25–1265, dated June 6, 2001, which describes procedures for another modification of the emergency evacuation slides. This modification involves installing:

- A standoff and a new lacing cover to prevent the aspirator of the off-wing emergency evacuation slide from migrating.
- A valve protector to prevent the aspirator of the off-wing emergency evacuation slide from hanging up.
- An in-line check valve to prevent pressurized cabin air from leaking into the packed inflatable slide assembly via the remote inflation system mounted in the cargo hold of the airplane.

Airbus Service Bulletin A320–25–1265 refers to Air Cruisers Service Bulletin 004–25–48, Revision 3, dated August 3, 2001, as an additional source of service information for modification and re-identification of the evacuation slides.

The DGAC classified Airbus Service Bulletins A320–25–1156, Revision 02, and A320–25–1265 as mandatory and issued French airworthiness directive 2001–380(B), dated September 5, 2001, to ensure the continued airworthiness of these airplanes in France.

FAA's Conclusions

These airplane models are manufactured in France and are type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would supersede AD 99–26–22 to continue to require a modification of the off-wing emergency evacuation slides. This proposed AD would remove the currently required repetitive inspections, and require an additional modification of the off-wing emergency evacuation slides. The actions would be required to be accomplished in accordance with Airbus Service Bulletins A320–25–1156, Revision 02, and A320–25–1265.

Cost Impact

The modification per Airbus Service Bulletin A320–25–1156, Revision 02, is currently required by AD 99–26–22, which is applicable to approximately 121 airplanes of U.S. registry. This modification takes approximately 3 work hours per airplane to accomplish (not including time for gaining access and closing up), at an average labor rate of $65 per work hour. The cost of required parts is now approximately $679 per airplane. Based on these figures, the cost impact of this current requirement is estimated to be $105,754, or $874 per airplane.

The new requirements of this proposed AD would affect approximately 435 airplanes of U.S. registry.

The new actions that are proposed in this AD action would take approximately 3 work hours per airplane to accomplish, at an average labor rate of $65 per work hour. Required parts would cost approximately $80 per airplane. Based on these figures, the cost impact of this new proposed requirement is estimated to be $119,625, or $275 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the current or proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–11481 (64 FR 72533, December 28, 1999), and by adding a new airworthiness directive (AD), to read as follows:

Airbus: Docket 2001–NM–339–AD. Supersedes AD 99–26–22, Amendment 39–11481.

Applicability: Model A319 and A320 series airplanes, certificated in any category; except airplanes that have Airbus Modifications 24850 and 25844 and 27275 installed in production; or that have Airbus Service Bulletin A320–25–1156, Revision 01, dated February 2, 1999; or Revision 02, dated October 26, 1999; and Airbus Service Bulletin A320–25–1265, dated June 6, 2001; accomplished.

Compliance: Required as indicated, unless accomplished previously.

To prevent the loss of the emergency evacuation slides during flight, which could result in damage to the fuselage, and to prevent incorrect inflation of the emergency evacuation slides, which could result in the emergency exits being unusable during an emergency evacuation, accomplish the following:

Restatement of Requirements of AD 99–26–22

Terminating Modification

(a) For airplanes on which Airbus Modifications 24850 and 25844; or Airbus Service Bulletin A320–25–1156, Revision 01, dated February 2, 1999, or Revision 02, dated October 26, 1999; have not been accomplished: Within 5 years after February 1, 2000, modify the off-wing emergency evacuation slides (*i.e.*, modifications, inspection, repair, and repacking) in accordance with Airbus Service Bulletin A320–25–1156, Revision 01, dated February 2, 1999; or Revision 02, dated October 26, 1999. After the effective date of this AD, only Revision 02 may be used.

Note 1: Airbus Service Bulletin A320–25–1156, Revision 01, dated February 2, 1999; and Revision 02, dated October 26, 1999; refer to Air Cruisers Service Bulletins 004–25–37, Revision 2, dated May 29, 1996, and 004–25–42, dated September 16, 1996, as additional sources of service information for accomplishment of the modification of the off-wing escape slides.

New Requirements of This AD

(b) For airplanes listed in Airbus Service Bulletin A320–25–1265, dated June 6, 2001: Within 3 years after the effective date of this AD, modify the left and right off-wing emergency evacuation slides in accordance with the Accomplishment Instructions of that service bulletin.

Note 2: Airbus Service Bulletin A320–25–1265, dated June 6, 2001, refers to Air Cruisers Service Bulletins 004–25–48, Revision 3, dated August 3, 2001, as an additional source of service information for accomplishment of the modification of the off-wing emergency evacuation slides.

Spares

(c) As of the effective date of this AD, no person may install, on any airplane, an off-wing emergency evacuation slide having part number D31865–101, –102, –103, –104, –105, –106, –107, or –108.

Alternative Methods of Compliance

(d) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, FAA, is authorized to approve alternative methods of compliance for this AD.

Note 3: The subject of this AD is addressed in French airworthiness directive 2001–380(B), dated September 5, 2001.

Issued in Renton, Washington, on December 29, 2003.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–51 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2003–NM–115–AD]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB 2000 Series Airplanes

AGENCY: Federal Aviation Administration, DOT

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Saab Model SAAB 2000 series airplanes. This proposal would require measuring the torque of the adjustable pin in the rear attachment of the intermediate strut for both engines, and retorquing the adjustable pins to the correct torque value. This action is necessary to prevent long-term damage to the engine mounting structure (EMS), and loss of redundancy on the EMS, which could result in possible separation of an engine from the airplane, reduced controllability of the airplane, and injury to persons or property on the ground. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by February 4, 2004.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–115–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov*. Comments sent via fax or the Internet must contain "Docket No. 2003–NM–115–AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 or 2000 or ASCII text.

The service information referenced in the proposed rule may be obtained from Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Rosanne Ryburn, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4057; telephone (425) 227–2139; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Submit comments using the following format:

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2003–NM–115–AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2003–NM–115–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Luftfartsverket (LFV), which is the airworthiness authority for Sweden, notified the FAA that an unsafe condition may exist on certain Saab Model SAAB 2000 series airplanes. The LFV advises that, during two inspections, torque values that were too low were found for the adjustable pin in the rear attachment of the intermediate structure of the engine mounting structure (EMS). Further investigation revealed that the manufacturer's airplane maintenance manual and a relevant service bulletin both specify torque values that are too low. This condition, if not corrected, could result in long-term damage to the EMS, and loss of redundancy on the EMS, which could also result in possible separation of an engine from the airplane, reduced controllability of the airplane, and injury to persons or property on the ground

Explanation of Relevant Service Information

Saab has issued Saab Service Bulletin SAAB 2000–71–014, dated January 23, 2003, which describes procedures for measuring the torque of the adjustable pin in the rear attachment of the intermediate strut for both engines, and retorquing the adjustable pin to the correct torque value. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition. The LFV classified this service bulletin as mandatory and issued Swedish airworthiness directive 1–183, dated January 23, 2003, to ensure the continued airworthiness of these airplanes in Sweden.

FAA's Conclusions

This airplane model is manufactured in Sweden and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the LFV has kept the FAA informed of the situation described above. The FAA has examined the findings of the LFV, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the service bulletin described previously, except as discussed below.

Difference Between the Proposed AD and the Service Bulletin

Although the Accomplishment Instructions of the service bulletin specify to report inspection results, this proposed AD does not require that action.

Cost Impact

The FAA estimates that 3 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 2 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $65 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $390, or $130 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

Regulatory Impact

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

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Saab Aircraft AB: Docket 2003–NM–115–AD.

Applicability: Model SAAB 2000 series airplanes, serial numbers –004 through –063 inclusive; certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent long-term damage to the engine mounting structure (EMS), and loss of redundancy on the EMS, which could result in possible separation of an engine from the airplane, reduced controllability of the airplane, and injury to persons or property on the ground, accomplish the following:

Service Bulletin References

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

(1) The term "service bulletin," as used in this AD, means the Accomplishment Instructions of Saab Service Bulletin SAAB 2000–71–014, dated January 23, 2003.

(2) Although the service bulletin specifies to submit certain information to the manufacturer, this AD does not include such a requirement.

Torque Check

(b) Within 3 months after the effective date of this AD: Measure the torque of the adjustable pin in the rear attachment of the intermediate strut for both engines, in accordance with the inspection requirements and torque values in the service bulletin.

Retorque

(c) Retorque the adjustable pin in the intermediate strut rear attachment of the EMS to the correct torque value, in accordance with the service bulletin.

Alternative Methods of Compliance

(d) In accordance with 14 CFR 39.19, the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, is authorized to approve alternative methods of compliance for this AD.

Note 1: The subject of this AD is addressed in Swedish airworthiness directive 1–183, dated January 23, 2003.

Issued in Renton, Washington, on December 23, 2003.

Ali Bahrami,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 04–31 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

36 CFR Parts 1254 and 1256

RIN 3095–AB11

Restrictions on the Use of Records

AGENCY: National Archives and Records Administration.

ACTION: Proposed rule.

SUMMARY: NARA proposes to revise its regulations on access to Federal records and donated historical materials containing restricted information. This proposal entirely rewrites and reorganizes this portion of NARA's regulations to incorporate several changes, and also to clarify it using plain language. The regulation has been updated to bring the language on access restrictions in better conformance with the Freedom of Information Act (FOIA). In addition, we propose to remove an existing policy that allows access to restricted information for purposes of biomedical statistical research. This proposed rule would affect the public and Federal agencies.

DATES: Comments must be received on or before March 5, 2004.

ADDRESSES: Send comments to Regulation Comments Desk (NPOL), Room 4100, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. You may fax comments to (301) 837–0319 or e-mail them to *comments@nara.gov*. You may also comment via *www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Jennifer Davis Heaps at (301) 837–1801.

SUPPLEMENTARY INFORMATION: This proposed rule contains discussion of important changes in our regulations dealing with access to archival materials. We have made additional changes in presenting the information. We also have written the proposed regulation in plain language following the Presidental Memorandum of June 1, 1998, Plain Language in Government Writing.

What Substantive Changes Have Been Made in These Proposed Regulations?

We have broadened the scope of 36 CFR part 1256, currently titled Restrictions on the Use of Records, to cover access to archival holdings in general. Specifically, we:

- Renamed the part Access to Records and Donated Historical Materials to reflect the proposed scope of the whole part, which covers NARA's policies on access to our holdings, including information about restrictions on Federal records and donated historical materials.
- Updated and renumbered the current §§ 1256.10 through 1256.18 on NARA's general restrictions which parallel selected FOIA exemptions to include all exemptions, reflect Department of Justice guidance on exemption (b)(2), and show statutory changes to the wording of other exemptions.
- Removed references to the publication of restrictions in the *Guide to the National Archives of the United States* because the information on general restrictions in the Guide is no longer current.
- Removed the current subpart B on specific restrictions because all restrictions that agencies designate must be in compliance with the Freedom of Information Act.
- Created a new section, § 1256.44, on conditions for the release of restricted information in Federal records or materials withheld under any general restriction.
- Added information on how to request access to restricted information in donated historical materials.
- Moved subparts C and D from 36 CFR part 1254 into 36 CFR part 1256 because they relate to general information about access to records and donated historical materials. We will revise the remainder of Part 1254 later this year.
- Removed our procedures for granting permission to do biomedical statistical or quantitative research in privacy-restricted records.

Other than rewriting in plain language, we have not changed the process for access to United States Information Agency (USIA) audiovisual records accessioned into the National Archives of the United States.

How Is NARA Proposing To Change Access to Privacy-Restricted Federal Records for Statistical Biomedical Research?

NARA currently permits full access to privacy-restricted information in Federal records to persons engaged in statistical or quantitative biomedical research on an approval basis under tightly-controlled conditions specified in the current § 1256.4. No researchers have requested access to any records under these conditions since the regulation went into effect in 1988. We propose to remove this provision for access because we have determined that the procedures may not provide sufficient safeguards against the accidental or intentional release of privacy-restricted information.

Instead, as already provided for in law, NARA will provide access to the releasable portions of records and materials containing such information to entities and individuals in accordance with the provisions of the Freedom of Information Act (5 U.S.C. 552, as amended), Presidential Records Act (44 U.S.C. chapter 22), Presidential Recordings and Materials Preservation Act (44 U.S.C. 2111 *note*), Federal Records Act (44 U.S.C. 2108), applicable executive orders, and Deeds of Gift for donated historical materials.

NARA will continue to provide full access to these records to the agency of origin in accordance with the proposed § 1256.44(b).

This proposed change also removes the information collection required for

statistical biomedical researcher applicants under the current regulation.

Why Is NARA Moving Portions of 36 CFR 1254 Into Part 1256?

Part 1254, Availability of Records and Donated Historical Materials, currently includes these subparts: general information; research room rules; access to unclassified records and donated historical materials; access to national security information; information, reproduction, and authentication services; and microfilming archival records. We propose to move § 1254.8 on how NARA handles subpoenas, the subpart on access to unclassified records and donated historical materials, and the subpart on access to national security information to part 1256 to provide a more comprehensive explanation of how our holdings may be accessed. The proposed §§ 1256.8 and 1256.10 provide references to our regulations on access to Presidential records and Nixon Presidential historical materials, respectively. The following chart provides the proposed and current designations of the relevant subparts:

Proposed designation of subpart	Current designation
36 CFR part 1256, Subpart A, General Information	Expansion of 36 CFR § 1254.8 and §§ 1254.32 through 1254.36.
36 CFR Part 1256, Subpart B, Access to Federal Archival Records	Expansion of 36 CFR §§ 1254.30 and 1256.2.
36 CFR Part 1256, Subpart C, Access to Donated Historical Materials	Expansion of 36 CFR §§ 1254.36 and 1256.2.
36 CFR Part 1256, Subpart D, General Restrictions	36 CFR Part 1256, Subpart A, General Restrictions
36 CFR Part 1256, Subpart E, Access to Materials Containing National Security-Classified Information.	36 CFR Part 1254, Subpart D, Access to National Security Information.
36 CFR Part 1256, Subpart F, Domestic Distribution of United States Information Agency Audiovisual Materials in the National Archives of the United States.	36 CFR Part 1256, Subpart C, Domestic Distribution of United States Information Agency Materials in the National Archives of the United States.

This proposed rule is not a significant regulatory action for the purposes of Executive Order 12866 and has not been reviewed by the Office of Management and Budget (OMB). As required by the Regulatory Flexibility Act, it is hereby certified that this proposed rule will not have a significant impact on a substantial number of small entities because this rule applies to individual researchers. This proposed rule does not have any federalism implications.

List of Subjects

36 CFR Part 1254

Archives and records, Confidential business information, Freedom of information, Micrographics.

36 CFR Part 1256

Archives and records, Copyright.

For the reasons set forth in the preamble, NARA proposes to amend chapter XII of title 36 of the Code of Federal Regulations as follows:

PART 1254—AVAILABILITY OF RECORDS AND DONATED HISTORICAL MATERIALS

1. The authority for part 1254 is revised to read as follows:

Authority: 44 U.S.C. 2101–2118 and 5 U.S.C. 552, as amended.

§§ 1254.30 through 1254.36 and 1254.40 through 1254.50 [Removed]

2. Amend part by removing and reserving subparts C (§§ 1254.30 through 1254.36) and D (§§ 1254.40 through 1254.50).

3. Amend § 1254.1 by revising paragraph (e) to read as follows:

§ 1254.1 General provisions.

* * * * *

(e) Requests received in the normal course of reference service that do not specifically cite the Freedom of Information Act (5 U.S.C. 552, as amended) are not considered requests made under the act. Requests under the act must follow the procedures in part 1250.

* * * * *

§ 1254.8 [Removed]

4. Part 1254 is amended by removing § 1254.8.

5. Part 1256 is revised to read as follows:

PART 1256—ACCESS TO RECORDS AND DONATED HISTORICAL MATERIALS

Subpart A—General Information

Sec.
1256.1 What does this part cover?
1256.2 How do I obtain access to records stored in Federal Records Centers?
1256.4 How does NARA handle subpoenas and other legal demands for records in its custody?
1256.6 How do I obtain access to records of defunct agencies?
1256.8 How do I obtain access to Presidential records?
1256.10 How do I obtain access to Nixon Presidential materials?

Subpart B—Access to Federal Archival Records

1256.20 May I obtain access to Federal archival records?
1256.22 How do I request access to restricted information in Federal archival records?
1256.24 How long may access to some records be denied?
1256.26 When can I appeal decisions about access to Federal archival records?

Subpart C—Access to Donated Historical Materials

1256.30 How do I obtain access to donated historical materials?
1256.32 How do I request access to restricted information in donated historical materials?
1256.34 How long may access to some donated historical materials be denied?
1256.36 When can I appeal decisions about access to donated historical materials?

Subpart D—General Restrictions

1256.40 What are general restrictions?
1256.42 Who imposes general restrictions?
1256.44 Does NARA ever waive general restrictions?
1256.46 National security-classified information.
1256.48 Information about internal agency rules and practices.
1256.50 Information exempted from disclosure by statute.
1256.52 Trade secrets and commercial or financial information.
1256.54 Inter- and intra-agency memoranda.
1256.56 Information that would invade the privacy of a living individual.
1256.58 Information related to law enforcement investigations.
1256.60 Information relating to financial institutions.
1256.62 Geological and geophysical information relating to wells.

Subpart E—Access to Materials Containing National Security-Classified Information

1256.70 What controls access to national security-classified information?
1256.72 What are FOIA requests and mandatory review requests?
1256.74 How does NARA process Freedom of Information Act (FOIA) requests for classified information?
1256.76 How do I request mandatory review of classified information under Executive Order 12958, as amended?
1256.78 How does NARA handle my mandatory review request?

1256.80 How does NARA provide classified access to historical researchers and former Presidential appointees?

Subpart F—Domestic Distribution of United States Information Agency Audiovisual Materials in the National Archives of the United States

1256.90 What does this subpart cover?
1256.92 What is the purpose of this subpart?
1256.94 Definition.
1256.96 What provisions apply to the transfer of USIA audiovisual records to the National Archives of the United States?
1256.98 Can I get access to and obtain copies of USIA audiovisual records transferred to the National Archives of the United States?
1256.100 What is the copying policy for USIA audiovisual records that either have copyright protection or contain copyrighted material?
1256.102 What fees does NARA charge?

Authority: 44 U.S.C. 2101–2118; 22 U.S.C. 1461(b); 5 U.S.C. 552, as amended; E.O. 12958 (3 CFR, 1995 Comp., p. 333), as amended; E.O. 13292 (68 FR 15315); E.O. 13233 (66 FR 56023, November 5, 2001, 3 CFR, 2001 Comp., p. 815).

Subpart A—General Information

§ 1256.1 What does this part cover?

This part describes NARA's policies on access to archival records of the Executive Branch and donated historical materials in the National Archives of the United States and to records in the physical custody of the Federal records centers. This part applies to records and materials covered by the Federal Records Act (44 U.S.C. 2108 and chs. 29, 31, 33) and donated historical materials. This part does not apply to Presidential, judicial, and legislative records except for the purpose of directing mandatory review requests in subpart E.

§ 1256.2 How do I obtain access to records stored in Federal Records Centers?

Agencies that retire their records to a Federal records center (FRC) set rules for access to those records. Address requests for access to records stored in Federal records centers directly to the appropriate agency or to the appropriate FRC director at the address shown in part 1253. When the agency's rules permit, NARA makes FRC records available to requesters. When the agency's rules and restrictions do not permit access, the FRC director refers the requests and any appeals for access, including those made under the Freedom of Information Act (5 U.S.C. 552, as amended), to the responsible agency.

§ 1256.4 How does NARA handle subpoenas and other legal demands for records in its custody?

(a) For records stored in a Federal records center, NARA honors a *subpoena duces tecum* (subpoena) or other legal demand for the production of agency records, to the extent required by law, if the agency that retired the records has not imposed any restrictions. If the agency has imposed restrictions, NARA notifies the authority issuing the subpoena or other legal demand that NARA abides by the agency-imposed restrictions and refers the authority to the agency for further action.

(b) The Archivist of the United States, the General Counsel (NGC) or his or her designee, and the Director of the FRC where the records are stored are the only NARA officials authorized to accept a subpoena or other legal demand for records transferred to an FRC.

(c) The Archivist of the United States, the General Counsel (NGC) or his or her designee, the appropriate Assistant Archivist, Regional Administrator, or Director of a Presidential library are the only NARA officials who may be served a *subpoena duces tecum* or other legal demand for the production of documents designated as Federal archival records or donated historical materials administered by NARA.

§ 1256.6 How do I obtain access to records of defunct agencies?

NARA handles access to archives and FRC records received from agencies that have ceased to exist without a successor in function as described in §§ 1256.20 and 1256.78.

§ 1256.8 How do I obtain access to Presidential records?

See 36 CFR part 1270, Presidential Records, for the rules for access to Presidential records transferred to NARA.

§ 1256.10 How do I obtain access to Nixon Presidential materials?

See 36 CFR part 1275, Preservation and Protection of and Access to the Presidential Historical Materials of the Nixon Administration, for the rules for access to Nixon Presidential materials.

Subpart B—Access to Federal Archival Records

§ 1256.20 May I obtain access to Federal archival records?

(a) Most Federal archival records are open for research without submitting a Freedom of Information Act (FOIA) request. Part 1254 specifies procedures for using unrestricted records in a NARA research room, submitting reference requests, and ordering copies of records.

(b) Some records are subject to restrictions prescribed by statute, Executive Order, or by restrictions specified in writing in accordance with 44 U.S.C. 2108 by the agency that transferred the records to the National Archives of the United States. All agency-specified restrictions must comply with the FOIA. Even if the records are not national-security classified, we must screen some records for other information exempt from release under the FOIA.

§ 1256.22 How do I request access to restricted information in Federal archival records?

(a) You may file a FOIA request. To request access under the provisions of the FOIA, *see* part 1250 of this chapter, Public Availability and Use of Federal Records.

(b) For classified information in Federal records, you may file a FOIA request or a mandatory review request under Executive Order 12958, as amended, as described in § 1256.74.

§ 1256.24 How long may access to some records be denied?

(a) Although many records are open for research, some records are closed for long periods, either under our general restrictions, described in subpart D of this part, or another governing authority. For example, in accordance with 44 U.S.C. 2108(b), we do not grant access to restricted census and survey records of the Bureau of the Census less than 72 years old containing data identifying individuals enumerated in population censuses.

(b) Screening records takes time. We screen records as soon as possible and can often make most of the records in which you are interested available. In the case of electronic structured databases, NARA can make a copy of records with restricted information masked. In response to FOIA requests for records in other media, we make a copy of the record available if we can mask or "redact" restricted information.

§ 1256.26 When can I appeal decisions about access to Federal archival records?

(a) For information on filing appeals for requests made under the FOIA, *see* 36 CFR part 1250, subpart D, Appeals.

(b) For information on filing appeals for requests made under mandatory review, *see* § 1260.54 of this chapter.

Subpart C—Access to Donated Historical Materials

§ 1256.30 How do I obtain access to donated historical materials?

NARA encourages researchers to confer about donated historical materials with the appropriate director or reference staff member at the facilities listed in part 1253 of this chapter. Some donated historical materials have restrictions on their use and availability as stated in writing by the donors in the Donor's Deed of Gift. Some may have other restrictions imposed by statute or Executive Order. If warranted, the Archivist may apply general restrictions to donated materials even when not specified in the donor's deed of gift. NARA staff can assist you with questions about restrictions or copyright protection that may apply to donated materials. *See* § 1256.36 for information on appealing closure of donated materials and subpart D of this part for information about general restrictions.

§ 1256.32 How do I request access to restricted information in donated historical materials?

(a) At Presidential libraries and regional archives, you may write to the appropriate director at the facilities in part 1253 of this chapter. In the Washington, DC, area, you may write to the Director of Access Programs (NWC) for donated textual materials or the Director of Modern Records Programs (NWM) for donated electronic records. The mailing address for NWC and NWM is Office of Records Services—Washington, DC, 8601 Adelphi Road, College Park, MD 20740–6001.

(b) You may request a review of documents restricted under terms of a donor's deed of gift or other legal instrument to determine whether the conditions originally requiring the closure still exist. Your request must describe each document requested so that the staff can locate it with a reasonable amount of effort. For files that NARA previously screened, you may cite the reference to the withheld document as it appears on the withdrawal sheet.

(c) In many instances, the director or his or her designated representative will determine whether entire documents or portions of them can be opened. However, a donor or his or her representative reserves the right to determine whether the donor's materials, a series, or a document or portions of it should remain closed (*see* § 1256.36).

(d) For classified information in donated historical materials, you may file a mandatory review request under Executive Order 12958, as amended, as described in § 1256.74.

§ 1256.34 How long may access to some donated historical materials be denied?

Some donated historical materials are closed for long periods, either under the provisions of the deed of gift, our general restrictions described in subpart D of this part, or another governing authority. We are sometimes able to make a copy of materials with restricted information redacted.

§ 1256.36 When can I appeal decisions about access to donated historical materials?

(a) If you wish to appeal a denial of access from the director or his designated representative in implementing the provisions of a donor's deed of gift, you may write a letter addressed to the Deputy Archivist of the United States, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. The Deputy Archivist, the Assistant Archivist for Presidential Libraries, and the Assistant Archivist for Records Services—Washington, DC, or their designated representatives, compose the Board of Review for appeals relating to donated historical materials.

(b) The board's decision is final. If the board cannot make a determination on your request within 30 working days of receipt, NARA informs you of the reason for the delay. If the board determines that a document should remain closed, you may not file a new appeal for two years. Similarly, you may not file an appeal on documents in collections that have been open for research for less than 2 years.

(c) In some cases, the donor or his representative may reserve the right to determine whether the donor's materials, a series, or a document or portions of it should remain closed; you cannot appeal such decisions.

(d) For information on filing appeals for requests made under mandatory review of White House originated information, *see* § 1260.62 of this chapter.

Subpart D—General Restrictions

§ 1256.40 What are general restrictions?

General restrictions apply to certain kinds of information or classes of records, regardless of the record group to which the records have been allocated. These general restrictions may apply to records and materials not covered by the Freedom of Information Act. The general restrictions are listed and explained in §§ 1256.46 through 1256.62.

§ 1256.42 Who imposes general restrictions?

The Archivist of the United States imposes all general restrictions in accordance with 5 U.S.C. 552, as amended, and 44 U.S.C. 2107(4), 2108, and 2111.

§ 1256.44 Does NARA ever waive general restrictions?

NARA may provide access to records withheld under a general restriction only:

(a) To NARA employees for work purposes;

(b) To the creating agency or its authorized agent in the conduct of agency business;

(c) To the donor, in the case of donated historical materials; or

(d) To the subject of the records in some cases.

§ 1256.46 National security-classified information.

In accordance with 5 U.S.C. 552(b)(1), NARA cannot disclose records containing information regarding national defense or foreign policy that is properly classified under the provisions of the pertinent Executive Order on Classified National Security Information and its implementing directive (Executive Order 12958, as amended).

§ 1256.48 Information about internal agency rules and practices.

(a) NARA may withhold from disclosure, in accordance with 5 U.S.C. 552(b)(2), the following:

(1) Records that contain information on substantial internal matters of agencies that, if disclosed, could risk circumvention of a legal requirement, such as a statute or an agency regulation.

(2) Records containing information that states or assesses an agency's vulnerability to outside interference or harm. NARA withholds records that identify agency programs, systems, or facilities deemed most sensitive. NARA also withholds records describing specific measures that can be used to counteract such agency vulnerabilities.

(b) The Archivist of the United States may determine that this general restriction does not apply to specific records because enough time has passed that agency statutes or regulations would not be compromised and programs, systems, and facilities would not be harmed.

§ 1256.50 Information exempted from disclosure by statute.

In accordance with 5 U.S.C. 552(b)(3), NARA withholds records containing

information that is specifically exempted from disclosure by statute when that statute:

(a) Requires withholding information from the public, leaving no discretion; or

(b) Establishes particular criteria for withholding or refers to particular types of matters to be withheld.

§ 1256.52 Trade secrets and commercial or financial information.

In accordance with 5 U.S.C. 552(b)(4), NARA may withhold records that contain trade secrets and commercial or financial information, obtained from a person, that is privileged or confidential and submitted to the government. Such records may be disclosed only if:

(a) The person who provided the information agrees to its release; or

(b) In the judgment of the Archivist of the United States, enough time has passed that release of the information would not result in substantial competitive harm to the submitter of the information.

§ 1254.54 Inter- and intra-agency memoranda.

(a) In accordance with 5 U.S.C. 552(b)(5), NARA may withhold information found in inter-agency or intra-agency memoranda if that information:

(1) Relates to advice, recommendations, and opinions that are a part of the deliberative, consultative, decision-making process of government, or

(2) Would reveal the theory of an attorney's case or litigation strategy.

(b) The Archivist of the United States may determine that this general restriction does not apply to specific records because enough time has passed that release of the information would not result in harm to the decision-making process of government or an attorney's litigation strategy.

§ 1256.56 Information that would invade the privacy of a living individual.

(a) In accordance with 5 U.S.C. 552(b)(6), NARA will withhold records in personnel and medical and similar files containing information about a living individual that reveals details of a highly personal nature that, if released, would cause a clearly unwarranted invasion of personal privacy. Similar information in other kinds of files also may be withheld. Privacy information may include, but is not limited to, information about the physical or mental health or the medical or psychiatric care or treatment of the individual, and that:

(1) Contains personal information not known to have been previously made public, and

(2) Relates to events less than 75 years old.

(b) The Archivist of the United States may determine that this general restriction does not apply to specific records because enough time has passed that the privacy of living individuals is not compromised.

§ 1256.58 Information related to law enforcement investigations.

(a) In accordance with 5 U.S.C. 552(b)(7), NARA will withhold records compiled for law enforcement purposes. Unless otherwise determined by the Archivist in accordance with paragraph (b) of this section, records compiled for law enforcement purposes may be disclosed only if all of the following conditions are met:

(1) The release of the information does not interfere with law enforcement proceedings;

(2) The release of the information would not deprive a person of a right to a fair trial or an impartial adjudication;

(3) The release of the information would not constitute an unwarranted invasion of personal privacy;

(4) Confidential sources and/or information provided by a confidential source are not revealed;

(5) Confidential investigation techniques are not described; and

(6) Release of the information would not endanger the life or physical safety of any person.

(b) The Archivist of the United States may determine that this general restriction does not apply to specific records because enough time has passed that:

(1) The safety of persons is not endangered, and

(2) The public interest in disclosure outweighs the continued need for confidentiality.

§ 1256.60 Information relating to financial institutions.

(a) In accordance with 5 U.S.C. 552(b)(8), NARA may withhold information in records contained in or relating to the examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

(b) The Archivist of the United States may determine that this general restriction does not apply to specific records because enough time has passed that current financial information is not compromised.

§ 1256.62 Geological and geophysical information relating to wells.

(a) In accordance with 5 U.S.C. 552(b)(9), NARA may withhold information in records that relates to geological and geophysical information and data, including maps, concerning wells.

(b) The Archivist of the United States may determine that this general restriction does not apply to specific records because enough time has passed that current proprietary rights are not compromised.

Subpart E—Access to Materials Containing National Security-Classified Information

§ 1256.70 What controls access to national security-classified information?

(a) The declassification of and public access to national security-classified information, hereinafter referred to as "classified information" is governed by Executive Order 12958 of April 17, 1995 (3 CFR, 1995 Comp., p. 333) and as amended by Executive Order 13292 of March 25, 2003 (68 FR 15315), 32 CFR part 2001, and the Freedom of Information Act (5 U.S.C. 552, as amended).

(b) Public access to documents declassified in accordance with this regulation may be restricted or denied for other reasons under the provisions of 5 U.S.C. 552(b) for accessioned agency records; §§ 1256.30 through 1256.36 of this part for donated historical materials; 44 U.S.C. 2111, 44 U.S.C. 2201 *et seq.*, and 36 CFR part 1270 for Presidential records; and 44 U.S.C. 2111 *note* and 36 CFR part 1275 for Nixon Presidential materials.

§ 1256.72 What are FOIA requests and mandatory review requests?

(a) You may file a FOIA request for Executive Branch records, regardless of whether they contain classified information. The FOIA also applies to Presidential records as cited in § 1256.74(b). The FOIA does not apply to records of the Judicial and Legislative Branches or to donated historical materials.

(b) You may only file a mandatory review request if the records contain classified information. NARA handles mandatory review requests for records we hold for the Executive, Judicial, and Legislative Branches as well as donated historical materials under E.O. 12958, as amended, section 3.5.

§ 1256.74 How does NARA process Freedom of Information Act (FOIA) requests for classified information?

(a) NARA processes FOIA requests for access to classified information in

Federal records in accordance with the provisions of 36 CFR part 1250. Time limits for responses to FOIA requests for classified information are those provided in the FOIA, rather than the longer time limits provided for responses to mandatory review requests specified by Executive Order 12958, Classified National Security Information (3 CFR, 1995 Comp., p. 333), as amended by Executive Order 13292 (68 FR 15315, March 28, 2003).

(b) NARA processes requests for access to classified information in Presidential records under the FOIA and the Presidential Records Act (PRA) in accordance with the provisions of part 1270 of this chapter. Time limits for responses to FOIA requests for classified information are those provided in the FOIA, the PRA, and Executive Order 13233, Further Implementation of the Presidential Records Act (3 CFR, 2001 Comp., p. 815).

§ 1256.76 How do I request mandatory review of classified information under Executive Order 12958, as amended?

(a) You may request mandatory review of classified information that is in the legal custody of NARA, as well as in legislative and judicial records NARA holds. Your mandatory review request must describe the document or material containing the information with sufficient specificity to enable NARA to locate it with a reasonable amount of effort. When possible, a request must include the name of the originator and recipient of the information, as well as its date, subject, and file designation. Information we reviewed within the previous 2 years is not subject to mandatory review. We notify you if this provision applies to your request.

(b) You must address your mandatory review request to the appropriate staff in the following table.

If the documents are . . .	. . . then address your request to
Presidential records and donated historical materials at a Presidential library.	The appropriate library cited in 36 CFR part 1253.
Nixon Presidential materials	Director, Nixon Presidential Materials Staff (NLNS), 8601 Adelphi Road, College Park, MD 20740–6001.
Presidential materials maintained in the Washington, DC area	Director, Presidential Materials Staff (NLMS), 700 Pennsylvania Avenue, N.W., Washington, DC 20408.
• Federal records • Donated historical materials related to Federal records • Judicial records • Legislative records maintained in the Washington, DC area	Chief, Special Access/FOIA Staff (NWCTF), 8601 Adelphia Road, College Park, MD 20740–6001.
Federal records and judicial records maintained at a regional archives	The appropriate regional archives cited in 36 CFR part 1253.

§ 1256.78 How does NARA handle my mandatory review request?

(a) You may find our procedures for mandatory review and appeals of denials in part 1260 of this chapter, Declassification of National Security Information.

(1) When agencies delegate declassification guidance to the Archivist of the United States, NARA reviews for declassification and releases the requested information or those declassified portions of the request that constitute a coherent segment unless withholding is otherwise warranted under applicable law.

(2) When we do not have guidance from agencies, we coordinate the declassification review with the original classifying agency or agencies under the provisions of part 1260, subchapter D of this chapter.

(b) If we cannot identify the information you seek from the description you provide or if the volume of information you seek is so large that processing it would interfere with our capacity to serve all requestors on an equitable basis, we notify you that, unless you provide additional information or narrow the scope of your request, we cannot take further action.

§ 1256.80 How does NARA provide classified access to historical researchers and former Presidential appointees?

(a) In accordance with the requirements of E.O. 12958, as amended, Section 4.4, we may grant access to classified information to certain eligible persons. These persons are engaged in historical research projects or previously occupied policy-making positions to which they were appointed by the President. If you seek permission to examine materials under this special historical researcher/Presidential appointees access program, you must contact NARA in advance. We need at least 4 months before you wish to have access to the materials to permit time for the responsible agencies to process your request for access. If you seek access to classified Presidential records under Section 4.4, you must first qualify under special access provisions of 44 U.S.C. 2205. NARA informs you of the agencies to which you have to apply for permission to examine classified information, including classified information originated by the White House or classified information in the custody of the National Archives which was originated by a defunct agency.

(b) You may examine records under this program only after the originating or responsible agency:

(1) Determines in writing that access is consistent with the interest of national security; and

(2) Takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is safeguarded in a manner consistent with Executive Order 12958, as amended.

(c) The originating or responsible agency limits the access granted to former Presidential and Vice Presidential appointees to items that the person originated, reviewed, signed, or received while serving as an appointee.

(d) To protect against the possibility of unauthorized access to restricted documents, a director may issue instructions supplementing the research room rules provided in 36 CFR part 1254.

Subpart F—Domestic Distribution of United States Information Agency Audiovisual Materials in the National Archives of the United States

§ 1256.90 What does this subpart cover?

This subpart contains procedures governing the public availability of audiovisual records and other materials subject to 22 U.S.C. 1461(b) that have been transferred to the National Archives of the United States by the United States Information Agency (USIA).

§ 1256.92 What is the purpose of this subpart?

This subpart implements section 501 of the United States Information and Educational Exchange Act of 1948 (22 U.S.C. 1461), as amended by section 202 of Public Law No. 101–246 (104 Stat. 49, Feb. 16, 1990). This subpart also outlines procedures that permit the public to inspect and obtain copies of USIA audiovisual records and other materials in the United States that were prepared for dissemination abroad and that have been transferred to NARA for preservation and domestic distribution.

§ 1256.94 Definition.

For the purposes of this subpart, *Audiovisual records* mean motion picture films, videotapes, and sound recordings, and other materials regardless of physical form or characteristics that were prepared for dissemination abroad.

§ 1256.96 What provisions apply to the transfer of USIA audiovisual records to the National Archives of the United States?

The provisions of 44 U.S.C. 2107 and 36 CFR part 1228 apply to the transfer of USIA audiovisual records to NARA, and to their deposit with the National Archives of the United States. At the time the audiovisual records are transferred to NARA, the Director of USIA, in accordance with § 1228.184(e) of this chapter, also transfers any production or title files relating to the ownership of rights in the productions in connection with USIA's official overseas programming.

§ 1256.98 Can I get access to and obtain copies of USIA audiovisual records transferred to the National Archives of the United States?

NARA provides access to USIA audiovisual records after the appropriate time period of restriction has passed.

(a) No USIA audiovisual records in the National Archives of the United States that were prepared for dissemination abroad are available for copying until at least 12 years after USIA first disseminated these materials abroad, or, in the case of materials prepared for foreign dissemination but not disseminated abroad, until at least 12 years after the preparation of the materials.

(b) If the appropriate time has passed, you may have access to USIA audiovisual records that do not have copyright protection and do not contain copyright material. USIA audiovisual records prepared for dissemination abroad that NARA determines do not have copyright protection nor contain copyrighted material are available for examination and copying as described in the regulations in parts 1252, 1253, 1254, 1256, and 1258 of this chapter. To determine whether materials have copyright protection or contain copyrighted material, NARA relies on information contained within or fastened to individual records (for example, copyright notices); information contained within relevant USIA production, title, or other files that USIA transferred to NARA; information provided by requesters under § 1256.100(b) (for example, evidence from the Copyright Office that copyright has lapsed or expired); and information provided by copyright or license holders.

§ 1256.100 What is the copying policy for USIA audiovisual records that either have copyright protection or contain copyrighted material?

If the appropriate time has passed, as stated in § 1256.98(a), USIA audiovisual records that either have copyright protection or contain copyrighted material may be copied as follows:

(a) USIA audiovisual records prepared for dissemination abroad that NARA determines may have copyright protection or may contain copyrighted material are made available for examination in NARA research facilities as described in the regulations in this title.

(b) Copies of USIA audiovisual records prepared for dissemination abroad that NARA determines may have copyright protection or may contain copyrighted material are provided to you if you seek the release of such materials in the United States once NARA has:

(1) Ensured, as described in paragraph (c) of this section, that you have secured and paid for necessary United States rights and licenses;

(2) Been provided with evidence from the Copyright Office demonstrating that copyright protection in the materials sought, or relevant portions in the materials, has lapsed or expired; or

(3) Received your signed certification in accordance with paragraph (d) of this section that you will use the materials sought only for purposes permitted by the Copyright Act of 1976, as amended, including the fair use provisions of 17 U.S.C. 107. No copies of USIA audiovisual records will be provided until the fees authorized under part 1258 of this chapter have been paid.

(c) If NARA determines that a USIA audiovisual record prepared for dissemination abroad may have copyright protection or may contain copyrighted material, you may obtain copies of the material by submitting to NARA written evidence from all copyright and/or license owner(s) that any necessary fees have been paid or waived and any necessary licenses have been secured.

(d) If NARA has determined that a USIA audiovisual record prepared for dissemination abroad may have copyright protection or may contain copyrighted material, persons seeking the release of such material in the United States may obtain copies of the material by submitting to NARA the following certification statement:

I, (printed name of individual), certify that my use of the copyrighted portions of the (name or title and NARA identifier of work involved) provided to me by the National Archives and Records Administration (NARA), will be limited to private study, scholarship, or research purposes, or for other purposes permitted by the Copyright Act of 1976, as amended. I understand that I am solely responsible for the subsequent use of the copyrighted portions of the work identified above.

(e) In every instance where NARA provides a copy of an audiovisual record under this subpart, and NARA has determined that the work reproduced may have copyright protection or may contain copyrighted material, NARA must provide you with a warning notice of copyright.

(f) Nothing in this section limits NARA's ability to make copies of USIA audiovisual records for preservation, arrangement, repair and rehabilitation, description, exhibition, security, or reference purposes.

§ 1256.102 What fees does NARA charge?

Copies of audiovisual records will only be provided under this subpart upon payment of fees in accordance with 44 U.S.C. 2116(c) and 22 U.S.C. 1461(b)(3). *See* § 1258.4(b) for additional information.

Dated: December 23, 2003.

John W. Carlin,

Archivist of the United States.

[FR Doc. 04–174 Filed 1–2–04; 8:45 am]

BILLING CODE 7515–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[KY 146–200340(a) and IN 121–4; FRL–7606–2]

Approval and Promulgation of Implementation Plans; Kentucky and Indiana: Approval of Revisions to 1-Hour Ozone Maintenance Plan for Louisville Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the state implementation plans (SIPs) of the Commonwealth of Kentucky and the State of Indiana to revise the 2012 motor vehicle emission budgets (MVEBs) using MOBILE6 for the Louisville 1-hour ozone maintenance area. The Louisville maintenance area includes Jefferson County, and portions of Bullitt and Oldham Counties, Kentucky; and Clark and Floyd Counties, Indiana. The Commonwealth's and the State's submittals meet a commitment to revise and resubmit the MVEBs using MOBILE6 methods within two years following the release of MOBILE6 provided that transportation conformity is not determined in the Louisville area without adequate MOBILE6-based MVEBs during the second year. In two, separate **Federal Register** actions published on August 7, 2003, EPA found Kentucky's and Indiana's MVEBs adequate for transportation conformity purposes. As a result of these findings, the Louisville area must use the revised MVEBs for future conformity determinations effective August 22, 2003.

DATES: Written comments must be received on or before February 4, 2004.

ADDRESSES: Comments may be submitted by mail to: (Kentucky submittal)—Michele Notarianni, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. (Indiana submittal)—J. Elmer Bortzer, Chief, Regulation Development Section, Air Programs Branch, Air and Radiation Division, U.S. Environmental Protection Agency Region 5, 77 W. Jackson Blvd., Chicago, Illinois 60604–3590. Comments may also be submitted electronically, or through hand delivery/courier. Please follow the detailed instructions described in (sections IX.B.1. through 3.) of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: (Kentucky Submittal)—Michele Notarianni, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. Phone: (404) 562–9031. E-mail: *notarianni.michele@epa.gov*. (Indiana Submittal)—Patricia Morris, Air Programs Branch, U.S. Environmental Protection Agency Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604–3590. Phone: (312) 353–8656. E-mail: *morris.patricia@epa.gov*.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. What Is the Background for This Action?
II. What Action Is EPA Proposing Today?
III. What Changes Were Made to the Louisville 1-Hour Ozone Maintenance Plan?
IV. What Is Transportation Conformity?
V. What Is a MVEB?
VI. What Is a Safety Margin?
VII. How Does This Action Change Implementation of Transportation Conformity for the Louisville Maintenance Area?
VIII. What Is the Proposed Action?
IX. General Information
X. Statutory and Executive Order Reviews

I. What Is the Background for This Action?

On October 23, 2001, EPA redesignated the Louisville area to attainment for the 1-hour ozone National Ambient Air Quality Standard (NAAQS) and approved the plans for maintaining the 1-hour ozone NAAQS through 2012 as revisions to the Kentucky and Indiana SIPs (66 FR 53665). The Louisville maintenance area includes Jefferson County, and portions of Bullitt and Oldham Counties, Kentucky; and Clark and Floyd Counties, Indiana. In this same rulemaking, EPA also found adequate and approved Kentucky's and Indiana's MVEBs for volatile organic compounds (VOC) and nitrogen oxides (NO_X) in the maintenance plans for transportation conformity purposes. The future mobile source emissions used in the Kentucky and Indiana portions of the Louisville area maintenance plan and MVEBs were calculated using MOBILE5b and credit was taken for the federal Tier 2/Sulfur Program (VOC for Jefferson, Bullitt, and Oldham Counties, NO_X for Jefferson County, and both VOC and NO_X for Clark and Floyd Counties).

In November of 1999, EPA issued two memoranda [1] to articulate its policy regarding states that incorporated MOBILE5-based interim Tier 2 standard [2] benefits into their SIPs and MVEBs. Although these memoranda primarily targeted certain serious and severe ozone nonattainment areas, EPA has implemented this policy in all other areas that have made use of federal Tier 2 benefits in air quality plans from EPA's April 2000 MOBILE5 guidance, "MOBILE5 Information Sheet #8: Tier 2 Benefits Using MOBILE5." All states whose attainment demonstrations or maintenance plans include interim MOBILE5-based estimates of the Tier 2 standards were required to make a commitment to revise and resubmit their MVEBs within either one or two years of the final release of MOBILE6 in order to gain SIP approval.

EPA officially released the MOBILE6 motor vehicle emissions factor model on January 29, 2002 (67 FR 4254). Thus, the effective date of that **Federal Register** action constituted the start of the two year time period in which Kentucky and Indiana were required to revise the maintenance plan SIPs using the MOBILE6 model.

MOBILE 5b, as released, did not allow the user to estimate the emission reduction credits for the Tier 2/Low Sulfur rule. This situation existed since the Tier 2 rule was promulgated after the release of MOBILE5b. Therefore, in order to allow areas that wanted to claim emission reduction credit for the Tier 2/Low Sulfur rule to estimate the benefits, EPA provided a method to estimate those reductions. This MOBILE5b approximation methodology represented the information available for use in on-road mobile source modeling at that time when MOBILE5b was the approved model. EPA recognized these approximations may change as more data was analyzed and incorporated into the next version of the MOBILE model, MOBILE6. EPA required areas that used the MOBILE5b approximation method to resubmit MVEBs recalculated with MOBILE6. Specifically, EPA established a policy that MVEBs would not be approved as being adequate for purposes of conformity unless the SIP also included an enforceable commitment to revise and resubmit the MVEBs using MOBILE6 methods within one year after the EPA releases MOBILE6 or, alternatively, within two years

[1] Memoranda, "Guidance on Motor Vehicle Emissions Budgets in 1-Hour Ozone Attainment Demonstrations," issued November 3, 1999, and "1-Hour Ozone Attainment Demonstrations and Tier 2/Sulfur Rulemaking," issued November 8, 1999. Copies of these memoranda are on EPA's Web site at *http://www.epa.gov/otaq/transp/traqconf.htm*.

[2] The final rule on Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements ("Tier 2 standards") for passenger cars, light trucks, and larger passenger vehicles was published on February 10, 2000 (65 FR 6698).

following the release of MOBILE6 provided that transportation conformity is not determined in the area without adequate MOBILE6-based MVEBs during the second year. Based on this policy, EPA required both Kentucky and Indiana to update the MVEBs in their respective 1-hour ozone maintenance plans for the Louisville area within two years after the release of MOBILE6 and further, any new conformity analysis in the Louisville area cannot be found to conform during the second year until MVEBs based on MOBILE6 calculations are found adequate (October 23, 2001, 66 FR 53665). For a more detailed explanation of EPA's rationale for this policy, please refer to this same rulemaking under the heading, "Response 4D," in section II. "What Comments Did We Receive and What Are Our Responses?" (October 23, 2001, 66 FR 53665), or to the January 18, 2002, "Policy Guidance on the Use of MOBILE6 for SIP Development and Transportation Conformity" (*http://www.epa.gov/otaq/models/mobile6/m6policy.pdf*).

II. What Action Is EPA Proposing Today?

EPA is proposing to approve revisions to the Kentucky and Indiana SIPs submitted by the Commonwealth of Kentucky, through the Kentucky Department of Air Quality (KDAQ), on June 27, 2003, and submitted by the Indiana Department of Environmental Management (IDEM) on June 26, 2003. The States' revisions update the MVEBs and projected mobile source emissions using MOBILE6 for the Kentucky and Indiana portions of the Louisville 1-hour ozone maintenance area. These revisions meet the requirements established in the final rulemaking published October 23, 2001 (66 FR 53665). KDAQ and IDEM submitted drafts of their respective SIP revisions with a request to parallel process their submissions on May 14, 2003, and May 13, 2003, respectively.

III. What Changes Were Made to the Louisville 1-Hour Ozone Maintenance Plan?

Kentucky and Indiana demonstrate transportation conformity for the Louisville 1-hour ozone maintenance area together and thus, elect not to use sub-area MVEBs. IDEM, KDAQ, the Greater Louisville Air Pollution Control District (APCD), and the Kentuckiana Regional Planning and Development Agency (KIPDA) revised the MVEBs and mobile source emissions using MOBILE6.2, the most current version of MOBILE6. The revised 2012 MVEBs for the total Louisville area are 47.28 tons per summer day (tpd) for VOC and 111.13 tpd for NO_X. The MVEBs include allocations of 26.83 tpd VOC from the area's available VOC safety margin of 26.83 tpd and 72.25 tpd NO_X from the area's available NO_X safety margin of 154.00 tpd. The 2012, MOBILE6-based, projected mobile source emissions (excluding nonroad emissions) for the Kentucky portion of the area changed from 27.23 to 15.43 tpd VOC and from 44.19 to 29.59 tpd NO_X. For the Indiana portion, the 2012, MOBILE6-based, projected mobile source emissions (excluding nonroad emissions) changed from 17,619 pounds per summer day (lbs/d) (8.81 tpd) to 10,049 lbs/d (5.02 tpd) VOC and from 25,646 lbs/d (12.82 tpd) to 18,586 lbs/d (9.29 tpd) NO_X. (Please refer to the following table for details.)

LOUISVILLE MAINTENANCE AREA ANTHROPOGENIC EMISSIONS BY STATE SAFETY MARGINS AND MVEBs

[tons per summer day]

State and source category	VOC 1999	VOC 2012	NO_X 1999	NO_X 2012
Kentucky:				
Point	31.52	31.52	116.86	47.99
Area	18.94	19.64	0.81	0.82
Mobile	39.56	15.43	87.26	29.59
Nonroad	15.07	15.22	19.95	19.41
Total	105.09	81.81	224.88	97.81
Indiana:				
Point	4.16	4.88	26.04	12.38
Area	17.67	18.14	8.39	9.24
Mobile	10.49	5.02	23.87	9.29
Nonroad	7.36	8.09	6.25	6.71
Total	39.68	36.13	64.55	37.62
Total KY + IN Emissions	144.77	117.94	289.43	135.43
Total Emission Reductions from 1999 to 2012 (Allowable Safety Margin)		26.83		154.00
Safety Margin Allocated to MVEBs		26.83		72.25
Remaining Safety Margin for 2012 after allocation made to MVEBs		0.00		81.75
Regional 2012 MVEBs		47.28		111.13

The following changes were also made to the Kentucky portion of the plan. APCD updated mobile emission projections to reflect that Jefferson County is not taking emissions reduction credit for its Vehicle Emissions Testing Program after October 31, 2003, as the Kentucky General Assembly enacted legislation in 2002 to end the program by November 1, 2003. The planning assumptions for the point, area, and nonroad source categories in Jefferson, Bullitt, and Oldham Counties were also reviewed to ensure there have been no major changes since approval of the maintenance plan on October 23, 2001.

KIPDA, APCD, and DAQ also updated several key data parameters and modeling techniques. To address concerns expressed about the speed estimation procedures used, KIPDA made the following changes. The methodology and equations of the Highway Economic Reporting System have been used to provide empirical data for speed adjustment of roadways with urban functional classifications. Data from the Automatic Continuous Traffic Recorders (ATRs) of the Kentucky Transportation Cabinet (KYTC) have been used to provide empirical data for speed adjustment of roadways with rural functional classifications. Data from the local KYTC ATRs have been used to calculate the vehicle-miles-traveled (VMT) and speeds on an hourly basis.

To ensure that the VOC, NO_X, and carbon monoxide (CO) emissions remain constant when using MOBILE6.2 as opposed to MOBILE6.0, and to use newer data supplied by the EPA and KIPDA, APCD made the following changes. Fuel parameters have been added or modified to enable new AIR TOXICS functionality of MOBILE6.2 without modifying consensus planning assumptions for fuel types and control programs. The VMT mix now has annual variations. Speed VMT and facility VMT distribution tables have been significantly revised by KIPDA to address concerns raised by the EPA regarding the speed estimation procedures. The VMT weighting accounting for the effects of the various inspection and maintenance (I/M) programs in the Louisville area have been updated.

For the affected portions of Bullitt and Oldham Counties, the DAQ made the following changes. The minimum and maximum temperatures were updated using the three most recent years of data available, 1999, 2000, and 2001. These temperature values were last developed in 1992. The speed data used in MOBILE6.2 is the same as that used in the Louisville redesignation request using MOBILE5b except for the DAQ Road Classifications of Rural Local at 12.9 miles per hour (mph), Urban Local at 12.9 mph, and Ramp at 34.6 mph. A new requirement with MOBILE6.2 for freeway VMT distribution percentages, which apply to the Rural Interstate, Urban Interstate, and Urban Freeway Road Classifications, had to be implemented. Through consultation with the KYTC, it was advised that the MOBILE6.2 default values of "92.0 0.0 0.0 8.0" would best represent the conditions for the 1-hour ozone maintenance portions of Bullitt and Oldham Counties. These values represent a ramp percentage equal to eight percent of all Freeway Road Classifications. Following EPA guidance, the DAQ correlated 12 Road Classifications that were used in the MOBILE5b analysis with the four Road Classifications used in MOBILE6.2.

The following changes were made to the Indiana portion of the plan. IDEM updated the mobile emission projections to reflect the uncertainty in the continuation of the Enhanced I/M Program. On April 25, 2003, the Indiana House passed the House Enrolled Act 1798, which discontinued the vehicle I/M program in Clark and Floyd Counties after December 31, 2006, unless the State Budget Agency determined that the implementation of a periodic vehicle I/M program is necessary to avoid a loss of federal highway funding for the State or a political subdivision. The emission reductions from the I/M program have not been included in the emission estimates for 2012. Although the Governor vetoed this bill, Indiana has decided to not take credit for this program after 2007 in the maintenance plan due to the uncertainty about further legislative action. Although IDEM can maintain emissions at low enough levels to maintain the 1-hour ozone NAAQS, the Louisville area is not attaining the 8-hour ozone NAAQS and may need I/M to attain the 8-hour ozone standard. Therefore, mobile source emission reductions attributed to this I/M program that would have occurred in Jefferson County, Kentucky were removed from the 2008 and 2012 projected emission inventories. This increases the Jefferson County mobile source VOC emissions by 0.13 and 0.11 tpd for 2008 and 2012, respectively, and the Jefferson County NO_X emissions by 0.11 tpd for both 2008 and 2012.

In April 2003, the Indiana General Assembly also passed a bill, House Enrollment Act 1657, that lifted the restrictions on open burning of vegetation from agricultural land in the unincorporated portions of Clark and Floyd Counties. This resulted in a minor adjustment to the area source and total emissions inventories.

IDEM reviewed the planning assumptions for the point, area, and nonroad source categories in Clark and Floyd Counties to ensure there have been no other changes since approval of the maintenance plan on October 23, 2001.

IV. What Is Transportation Conformity?

Transportation conformity means that the level of emissions from the transportation sector (*i.e.*, cars, trucks and buses) must be consistent with the requirements in the SIP to attain and maintain the NAAQS. The Clean Air Act, in section 176(c), requires conformity of transportation plans, programs and projects to a SIP's purpose of attaining and maintaining the NAAQS. On November 24, 1993, EPA published a final rule establishing criteria and procedures for determining if transportation plans, programs and projects funded or approved under Title 23 U.S.C. or the Federal Transit Act conform to the SIP. EPA revised the transportation conformity rule on August 7, 1995 (60 FR 40098), November 14, 1995 (60 FR 57179), and August 15, 1997 (62 FR 43780), and codified the revisions under 40 CFR part 51, subpart T and 40 CFR part 93, Subpart A—Conformity to State or Federal Implementation Plans of Transportation Plans, Programs, and Projects Developed, Funded or Approved Under Title 23 U.S.C. of the Federal Transit Laws (62 FR 43780). The transportation conformity rules require an ozone maintenance area to compare the actual projected emissions from cars, trucks and buses on the highway network, to the MVEB established by the maintenance plan. The Louisville area has an approved maintenance plan. EPA's approval of the maintenance plan on October 23, 2001, established interim MVEBs for transportation conformity purposes. These SIP revisions revise the MVEBs and reestablish the MVEBs for transportation conformity purposes.

V. What Is a MVEB?

A MVEB is the projected level of controlled emissions from the transportation sector (mobile sources) that is estimated in the SIP. The SIP controls emissions through regulations, for example, on fuels and exhaust levels for cars. The MVEB concept is further explained in the preamble to the November 24, 1993, transportation conformity rule (58 FR 62188). The preamble also describes how to establish the MVEB in the SIP and revise the MVEB. The transportation conformity rule allows the MVEB to be changed as long as the total level of emissions from all sources remains below the attainment level of emissions.

VI. What Is a Safety Margin?

A "safety margin" is the difference between the attainment level of emissions (from all sources) and the projected level of emissions (from all sources) in the maintenance plan. The attainment level of emissions is the level of emissions during one of the years in which the area met the NAAQS. Because Kentucky and Indiana demonstrate transportation conformity for the Louisville area together, the safety margin is for the entire area and is not sub-allocated by state. For example, the Louisville area attained the 1-hour ozone NAAQS during the 1998–2000 time period. Kentucky and Indiana use 1999 as the attainment level of emissions for the area. The emissions from point, area, nonroad, and mobile sources in 1999 equaled 144.77 tpd of VOC for the entire Louisville area. Projected VOC emissions out to the year 2012 equaled 117.94 tpd of VOC. The safety margin for VOCs is calculated to be the difference between these amounts or, in this case, 26.83 tpd of VOC for 2012. By this same method, 154.00 tpd (*i.e.*, 289.43 tpd less 135.43 tpd) is the safety margin for NO_X for 2012. The emissions are projected to maintain the area's air quality consistent with the NAAQS. The safety margin credit, or a

portion thereof, can be allocated to the transportation sector. The total emission level must stay below the attainment level to be acceptable. The safety margin is the extra emissions that can be allocated as long as the total attainment level of emissions is maintained.

VII. How Does This Action Change Implementation of Transportation Conformity for the Louisville Maintenance Area?

In today's action, EPA is proposing to approve revisions to the 2012 MVEBs for both the Kentucky and Indiana portions of the Louisville 1-hour ozone maintenance area. The revised 2012 MVEBs for the total Louisville area are 47.28 tpd for VOC and 111.13 tpd for NO_X. In two, separate **Federal Register** actions published on August 7, 2003 (68 FR 47059 and 68 FR 47060), EPA found Kentucky's and Indiana's MVEBs adequate for transportation conformity purposes. As a result of these findings, the Louisville area must use the revised 2012 MVEBs for future conformity determinations effective August 22, 2003. The action of EPA finding the MVEBs adequate removes the administrative freeze on transportation conformity on the area and allows the area to demonstrate conformity.

VIII. What Is the Proposed Action?

EPA is proposing to approve Kentucky's and Indiana's SIP revisions because they meet all of the requirements of section 110 of the Clean Air Act. Additionally, these SIP revisions meet the applicable requirements of the Transportation Conformity Rule.

IX. General Information

A. How Can I Get Copies of This Document and Other Related Information?

1. The Regional Offices have established an official public rulemaking file available for inspection at the Regional Offices. EPA has established an official public rulemaking file for this action under KY 146–200340(a) and for Indiana under IN 121–4. The official public file 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 rulemaking file does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public rulemaking file for Kentucky's SIP is the collection of materials that is available for public viewing at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The official public rulemaking file for Indiana's SIP is the collection of materials that is available for public viewing at the Regulation Development Section, Air Programs Branch, Air and Radiation Division, U.S. Environmental Protection Agency Region 5, 77 W. Jackson Blvd., Chicago, Illinois 60604–3590. EPA requests that if at all possible, you contact the contacts listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Offices' official hours of business are Monday through Friday, 9 to 3:30, excluding Federal Holidays.

2. Copies of the Kentucky submittal are also available for public inspection during normal business hours, by appointment at the Kentucky State Air Agency. Commonwealth of Kentucky, Division for Air Quality, 803 Schenkel Lane, Frankfort, Kentucky 40601–1403. (502/573–3382).

3. Electronic Access. You may access this **Federal Register** document electronically through the Regulation.gov Web site located at *http://www.regulations.gov*, where you can find, review, and submit comments on Federal rules that have been published in the **Federal Register**, the Government's legal newspaper, and are open for comment.

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 at the EPA Regional Office, as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in the official public rulemaking file. The entire printed comment, including the copyrighted material, will be available at the Regional Office for public inspection.

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 rulemaking identification number by including the text "Public comment on proposed rulemaking KY 146–200340(a)" or "Public comment on proposed rulemaking IN 121–4" in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." EPA is not required to consider these late comments.

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. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *E-mail*. Comments may be sent by electronic mail (e-mail) to *notarianni.michele@epa.gov* and *bortzer.jay@epa.gov*. Please include the text "Public comment on proposed rulemaking KY 146–200340(a) and IN 121–4" in the subject line. EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly without going through Regulations.gov, 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.

ii. *Regulation.gov*. Your use of Regulation.gov is an alternative method of submitting electronic comments to EPA. Go directly to Regulations.gov at *http://www.regulations.gov*, then select Environmental Protection Agency at the top of the page and use the go button. The list of current EPA actions available for comment will be listed. Please follow the online instructions for submitting comments. 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.

iii. *Disk or CD ROM.* You may submit comments on a disk or CD ROM that you mail to the mailing address identified in Section 2, directly below. These electronic submissions will be accepted in WordPerfect, Word or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* For the Kentucky submittal, send your comments to: Michele Notarianni, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, Region 4, U.S. Environmental Protection Agency, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. For the Indiana submittal, send your comments to: J. Elmer Bortzer, Chief, Regulation Development Section, Air Programs Branch, Air and Radiation Division, U.S. Environmental Protection Agency Region 5, 77 W. Jackson Blvd., Chicago, Illinois 60604–3590. Please include the text "Public comment on proposed rulemaking KY 146–200340(a)" or "Public comment on proposed rulemaking IN 121–4" in the subject line on the first page of your comment.

3. *By Hand Delivery or Courier.* For the Kentucky submittal, deliver your comments to: Michele Notarianni, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. For the Indiana submittal, deliver your comments to: J. Elmer Bortzer, Chief, Regulation Development Section, Air Programs Branch, Air and Radiation Division, U.S. Environmental Protection Agency Region 5, 77 W. Jackson Blvd., Chicago, Illinois 60604–3590. Such deliveries are only accepted during the Regional Offices' normal hours of operation. The Regional Offices' official hours of business are Monday through Friday, 9 to 3:30, excluding federal Holidays.

C. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically to EPA. You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI (if you submit CBI on disk or CD ROM, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the official public regional rulemaking file. If you submit the copy that does not contain CBI on disk or CD ROM, mark the outside of the disk or CD ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public file and available for public inspection without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

D. 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 regional file/rulemaking 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.

X. Statutory and Executive Order Reviews

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

This proposed rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

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

List of Subjects in 40 CFR Part 52

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

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

Dated: October 15, 2003.

Bharat Mathur,

Acting Regional Administrator, Region 5.

Dated: December 16, 2003.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 04–11 Filed 1–2–04; 8:45 am]

BILLING CODE 6560–50–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

[Regulations No. 4 and 16]

RIN 0960–AF21

Reinstatement of Entitlement to Disability Benefits

AGENCY: Social Security Administration.

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: The Social Security Administration (SSA) is extending the comment period for the proposed rules regarding the Reinstatement of Entitlement (Expedited Reinstatement) provision in section 112 of the Ticket to Work and Work Incentives Improvement Act of 1999. This provision allows former Social Security disability and Supplemental Security Income (SSI) disability or blindness beneficiaries, whose entitlement or eligibility had been terminated due to their work activity, to have their entitlement or eligibility reinstated in a timely fashion if they become unable to do substantial gainful work due to their medical condition. These rules provide beneficiaries an additional incentive to return to work.

DATES: To be sure your comments are considered we must receive them no later than January 16, 2004.

ADDRESSES: You may give us your comments by using: our Internet site facility (*i.e.*, Social Security Online) at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs;* or the Federal eRulemaking Portal: *http://www.regulations.gov;* or e-mail to *regulations@ssa.gov;* telefax to (410) 966–2830; or letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, MD 21235–7703. You may also deliver them to the Office of Regulations, Social Security Administration, 100 Altmeyer Building, between 8 a.m. and 4:30 p.m. on regular business days. Comments are posted for your review on our Internet site *http://policy.ssa.gov/pnpublic.nsf/LawsRegs,* or you may inspect them physically on regular business days by making arrangements with the contact person shown in this preamble.

Electronic Version

The electronic file of this document is available on the date of publication in the **Federal Register** at *http://www.gpoaccess.gov/fr/index.html.* It is also available on the Internet site for SSA (*i.e.*, Social Security Online) at *http://policy.ssa.gov/pnpublic.nsf/LawsRegs.*

FOR FURTHER INFORMATION CONTACT: John Nelson, Team Leader, Employment Policy Team, Office of Employment Support Programs, Social Security Administration, 6401 Security Boulevard, Room 107 Altmeyer Building, Baltimore, MD 21235–6401, (410) 966–5114 or TTY (410) 966–5609. For information on eligibility or filing for benefits call our national toll-free numbers 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet site, Social Security Online at *http://www.socialsecurity.gov.*

SUPPLEMENTARY INFORMATION: The Social Security Administration published a notice of proposed rulemaking in the **Federal Register** on October 27, 2003 (68 FR 61162), proposing rules regarding the expedited reinstatement provision in section 112 of the Ticket to Work and Work Incentives Improvement Act of 1999 (Pub. L. 106–170).

This document extends, to January 16, 2004, the comment period for that notice of proposed rulemaking. If you have already provided comments on the proposed rules, your comments will be considered and you do not need to re-submit them.

Dated: December 29, 2003.

Martin J. Sussman,

SSA Regulations Officer.

[FR Doc. 04–58 Filed 1–2–04; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. NHTSA–03–16797]

Federal Motor Vehicle Safety Standards (FMVSS); Small Business Impacts of Motor Vehicle Safety

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of regulatory review; Request for comments.

SUMMARY: The National Highway Traffic Safety Administration (NHTSA) seeks comments on the economic impact of its regulations on small entities. As required by Section 610 of the Regulatory Flexibility Act, we are attempting to identify rules that may have a significant economic impact on a substantial number of small entities. We also request comments on ways to make these regulations easier to read and understand. The focus of this notice is rules that specifically relate to passenger cars, multipurpose passenger vehicles, trucks, buses, trailers, incomplete vehicles, motorcycles, and motor vehicle equipment.

DATES: Comments must be received on or before March 5, 2004.

ADDRESSES: You should mention the docket number of this document in your comments and submit your comments in writing to: Docket Management System, U.S. Department of Transportation, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. You may call Docket Management at: (202) 366–9324. You may visit the Docket from 10 a.m. to 5 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Nita Kavalauskas, Office of Regulatory Analysis, Office of Planning, Evaluation and Budget, National Highway Traffic Safety Administration, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Telephone: (202) 366–2584. Facsimile (fax): (202) 366–2559.

SUPPLEMENTARY INFORMATION:

I. Section 610 of the Regulatory Flexibility Act

A. Background and Purpose

Section 610 of the Regulatory Flexibility Act of 1980 (Pub. L. 96–354), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), requires agencies to conduct periodic reviews of final rules that have a significant

economic impact on a substantial number of small business entities. The purpose of the reviews is to determine whether such rules should be continued without change, or should be amended or rescinded, consistent with the objectives of applicable statutes, to minimize any significant economic impact of the rules on a substantial number of such small entities.

B. Review Schedule

The Department of Transportation (DOT) published its Semiannual Regulatory Agenda on November 22, 1999, listing in Appendix D (64 FR 64684) those regulations that each operating administration will review under section 610 during the next 12 months. Appendix D also contains DOT's 10-year review plan for all of its existing regulations.

The National Highway Traffic Safety Administration (NHTSA, "we") has divided its rules into 10 groups by subject area. Each group will be reviewed once every 10 years, undergoing a two-stage process—an Analysis Year and a Review Year. For purposes of these reviews, a year will coincide with the fall-to-fall publication schedule of the Semiannual Regulatory Agenda. Thus, Year 1 (1998) began in the fall of 1998 and ended in the fall of 1999; Year 2 (1999) began in the fall of 1999 and ended in the fall of 2000; and so on.

During the Analysis Year, we will request public comment on and analyze each of the rules in a given year's group to determine whether any rule has a significant impact on a substantial number of small entities and, thus, requires review in accordance with section 610 of the Regulatory Flexibility Act. In each fall's Regulatory Agenda, we will publish the results of the analyses we completed during the previous year. For rules that have subparts, or other discrete sections of rules that do have a significant impact on a substantial number of small entities, we will announce that we will be conducting a formal section 610 review during the following 12 months.

The section 610 review will determine whether a specific rule should be revised or revoked to lessen its impact on small entities. We will consider: (1) The continued need for the rule; (2) the nature of complaints or comments received from the public; (3) the complexity of the rule; (4) the extent to which the rule overlaps, duplicates, or conflicts with other federal rules or with state or local government rules; and (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule. At the end of the Review Year, we will publish the results of our review.

The following table shows the 10-year analysis and review schedule:

NHTSA SECTION 610 REVIEW PLAN

Year	Regulations to be reviewed	Analysis year	Review year
1	49 CFR parts 501 through 526 and 571.213	1998	1999
2	49 CFR 571.131, 571.217, 571.220, 571.221, and 571.222	1999	2000
3	49 CFR 571.101 through 571.110 and 571.135	2000	2001
4	49 CFR parts 529 through 579, except part 571	2001	2002
5	49 CFR 571.111 through 571.129 and parts 580 through 590	2002	2003
6	49 CFR 571.201 through 571.212	2003	2004
7	49 CFR 571.214 through 571.219, except 571.217	2004	2005
8	49 CFR parts 591 through 594	2005	2006
9	49 CFR 571.223 through 571.304, part 500 and new parts and subparts under 49 CFR	2006	2007
10	23 CFR parts 1200 and 1300 and new parts and subparts under 23 CFR	2007	2008

C. Regulations Under Analysis

During Year 6 (2003), the Analysis Year, we will conduct a preliminary assessment of the following sections of 49 CFR part 571:

Section	Title
571.201	Occupant protection in interior impact.
571.202	Head restraints.
571.203	Impact protection for the driver from the steering control system.
571.204	Steering control rearward displacement.
571.205	Glazing materials.
571.206	Door locks and door retention components.
571.207	Seating systems.
571.208	Occupant crash protection.
571.209	Seat belt assemblies.
571.210	Seat belt assembly anchorages.
571.211	[Reserved].
571.212	Windshield mounting.

We are seeking comments on whether any requirements in part 571 have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. Business entities are generally defined as small businesses by Standard Industrial Classification (SIC) code, for the purposes of receiving Small Business Administration (SBA) assistance. Size standards established by SBA in 13 CFR 121.201 are expressed either in number of employees or annual receipts in millions of dollars, unless otherwise specified. The number of employees or annual receipts

indicates the maximum allowed for a concern and its affiliates to be considered small. If your business or organization is a small entity and if any of the requirements in part 571 have a significant economic impact on your business or organization, please submit a comment to explain how and to what degree these rules affect you, the extent of the economic impact on your business or organization, and why you believe the economic impact is significant.

If the agency determines that there is a significant economic impact on a substantial number of small entities, it will ask for comment in a subsequent notice during the Review Year on how these impacts could be reduced without reducing safety.

II. Plain Language

A. Background and Purpose

Executive Order 12866 and the President's memorandum of June 1, 1998, require each agency to write all rules in plain language. Application of the principles of plain language includes consideration of the following questions:

- Have we organized the material to suit the public's needs?
- Are the requirements in the rule clearly stated?
- Does the rule contain technical language or jargon that is not clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the rule easier to understand?

If you have any responses to these questions, please include them in your comments on this document.

B. Review Schedule

In conjunction with our section 610 reviews, we will be performing plain language reviews over a ten-year period on a schedule consistent with the section 610 review schedule. We will review part 571 to determine if these regulations can be reorganized and/or rewritten to make them easier to read, understand, and use. We encourage interested persons to submit draft regulatory language that clearly and simply communicates regulatory requirements, and other recommendations, such as for putting information in tables that may make the regulations easier to use.

Comments

How Do I Prepare and Submit Comments?

Your comments must be written and in English. To ensure that your comments are correctly filed in the Docket, please include the docket number of this document in your comments.

Your comments must not be more than 15 pages long. (49 CFR 553.21.) We established this limit to encourage you to write your primary comments in a concise fashion. However, you may attach necessary additional documents to your comments. There is no limit on the length of the attachments.

Please submit two copies of your comments, including the attachments, to Docket Management at the address given above under **ADDRESSES**.

Comments may also be submitted to the docket electronically by logging onto the Docket Management System Web site at *http://dms.dot.gov*. Click on "Help & Information" or "Help/Info" to obtain instructions for filing your comments electronically.

How Can I Be Sure That My Comments Were Received?

If you wish Docket Management to notify you upon its receipt of your comments, enclose a self-addressed, stamped postcard in the envelope containing your comments. Upon receiving your comments, Docket Management will return the postcard by mail.

How Do I Submit Confidential Business Information?

If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Chief Counsel, NHTSA, U.S. Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above under **ADDRESSES**. When you send a comment containing information claimed to be confidential business information, you should include a cover letter setting forth the information specified in our confidential business information regulation. (49 CFR part 512.)

Will the Agency Consider Late Comments?

We will consider all comments that Docket Management receives before the close of business on the comment closing date indicated above under **DATES**. To the extent possible, we will also consider comments that Docket Management receives after that date.

How Can I Read the Comments Submitted by Other People?

You may read the comments received by Docket Management at the address given above under **ADDRESSES**. The hours of the Docket are indicated above in the same location.

You may also see the comments on the Internet. To read the comments on the Internet, take the following steps:

(1) Go to the Docket Management System (DMS) Web page of the Department of Transportation (*http://dms.dot.gov/*).

(2) On that page, click on "search."

(3) On the next page (*http://dms.dot.gov/search/*), type in the four-digit docket number shown at the beginning of this document. Example: If the docket number were "NHTSA–1998–1234," you would type "1234." After typing the docket number, click on "search."

(4) On the next page, which contains docket summary information for the docket you selected, click on the desired comments. You may download the comments. However, since the comments are imaged documents, instead of word processing documents, the "pdf" versions of the documents are word searchable.

Please note that even after the comment closing date, we will continue to file relevant information in the Docket as it becomes available. Further, some people may submit late comments. Accordingly, we recommend that you periodically check the Docket for new material.

Noble N. Bowie,
Associate Administrator for Planning, Evaluation and Budget.

[FR Doc. 04–28 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[I.D. 121903A]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; South Atlantic Fishery Management Council; Informational Public Hearings

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of informational public hearings.

SUMMARY: The South Atlantic Fishery Management Council (Council) will hold nine informational public hearings to collect social and economic information on the use of proposed marine protected area (MPA) candidate sites as a fishery management tool with an emphasis on deepwater species found in the snapper/grouper management complex.

DATES: The meetings will be held in January and February 2004. See **SUPPLEMENTARY INFORMATION** for specific dates, location and times of the informational public hearings. Written comments, including email will be accepted until close of business on February 27, 2004.

ADDRESSES: Written comments should be sent to Kerry O'Malley, South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407; email *kerry.omalley@safmc.net.* Copies of the informational public hearing document are available by contacting Kerry O'Malley, South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407-4699; telephone: 843/571–4366 or toll free 1–866/SAFMC–10; FAX 843/769–4520; email: *kerry.omalley@safmc.net.* The informational public hearing document will also be available at the meeting. See **SUPPLEMENTARY INFORMATION** for specific locations.

FOR FURTHER INFORMATION CONTACT: Kim Iverson, Public Information Officer; telephone: 843/571–4366 or toll free 1–866/SAFMC–10; fax: 843/769–4520; email: *kim.iverson@safmc.net.*

SUPPLEMENTARY INFORMATION:

Purpose of Meetings

The Council will hold nine informational public hearings to collect social and economic information from the public on individual marine protected area alternatives being considered for use as a fishery management tool to protect deepwater species in the snapper/grouper management complex. This information is critical to evaluating the impacts of the various MPA candidate sites on people and communities.

Times and Locations of Informational Public Hearings

Public informational hearings will be held at the following dates and locations. All meetings are scheduled to begin at 6 p.m.

1. Monday, January 19, 2004, Sea Turtle Inn, One Ocean Boulevard, Atlantic Beach, FL 32233; telephone: 904 -249–7402;

2. Tuesday, January 20, 2004, Ramada Inn, 1200 S Federal Highway, Stuart, FL 34994; telephone: 772–287–6900;

3. Thursday, January 22, 2004, The Islander, 82100 Overseas Highway, Islamorada, FL 33036; telephone: 305–664–2031;

4. Tuesday, January 27, 2004, Crystal Coast Civic Center, 3505 Arendell Street, Morehead City, NC 28557; telephone: 252–247–3883;

5. Wednesday, January 28, 2004, Blockade Runner, 275 Waynick Boulevard, Wrightsville Beach, NC 28480; telephone: 800–541–1161 or 910–256–2251;

6. Tuesday, February 10, 2004, University of Georgia Marine Extension, 715 Bay Street, Brunswick, GA 31520; telephone: 912–264–7268;

7. Wednesday, February 11, 2004, Richmond Hill City Hall, 40 Richard R. Davis Drive, Richmond Hill, GA 31324; telephone: 912–756–3345;

8. Tuesday, February 17, 2004, Holiday Inn, 722 Highway 17, Little River, SC 29566; telephone: 843–281–9400; and

9. Thursday, February 19, 2004, Town & Country Inn, 2008 Savannah Highway, Charleston, SC 29407; telephone: 1–800–334–6660 or 843–571–1000.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) by January 16, 2004.

Dated: December 29, 2003.

Bruce C. Morehead,

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

[FR Doc. 04–90 Filed 1–2–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 031217320–3320–01; I.D. 112403D]

RIN 0648–AR66

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Extension of Marine Reserves

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues proposed regulations to implement Amendment 21 to the Fishery Management Plan (FMP) for the Reef Fish Resources of the Gulf of Mexico (Amendment 21) prepared by the Gulf of Mexico Fishery Management Council (Council). These proposed regulations would modify the fishing restrictions that apply within the Madison and Swanson sites and Steamboat Lumps marine reserves in the eastern Gulf of Mexico and would extend the period of effectiveness of those restrictions through June 16, 2010. The intended effect of these proposed regulations is to protect the spawning aggregations of species within these areas, prevent overfishing, and aid in the evaluation of the effectiveness of marine reserves as a management tool.

DATES: Comments on the proposed rule must be received no later than 5 p.m., eastern time, on February 19, 2004.

ADDRESSES: Written comments on the proposed rule must be sent to Phil Steele, Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702. Comments also may be sent via fax to 727–570–5583. Comments will not be accepted if submitted via e-mail or Internet.

Copies of Amendment 21, which includes a regulatory impact review (RIR), Regulatory Flexibility Analyses, and an environmental assessment (EA), and a copy of a minority report filed by three Council members opposing provisions in the amendment that allow seasonal surface trolling within the reserves, may be obtained from the Gulf of Mexico Fishery Management Council, The Commons at Rivergate, 3018 U.S. Highway 301 North, Suite 1000, Tampa, FL 33619–2266; telephone: 813–228–2815; fax: 813–225–7015; e-mail: gulfcouncil@gulfcouncil.org. Copies of

Amendment 21 can also be downloaded from the Council's website at www.gulfcouncil.org.

Copies of a supplement to the RIR and EA, and copies of a supplementary RIR and Regulatory Flexibility Analysis, may be obtained from Phil Steele, Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702; telephone: 727–570–5305, fax: 727–570–5583, e-mail: phil.steele@noaa.gov.

FOR FURTHER INFORMATION CONTACT: Phil Steele, telephone: 727–570–5305, fax: 727–570–5583, e-mail: phil.steele@noaa.gov.

SUPPLEMENTARY INFORMATION: The reef fish fishery in the exclusive economic zone (EEZ) of the Gulf of Mexico is managed under the FMP. The FMP was prepared by the Council and is implemented under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

Background

The Madison and Swanson sites and Steamboat Lumps are located in the eastern Gulf of Mexico and encompass a total area of approximately 219 square nautical miles (751 km2). The boundaries of the two areas are:

MADISON AND SWANSON SITES

NW corner	29°17′ N. lat., 85°50′ W. long.
NE corner	29°17′ N. lat., 85°38′ W. long.
SW corner	29°06′ N. lat., 85°50′ W. long.
SE corner	29°06′ N. lat., 85°38′ W. long.

STEAMBOAT LUMPS

NW corner	28°14′ N. lat., 84°48′ W. long.
NE corner	28°14′ N. lat., 84°37′ W. long.
SW corner	28°03′ N. lat., 84°48′ W. long.
SW corner	28°03′ N. lat., 84°37′ W. long.

These two areas include important reef fish habitat in the dominant region where gag spawning aggregations are known to occur. These areas were originally established as marine reserves in June 2000 as part of a regulatory amendment intended to address concerns about overfishing of the gag stock, a substantial decline in the proportion of male gag in the gag population, and the need to evaluate the effectiveness of marine reserves as a management tool. The final rule implementing the regulatory amendment (65 FR 31827, May 19, 2000) prohibited all fishing, except fishing for highly migratory pelagic species (HMS)(billfish, sharks, swordfish and tunas other than blackfin tuna), within the Madison and Swanson sites and Steamboat Lumps for a 4–year period ending June 16, 2004.

Provisions of This Proposed Rule

This proposed rule would modify the fishing restrictions that apply within the Madison and Swanson sites and Steamboat Lumps marine reserves and would extend the period of effectiveness of those restrictions through June 16, 2010. Specifically, within these marine reserves, this proposed rule would: (1) prohibit the possession of Gulf reef fish year-round, except for possession aboard a vessel in transit with fishing gear appropriately stowed; (2) during November through April, prohibit all fishing and possession of any fish species, with exceptions for HMS species and for fish possessed aboard a vessel in transit with fishing gear appropriately stowed; and (3) during May through October, restrict fishing activity to surface trolling only.

For the purpose of these provisions, "transit" would mean non-stop progression through the area; "fishing gear appropriately stowed" would mean -

(A) A longline may be left on the drum if all gangions and hooks are disconnected and stowed below deck. Hooks cannot be baited. All buoys must be disconnected from the gear; however, buoys may remain on deck.

(B) A trawl net may remain on deck, but trawl doors must be disconnected from the trawl gear and must be secured.

(C) A gillnet must be left on the drum. Any additional gillnets not attached to the drum must be stowed below deck.

(D) A rod and reel must be removed from the rod holder and stowed securely on or below deck. Terminal gear (i.e., hook, leader, sinker, flasher, or bait) must be disconnected and stowed separately from the rod and reel. Sinkers must be disconnected from the down rigger and stowed separately.

For the purpose of these provisions, "surface trolling" would mean fishing with lines trailing behind a vessel which is in constant motion at speeds in excess of four knots with a visible wake. Such trolling may not involve the use of down riggers, wire lines, planers, or similar devices.

In structuring these modified provisions, the Council and NMFS carefully considered concerns expressed by members of the public and others regarding both the need to limit restrictions on fishing activities to those essential for protecting gag and other reef fish species and the need to avoid measures that would unduly compromise adequate enforcement. The resulting provisions represent a reasoned balance between those somewhat conflicting objectives. If Amendment 21 is approved and implemented, the Council and NMFS would monitor the effectiveness of these measures with respect to achievement of the purposes of the marine reserves as well as adequate enforceability. Any necessary adjustments could be made through a timely regulatory framework procedure that would involve additional rulemaking and opportunity for public comment.

Request for Complementary Restrictions for Highly Migratory Species (HMS)

The Council has requested that NMFS' HMS Division implement restrictions regarding HMS that would complement the restrictions in this proposed rule. Specifically, the Council requested that fishing for HMS be prohibited within the Madison and Swanson sites and Steamboat Lumps marine reserves, except for surface trolling during May through October. If NMFS concurs, such restrictions would be implemented through separate rulemaking, including the opportunity for public comment. If Amendment 21 is approved and NMFS implements the requested HMS restrictions, 50 CFR 622.34(k) would be revised accordingly

and would include a cross reference to the applicable HMS restrictions in 50 CFR part 635.

Minority Report

A minority report, signed by three Council members, opposed the provision of Amendment 21 that would allow surface trolling during May through October. Their objections included concerns that the measure was unenforceable and inconsistent with NMFS' policy to move toward ecosystem management; involved procedural irregularities at the July Council meeting; and would create a privileged class of fishermen (surface trollers) and, thus, was unfair to others. Copies of the minority report are available (see **ADDRESSES**).

Classification

At this time, NMFS has not determined that Amendment 21, which this proposed rule would implement, is consistent with the national standards of the Magnuson-Stevens Act and other applicable laws. In making that determination, NMFS will take into account the data, views, and comments received during the comment period on Amendment 21 and this proposed rule.

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

NMFS prepared an IRFA, based on the RIR, for this proposed rule. A summary of the IRFA follows.

The Magnuson-Stevens Fisheries Conservation and Management Act provides the statutory basis for the proposed rule. The proposed rule would extend the designation of the Madison and Swanson sites and Steamboat Lumps as marine reserves for another six years from the current sunset date of June 16, 2004. As an integral part of such designation, within the designated areas, the proposed rule would: prohibit possession of Gulf reef fish, except for possession aboard a vessel in transit with fishing gear appropriately stowed; during November through April, prohibit fishing for and possession of any fish species with exceptions for highly migratory species and for possession of fish aboard a vessel in transit with gear appropriately stowed; during May through October, allow only surface trolling; and require vessels transiting the marine reserves in possession of fish, subject to an exemption, to comply with gear stowage requirements.

The objectives of the proposed rule are to provide continued protection to spawning aggregations for gag, male gag, and other species within the reserves. A subsidiary objective of the proposed rule is to allow additional time for research to be conducted on the effectiveness of the two marine reserves as a fishery management tool. The Council believes that the achievement of these objectives can be best accomplished through an extension of the marine reserve designation for another six years.

The proposed rule would not impose any changes in record-keeping for affected entities. Compliance requirements would change slightly by allowing the use of troll gear within the reserves and allowing vessels to transit the reserves. These changes would mitigate revenue losses from fishing restrictions within the reserves and reduce travel costs for vessels passing through the reserves.

No duplicative, overlapping, or conflicting Federal rules have been identified. However, fishing restrictions within the reserves may pose coordination problems with respect to fishing provisions affecting highly migratory species.

This proposed rule would impact both the commercial and recreational participants that traditionally harvested fish, provided recreational trips to the two areas, received fish harvested in the two areas, or would be expected to do so upon sunset of the current designation.

The specific fishing activities that historically occurred within the two marine reserves are unknown, but some characteristics of fishing activities can be inferred from fishing activities conducted in Statistical Areas 6 and 8, where the marine reserves are located. This approach likely overestimates the impacts of the proposed rule because participants would have adjusted their fishing patterns, but adjustments in the estimation procedures incorporating consideration of water depth have been introduced to partially address this problem.

Of the 1,338 boats that reported in their logbooks to have landed fish in the Gulf of Mexico, 356 boats harvested fish in Statistical Areas 6 or 8. These 356 boats include 59 vessels that harvest reef fish using fish traps. These trap vessels are not believed to have historically operated in the marine reserve areas since they generally operate in shallower waters. Of the 431 dealers that received fish from various vessels in the Gulf of Mexico, 87 dealers received fish that were harvested in Statistical Areas 6 or 8. There are 1,515 for-hire vessels with Gulf reef fish or coastal migratory pelagics permits. It cannot be determined, however, how many of these vessels actually fished in Statistical Areas 6 or 8. The rule is, thus, expected to directly affect 356 commercial fishing vessels, 87 fish dealers/processors, and an unknown number of for-hire vessels.

According to a survey of commercial fishing vessels, average gross receipts of vessels in the eastern Gulf (those that likely fished in Statistical Areas 6 or 8) ranged from $24,588 for low-volume vertical line vessels to $116,989 for high-volume longline vessels. Also, according to a survey of reef fish processors in the Southeast, employment by reef fish processors totaled 700 individuals, both part and full time. Given this number and the likelihood that fish dealers are generally of smaller size than processors, employment by any of the affected dealers is very likely to be less than 500 individuals. Furthermore, according to a survey of for-hire vessels in Florida, average gross receipts for charterboats totaled $68,000 while that for headboats totaled $324,000. A fishing business is considered a small entity if it is independently owned and operated and not dominant in its field of operation, and if it has annual receipts not in excess of $3.5 million in the case of commercial harvesting entities or $6 million in the case of for-hire entities, or if it has fewer than 500 employees in the case of fish processors, or fewer than 100 employees in the case of fish dealers. Given these data on earnings and employment, all of the business entities directly affected by the rule are determined to be small business entities.

Assuming alternative sources of revenue have not been located during the current closure, the proposed rule is expected to continue to reduce total gross revenues of commercial fishing vessels by $352,000 annually based on pre-closure fishing information. This represents approximately 1 percent to 4 percent of gross revenues if equally divided among the 356 affected vessels, or 2 percent to 5 percent if the 59 trap vessels are excluded from the universe of affected vessels. The revenue and profit profile for dealers is not known. The projected reduction in ex-vessel sales ($352,000) as a result of the proposed rule equals approximately 11 percent of total shallow-water grouper revenues generated from harvests in Statistical Areas 6 and 8. It is unlikely, however, that any dealer with substantial business operations would be wholly dependent upon harvests from just these areas. Although there is some information on the revenues of for-hire vessels, information on for-hire vessel profits is unavailable, and the extent of for-hire vessel participation within the marine reserves is unknown.

It is, therefore, not possible to provide even a general estimate of the impacts of the two marine reserves on the revenues and profits of for-hire vessels.

A general characteristic of economic impacts of the proposed rule shared by all affected small entities is that under the proposed rule they would likely shoulder lower costs than under current fishing restrictions because the proposed rule would allow surface trolling within the two reserves for the months of May through October and would allow commercial and recreational vessels to transit the reserves.

Seven alternatives were considered for the continuation of the two marine reserves. The alternatives differ mainly on the sunset date of the marine reserve designation, with four alternatives identifying a specific sunset date and three alternatives establishing an indefinite sunset date. For any given set of fishing restrictions accompanying the continuation of the marine reserve designation, forgone revenues and profits are greatest with the longest time horizon. It is not possible to determine the relative impacts of the alternatives that specify an indeterminate duration. With respect to those alternatives that have specific time durations, two alternatives provide shorter time horizons and two provide longer time horizons than the proposed alternative. Costs to small entities would be reduced under the no-extension or 4–year extension alternatives, whereas costs would increase under the longer extensions. The shorter extensions, however, would not provide sufficient time to assess the effects of the two marine reserves as a management tool and would not, therefore, achieve the Council's objectives.

There are six alternatives to the proposed alternative that would establish harvest restrictions in the reserves. In terms of impacts on revenues of small entities, these alternatives may be grouped into two groups, with the proposed alternative falling approximately in the middle of the two groups with regards to fishing restrictions. The proposed alternative provides for a middle-of-the-road approach with respect to trolling by allowing this gear to be used within the reserves for six months of the year. Four alternatives are more restrictive than the proposed alternative and would not reduce the adverse impacts. Two alternatives are less restrictive than the proposed alternative and would allow trolling year-round. These alternatives would reduce the negative impacts on small entities but would possibly interfere with the Council's goal of protecting spawning aggregations of gag during key spawning months. Prohibition of all trolling, however, was determined to be excessive. The proposed alternative, therefore, is expected to best achieve the Council's objectives at the lowest possible cost.

There are two alternatives to the proposed alternative on seasonal duration of the proposed fishing restrictions. These two alternatives would limit the applicability of fishing restrictions. Limiting the seasonal duration of the fishing restrictions would reduce the negative effects of the fishing restrictions within the reserves. However, reducing the seasonal duration of the fishing restrictions reduces the protection of the stocks and, therefore, would not achieve the Council's objectives.

Copies of the RIR and IRFA are available (see **ADDRESSES**).

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: December 29, 2003.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

PART 622 FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

1. The authority citation for part 622 continues to read as follows:

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

2. In § 622.34, paragraph (k) is revised to read as follows:

§ 622.34 Gulf EEZ seasonal and/or area closures.

* * * * *

(k) Closure provisions applicable to the Madison and Swanson sites and Steamboat Lumps. The Madison and Swanson sites are bounded by rhumb lines connecting, in order, the following points:

Point	North lat.	West long.
A	29°17′	85°50′
B	29°17′	85°38′
C	29°06′	85°38′
D	29°06′	85°50′
A	29°17′	85°50′

STEAMBOAT LUMPS IS BOUNDED BY RHUMB LINES CONNECTING, IN ORDER, THE FOLLOWING POINTS:

Point	North lat.	West long.
A	28°14′	84°48′
B	28°14′	84°37′
C	28°03′	84°37′
D	28°03′	84°48′
A	28°14′	84°48′

The following provisions apply within the Madison and Swanson sites and Steamboat Lumps through June 16, 2010.

(1) Possession of Gulf reef fish is prohibited, except for such possession aboard a vessel in transit with fishing gear stowed as specified in paragraph (k)(3) of this section.

(2) During November through April, all fishing is prohibited, and possession of any fish species is prohibited, except for such possession aboard a vessel in transit with fishing gear stowed as specified in paragraph (k)(3) of this section. The provisions of this paragraph, (k)(2), do not apply to highly migratory species.

(3) For the purpose of paragraph (k) of this section, transit means non-stop progression through the area; fishing gear appropriately stowed means -

(i) A longline may be left on the drum if all gangions and hooks are disconnected and stowed below deck. Hooks cannot be baited. All buoys must be disconnected from the gear; however, buoys may remain on deck.

(ii) A trawl net may remain on deck, but trawl doors must be disconnected from the trawl gear and must be secured.

(iii) A gillnet must be left on the drum. Any additional gillnets not attached to the drum must be stowed below deck.

(iv) A rod and reel must be removed from the rod holder and stowed securely on or below deck. Terminal gear (i.e., hook, leader, sinker, flasher, or bait) must be disconnected and stowed separately from the rod and reel. Sinkers must be disconnected from the down rigger and stowed separately.

(4) During May through October, surface trolling is the only allowable fishing activity. For the purpose of this paragraph (k)(4), surface trolling is defined as fishing with lines trailing behind a vessel which is in constant motion at speeds in excess of four knots with a visible wake. Such trolling may not involve the use of down riggers, wire lines, planers, or similar devices.

(5) For the purpose of paragraph (k) of this section, fish means finfish, mollusks, crustaceans, and all other

forms of marine animal and plant life other than marine mammals and birds. Highly migratory species means tuna species, marlin (Tetrapturus spp. and Makaira spp.), oceanic sharks, sailfishes (Istiophorus spp.), and swordfish (Xiphias gladius).

* * * * *

[FR Doc. 04–89 Filed 1–2–04; 8:45 am]
BILLING CODE 3510–22–S

Notices

Federal Register
Vol. 69, No. 2
Monday, January 5, 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

Animal and Plant Health Inspection Service

[Docket No. 03–101–1]

Monsanto Co. and The Scotts Co.; Availability of Petition for Determination of Nonregulated Status for Genetically Engineered Glyphosate-Tolerant Creeping Bentgrass; Request for Information and Comment

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public that the Animal and Plant Health Inspection Service has received a petition from Monsanto Company and The Scotts Company seeking a determination of nonregulated status for creeping bentgrass (*Agrostis stolonifera* L.) designated as event ASR368, which has been genetically engineered for tolerance to the herbicide glyphosate. The petition has been submitted in accordance with our regulations concerning the introduction of certain genetically engineered organisms and products. In accordance with those regulations, we are soliciting public comments on whether this creeping bentgrass presents a plant pest risk. We are also requesting information and public comment on certain issues pertaining to the potential environmental effects of the subject bentgrass.

DATES: We will consider all comments we receive on or before March 5, 2004.

ADDRESSES: You may submit comments by postal mail/commercial delivery or by e-mail. If you use postal mail/ commercial delivery, please send four copies of your comments (an original and three copies) to Docket No. 03–101–1, Regulatory Analysis and Development, PPD, APHIS, Station 3C71, 4700 River Road Unit 118, Riverdale, MD 20737–1238. Please state that your comments refer to Docket No. 03–101–1. If you use e-mail, address your comment to *regulations@aphis.usda.gov*. Your comment must be contained in the body of your message; do not send attached files. Please include your name and address in your message and Docket No. 03–101–1 on the subject line.

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

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

FOR FURTHER INFORMATION CONTACT: Dr. Bruce MacBryde, BRS, APHIS, Suite 5B05, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 734–5787. To obtain a copy of the petition, contact Ms. Kay Peterson at (301) 734–4885; e-mail: *Kay.Peterson@aphis.usda.gov*. The petition is also available on the Internet at *http://www.aphis.usda.gov/brs/ aphisdocs/03_10401p.pdf.*

SUPPLEMENTARY INFORMATION: The regulations in 7 CFR part 340, "Introduction of Organisms and Products Altered or Produced Through Genetic Engineering Which Are Plant Pests or Which There Is Reason to Believe Are Plant Pests," regulate, among other things, the introduction (importation, interstate movement, or release into the environment) of organisms and products altered or produced through genetic engineering that are plant pests or that there is reason to believe are plant pests. Such genetically engineered organisms and products are considered "regulated articles."

The regulations in § 340.6(a) provide that any person may submit a petition to the Animal and Plant Health Inspection Service (APHIS) seeking a determination that an article should not be regulated under 7 CFR part 340. Paragraphs (b) and (c) of § 340.6 describe the form that a petition for a determination of nonregulated status must take and the information that must be included in the petition.

On April 14, 2003, APHIS received a petition (APHIS Petition No. 03–104–01p) from Monsanto Company of St. Louis, MO, and The Scotts Company of Gervais, OR (Monsanto/Scotts), requesting a determination of nonregulated status under 7 CFR part 340 for a creeping bentgrass (*Agrostis stolonifera* L., synonym *A. palustris* Huds.) designated as event ASR368 (event ASR368), which has been genetically engineered for tolerance to the herbicide glyphosate. The Monsanto/Scotts petition states that the subject creeping bentgrass should not be regulated by APHIS because it does not present a plant pest risk.

As described in the petition, event ASR368 has been genetically engineered to express a 5-enolpyruvylshikimate-3-phosphate synthase protein from *Agrobacterium* sp. strain CP4 (CP4 EPSPS). The CP4 EPSPS enzyme confers tolerance to glyphosate herbicides. Expression of the added genes is controlled in part by gene sequences from the plant pathogens cauliflower mosaic virus and *A. tumefaciens*. Particle bombardment technology was used to transfer the added genes into the recipient creeping bentgrass cultivar Backspin.

Creeping bentgrass event ASR368 has been considered a regulated article under the regulations in 7 CFR part 340 because it contains gene sequences from plant pathogens. This creeping bentgrass has been field tested since 2000 in the United States under APHIS notifications. In the process of reviewing the notifications for field trials of event ASR368, APHIS determined that the trials, which were conducted under conditions of reproductive and physical containment or isolation, would not present a risk of plant pest introduction or dissemination.

In § 403 of the Plant Protection Act (7 U.S.C. 7701–7772), plant pest is defined as any living stage of any of the

following that can directly or indirectly injure, cause damage to, or cause disease in any plant or plant product: A protozoan, a nonhuman animal, a parasitic plant, a bacterium, a fungus, a virus or viroid, an infectious agent or other pathogen, or any article similar to or allied with any of the foregoing. APHIS views this definition very broadly. The definition covers direct or indirect injury, disease, or damage not just to agricultural crops, but also to plants in general, for example, native species, as well as to organisms that may be beneficial to plants, for example, honeybees, rhizobia, etc.

The U.S. Environmental Protection Agency (EPA) is responsible for the regulation of pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended (7 U.S.C. 136 *et seq.*). FIFRA requires that all pesticides, including herbicides, be registered prior to distribution or sale, unless exempt by EPA regulation. In cases in which genetically modified plants allow for a new use of a pesticide or involve a different use pattern for the pesticide, EPA must approve the new or different use. Monsanto/Scotts have filed a proposed supplemental label for Roundup PRO herbicide for uses in seed production of glyphosate-tolerant creeping bentgrass and a separate supplementary label for Roundup PRO herbicide for general weed control in glyphosate-tolerant creeping bentgrass turf, planted to golf course tees, greens, and fairways. When the use of the pesticide on the genetically modified plant would result in an increase in the residues in a food or feed crop for which the pesticide is currently registered, or in new residues in a crop for which the pesticide is not currently registered, establishment of a new tolerance or a revision of the existing tolerance would be required. Residue tolerances for pesticides are established by EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), as amended (21 U.S.C. 301 *et seq.*), and the Food and Drug Administration (FDA) enforces tolerances set by EPA under the FFDCA. A determination has been made that a revision of the existing tolerance is not necessary for a minimal use of creeping bentgrass straw and chaff as animal feed.

FDA published a statement of policy on foods derived from new plant varieties in the **Federal Register** on May 29, 1992 (57 FR 22984–23005). The FDA statement of policy includes a discussion of FDA's authority for ensuring food safety under the FFDCA, and provides guidance to industry on the scientific considerations associated with the development of foods derived from new plant varieties, including those plants developed through the techniques of genetic engineering. The petitioners have provided to FDA a summary of the animal feed safety and nutritional assessment of event ASR368 to permit the feed use of glyphosate-tolerant creeping bentgrass straw and chaff. On September 23, 2003, FDA notified the petitioners that no further questions remained to be considered.

In accordance with the regulations in 7 CFR 340.6(d), we are publishing this notice to inform the public that APHIS will accept written comments regarding the petition for a determination of nonregulated status from any interested person for a period of 60 days from the date of this notice. We are also soliciting data, information, and comments on the following matters to inform our review and analysis of potential risk assessment issues and environmental effects associated with a proposed determination of nonregulated status for creeping bentgrass event ASR368.

APHIS has done a preliminary risk assessment (available on the Internet at *http://www.aphis.usda.gov/brs/aphisdocs/03_10401p_ra.pdf*) and reached the following conclusions:

1. ASR368 contains a single insert of two EPSPS genes that are inherited as a single Mendelian locus.
2. There appear to be no major unintended effects resulting from the introduction of the EPSPS gene into the creeping bentgrass genome.
3. ASR368 is not sexually compatible with any Federal threatened or endangered species.
4. ASR368 is not sexually compatible with any species on the Federal noxious weed list.
5. ASR368 is not significantly different from its parental line or null comparators except for its tolerance to glyphosate.
6. ASR368 does not differ in pest and pathogen susceptibility or resistance from its parent.

However, unlike all deregulated articles previously considered by APHIS, creeping bentgrass is a widespread perennial species that establishes without cultivation in various habitats. Furthermore, as noted in the preliminary risk assessment, creeping bentgrass can form hybrids with at least 12 other U.S. naturalized or native species of *Agrostis* (bentgrasses) and *Polypogon* (rabbit's-foot grasses). These circumstances raise the possibility that glyphosate-tolerant creeping bentgrass and/or glyphosate-tolerant relatives would establish in various urbanized to rural and natural areas.

We are especially interested in receiving information pertaining to the following questions:

1. In which environments and crops (and locations) are creeping bentgrass and/or its sexually compatible relatives controlled or managed by herbicides, mechanical measures, and/or biological agents?
2. What are the intents and practices for the targeted or secondary control or management of creeping bentgrass and its sexually compatible relatives, to what extent is glyphosate used, and what are alternative herbicides that could be used?
3. What would be the cumulative effects from commercialization of glyphosate-tolerant creeping bentgrass, and how might these effects be monitored and mitigated by deployment (release) strategies or management practices?

(a) To what extent would glyphosate-tolerant creeping bentgrass and/or glyphosate-tolerant relatives become a problem in the glyphosate-tolerant crops? How might this potential problem be controlled or mitigated through management?

(b) What is the likelihood of glyphosate-tolerant creeping bentgrass contaminating non-glyphosate-tolerant grass seed production? Are there management measures that could reduce this potential problem?

(c) To what extent would the development of resistant weeds or weed shifts in bentgrasses production be accelerated as compared to existing practices? Are there management practices that could be implemented to delay resistance?

(d) What environmental or management problems would be raised by the intentional or unintentional stacking of herbicide-tolerant traits in *Agrostis*?

The petition and any comments received on this document are available for public review, and copies of the petition are available as indicated in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

After the comment period closes, APHIS will review the data submitted by the petitioners, all written comments received during the comment period, and any other relevant information. After reviewing and evaluating the comments on the petition and other data and information, APHIS will prepare an environmental document in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), to examine any potential environmental impacts associated with a determination of nonregulated status for the subject

creeping bentgrass. The environmental document will be made available for public comment. After reviewing and evaluating the comments on the environmental document and other data and information, APHIS will furnish a response to the petitioner, either approving the petition in whole or in part, or denying the petition. APHIS will then publish a notice in the **Federal Register** announcing the regulatory status of the Monsanto/Scotts creeping bentgrass event ASR368 and the availability of APHIS' written decision.

Authority: 7 U.S.C. 1622n and 7701–7772; 31 U.S.C. 9701; 7 CFR 2.22, 2.80, and 371.3.

Done in Washington, DC, this 29th day of December, 2003.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 04–62 Filed 1–2–04; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Resource Advisory Committee Meeting

AGENCY: North Central Idaho Resource Advisory Committee, Kamiah, Idaho, USDA, Forest Service.

ACTION: Notice of meeting.

SUMMARY: Pursuant to the authorities in the Federal Advisory Committee act (Pub. L. 92–463) and under the Secure Rural Schools and Community Self-Determination Act of 2000 (Pub. L. 106–393) the Nez Perce and Clearwater National Forests' North Central Idaho Resource Advisory Committee will meet Friday, February 6, 2004, in Kooskia, Idaho for a business meeting. The meeting is open to the public.

SUPPLEMENTARY INFORMATION: The business meeting on February 6, at the IOOF Hall, 102 N. Main Street, Kooskia, ID, begins at 10 a.m. (p.s.t.). Agenda topics will include discussion of potential projects. A public forum will begin at 2:30 p.m.

FOR FURTHER INFORMATION CONTACT: Ihor Mereszczak, Staff Officer and Designated Federal Officer, at (208) 935–2513.

Dated: December 20, 2003.

Ihor Mereszczak,

Acting Forest Supervisor.

[FR Doc. 04–19 Filed 1–2–04; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF AGRICULTURE

Forest Service

Wrangell-Petersburg Reservoir Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Wrangell-Petersburg Resource Advisory Committee (RAC) will meet from 1 p.m. until 5:15 p.m. (or until the conclusion of public testimony) on Friday, January 23, and from 8 a.m. until 1 p.m., Saturday, January 24, 2004, in Petersburg, Alaska. The purpose of this meeting is to review, discuss and potentially recommend for funding proposals received pursuant to Title II, Public Law 106–393, H.R. 2389, the Secure Rural Schools and Community Self-Determination Act of 2000, also called the "Payments to States" Act. Public testimony regarding the proposals will also be taken.

DATES: The meeting will be held commencing at 1 p.m. on Friday, January 23, through 1 p.m., Saturday, January 24, 2004.

ADDRESSES: The meeting will be held at the Petersburg Lutheran Church, Holy Cross House, 407 Fram Street, Petersburg, Alaska.

FOR FURTHER INFORMATION CONTACT: Chip Weber, Wrangell District Ranger, P.O. Box 51, Wrangell, AK 99929, phone (907) 874–2323, e-mail *cweber@fs.fed.us*, or Patty Grantham, Petersburg District Ranger, P.O. Box 1328, Petersburg, AK 99833, phone (907) 772–3871, e-mail *pagrantham@fs.fed.us*. For further information on RAC history, operations, and the applications process, a Web site is available at *http://www.fs.fed.us/r10/ro/payments*.

SUPPLEMENTARY INFORMATION: This meeting will focus on the review and discussion of proposals received by the RAC for funding under Title II of the Payments to States legislation (Pub. L. 106–393), particularly proposals that were of high interest to the committee, but lacked enough information for the committee to act. New information will be introduced concerning these proposals. No new proposals (initial reading) will be discussed at this meeting. The committee may make recommendations for project funding at this meeting. A field trip to review proposals proximate to the Petersburg, Alaska, area may take place. The meeting is open to the public. Should members of the public wish to participate in the potential field trip, please contact Patty Grantham or Chip Weber at the above noted addresses/e-mails/telephone numbers. Public input opportunity will be provided and individuals will have the opportunity to address the committee at that time.

Dated: December 22, 2003.

Dennis Neill,

Acting Forest Supervisor.

[FR Doc. 04–66 Filed 1–2–04; 8:45 am]

BILLING CODE 3410–11–M

COMMISSION ON CIVIL RIGHTS

Sunshine Act Meeting

AGENCY: U.S. Commission on Civil Rights.

DATE AND TIME: Friday, January 9, 2004, 9:30 a.m.

PLACE: U.S. Commission on Civil Rights, 624 9th Street, NW., room 540, Washington, DC 20425.

STATUS:

Agenda

I. Approval of Agenda
II. Approval of Minutes of December 12, 2003 Meeting
III. Announcements
IV. Staff Director's Report
V. State Advisory Committee Report: Coping with Police Misconduct in West Virginia (West Virginia)
VI. Program Planning
VII. Future Agenda Items

FOR FURTHER INFORMATION CONTACT: Les Jin, Press and Communications (202) 376–7700.

Debra A. Carr,

Deputy General Counsel.

[FR Doc. 03–32339 Filed 12–31–03; 3:36 pm]

BILLING CODE 6335–01–M

DEPARTMENT OF COMMERCE

[I.D. 122903D]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Northeast Region Sea Scallop Exemption Requirements.

Form Number(s): None.

OMB Approval Number: 0648–0416.

Type of Request: Regular submission.

Burden Hours: 2,994.

Number of Respondents: 267.

Average Hours Per Response: 10 minutes for a daily observer report; 2 minutes for notifications 5 days before month of fishing or 5 days before leaving on a trip; and 5seconds for an automated VMS position report.

Needs and Uses: Sea scallop fishermen wishing to fish in exemption areas are subject to certain vessel monitoring system (VMS) and communication requirements. This submission requests extension of the currently approved collection for these scallop programs.

Affected Public: Business or other for-profit organizations; individuals or households: and not-for-profit institutions.

Frequency: On occasion, monthly, hourly, and daily.

Respondent's Obligation: Mandatory.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov)*.Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number 202–395–7285, or David_Rostker@omb.eop.gov.

Dated: December 23, 2003.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–92 Filed 1–2–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

[I.D. 122903B]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Southeast Region Office Socioeconomic Survey of Gulf Shrimp Fishermen.

Form Number(s): None.

OMB Approval Number: 0648–0476.

Type of Request: Regular submission.

Burden Hours: 558.

Number of Respondents: 500.

Average Hours Per Response: 1 hour and 7 minutes.

Needs and Uses: NOAA Fisheries has not collected this data for the Gulf shrimp fishery since 1992. Current economic and social data is needed for the Gulf shrimp fishery as a whole in order to accurately assess the positive and/or negative impacts of federal rules and regulations. The assessments are mandated under Executive Order 12866, the Regulatory Flexibility Act, Magnuson-Stevens/Sustainable Fisheries Acts (and the National Standards attached thereto), and the Endangered Species Act, among others. This survey will update this data, and is intended to be a recurring annual survey.

Affected Public: Business or other for-profit organizations.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395–3897.Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482–0266, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at *dHynek@doc.gov)*.Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, FAX number 202–395–7285, or David_Rostker@omb.eop.gov.

Dated: December 23, 2003.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–94 Filed 1–2–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

[Docket No. 03–BIS–01]

Action Affecting Export Privileges; Mahmoud Haghsheno Kashani

In the Matter of:

Mahmoud Haghsheno Kashani, also known as Mike Kashani, acting as an officer of Zimex, Inc.
5557 Northrise Road
Mississauga, Ontario
Canada L5M 6E2,
Respondent.

Order

The Bureau of Industry and Security, United States Department of Commerce ("BIS"), having initiated an administrative proceeding against Mahmoud Haghsheno Kashani, also known as Mike Kashani, acting as an office of Zimex, Inc. ("Kashani"), pursuant to Section 13(c) of the Export Administration Act of 1979, as amended (50 U.S.C. app. sections 2401–2420 (2000)) (the "Act"),[1] and the Export Administration Regulations (currently codified at 15 CFR Parts 730–774 (2003)) ("Regulations"),[2] based on the amended charging letter issued to Kashani that alleged that Kashani violated the Regulations on three occasions. Specifically, the charges are:

1. 15 CFR 764.2(c)—Attempted Export of Replacement Parts to Iran Without the Required License: On or about July 8, 1998, Kashani attempted to export replacement parts for multiple gas analyzers that were subject to the Regulations and to the Iranian Transaction Regulations from the United States through Germany to Iran without prior authorization from the Office of Foreign Assets Control of the U.S. Department of Treasury, in violation of Section 746.7 of the Regulations.

2. 15 CFR 764.2(e)—Acting with Knowledge of a Violation: In connection with the attempted export referenced above, between on or about March 9, 1998 and July 8, 1998, Kashani ordered and attempted to transfer the commodities from the United States through Germany to Iran knowing that the goods would be exported from the United States in violation of the Regulations.

3. 15 CFR 764.2(h)—Evasion—Making False Statements to Evade the Regulations: In connection with the

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[1] From August 21, 1994 through November 12, 2000, the Act was in lapse. During that period, the President, through Executive Order 12924, which had been extended by successive Presidential Notices, the last of which was August 3, 2000 (3 CFR, 2000 Comp. 397 (2001)), continued the Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C. sections 1701–1706 (2000)) (IEEPA). On November 13, 2000, the Act was reauthorized and it remained in effect through August 20, 2001. Since August 21, 2001, the Act has been in lapse and the President, through Executive Order 13222 of August 17, 2001 (3 C.F.R., 2001 Comp. 783 (2002)), as extended by the Notice of August 7, 2003 (68 FR 47833, August 11, 2003)), has continued the Regulations in effect under IEEPA.

[2] The Regulations are currently codified in the Code of Federal Regulations at 15 CFR Parts 730–774 (2003). The Regulations governing the violations at issue are found in the 1998 version of the Code of Federal Regulations. These Regulations are codified at 15 CFR Parts 730–774 (1998) and, to the degree to which they pertain to this matter, are substantially the same as the 2003 version.

attempted export referenced above, between on or about December 11, 1997 and July 8, 1998, Kashani, with intent to evade the provisions of Section 746.7 of the Regulations with respect to export to Iran, told the supplier of the replacement parts that those goods were bound for an end-user in Saudi Arabia, when Kashani knew that the good were, in fact, bound for an end-user in Iran. Kashani's false assertion that the end-user was located in Saudi Arabia was intended to induce the supplier to ship the goods from the United States.

BIS and Kashani having entered into a Settlement Agreement pursuant to § 766.18(b) of the Regulations whereby they agreed to settle this matter in accordance with the terms and conditions set forth therein, and the terms of the Settlement Agreement having been approved by me;

It is therefore ordered:

First, that for a period of five years from the date of this Order, Kashani, and when acting for or on behalf of Kashani, his representatives, agents, assigns or employees ("denied person") may not, directly or indirectly, participate in any way in any transaction involving any commodity, software, or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations, including, but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the regulations; or

C. Benefitting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

Second, that no person may, directly, do any of the following:

A. Export or reexport to or on behalf of the denied person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the denied person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the denied person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the denied person of any item subject to the Regulations that has been exported from the Untied States;

D. Obtain from the denied person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported form the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the denied person, or service any item, of whatever origin, that is owned, possessed or controlled by the denied person if such service involves the use of any item subject to the Regulations that has been or will be exported from the Untied States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

Third, that after notice and opportunity for comment as provided in § 766.23 of the Regulations, any person, firm, corporation, or business organization related to Kashani by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order.

Fourth, that this Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

Fifth, that a copy of this Order shall be delivered to the United States Coast Guard ALJ Docketing Center, 40 gay street, Baltimore, Maryland 21202–4022, notifying that office that this case is withdrawn from adjudication, as provided by Section 766.18 of the Regulations.

Sixth, that the amended charging letter, the Settlement Agreement, and this Order shall be made available to the public.

This Order, which constitutes the final agency action in this matter, is effective immediately.

Entered this 29th day of December 2003.

Julie L. Myers,

Assistant Secretary of Commerce for Export Enforcement.

[FR Doc. 04–101 Filed 1–2–04; 8:45 am]

BILLING CODE 3510–DT–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–818]

Notice of Preliminary Results of New Shipper Review of the Antidumping Duty Order on Certain Pasta From Italy

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of new shipper antidumping duty review.

SUMMARY: In response to a request by Pastificio Carmine Russo S.p.A. ("Russo") , the Department of Commerce ("the Department") is conducting a new shipper review of the antidumping duty order on certain pasta ("pasta") from Italy for the period of review ("POR") July 1, 2002, through December 31, 2002. We preliminarily determine that during the POR, Russo sold subject merchandise at less than normal value ("NV"). If these preliminary results are adopted in the final results of this new shipper review, we will instruct the U.S. Customs and Border Protection ("CBP") to assess antidumping duties equal to the difference between the export price ("EP") and NV. Interested parties are invited to comment on these preliminary results.

EFFECTIVE DATE: January 5, 2004.

FOR FURTHER INFORMATION CONTACT: Alicia Kinsey or Brian Ledgerwood, AD/CVD Enforcement, Office 6, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4793 or (202) 482–3836, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 24, 1996, the Department published in the **Federal Register** the antidumping duty order on pasta from Italy. *See Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy,* 61 FR 38547. On December 17, 2002, we received a request from Russo to initiate a new shipper review of Russo's sales of pasta from Italy. On February 24, 2003,

Russo submitted additional factual information regarding the new shipper review. On March 7, 2003, the Department published the notice of initiation of this new shipper antidumping duty review covering the period July 1, 2002, through December 31, 2002, listing Russo as the sole respondent. *See Certain Pasta from Italy: Notice of Initiation of New Shipper Antidumping Duty Review*, 68 FR 11044 (March 7, 2003) ("Initiation Notice").

On March 11, 2003, we sent a questionnaire to Russo, and instructed Russo to fill out sections A–C of the questionnaire. The Department did not require Russo to respond to section D of the questionnaire at that time.

On April 1, 2003, the Department requested additional information from Russo regarding the date of Russo's first sale. Respondent submitted its response on April 10, 2003.

On May 7, 2003, after several extensions, Russo submitted its response to sections A–C of the original questionnaire.

On May 22, 2003, petitioners [1] submitted cost allegations against Russo. On June 6, 2003, respondent submitted a response to petitioners' cost allegations. We determined that petitioners' cost allegations provided a reasonable basis to initiate a cost of production ("COP") investigation, and as a result, we initiated a cost investigation of Russo. *See* the COP initiation memorandum, dated June 24, 2003, in the case file in the Central Records Unit, main Commerce building, room B–099 ("the CRU").

Also on June 24, 2003, we informed Russo that it was now required to respond to section D of the antidumping questionnaire. *See* June 24, 2003, letter from the Department to the respondent, on file in the CRU. On August 4, 2003, after one extension, we received Russo's response to section D of the questionnaire.

On July 28, 2003, the Department published a 120-day extension of the preliminary results of this review. *See Certain Pasta from Italy: Extension of Time Limit for Preliminary Results of Antidumping Duty New Shipper Review*, 68 FR 44284 (July 28, 2003).[2]

On September 26, 2003, the Department issued a supplemental questionnaire to Russo. On October 2, 2003, we issued a letter clarifying information requested in the September 26, 2003, supplemental questionnaire. On October 24, 2003, after one extension, we received Russo's response to the supplemental questionnaire, including a response to the Department's clarification letter. On October 14, 2003, the Department issued another supplemental questionnaire to Russo. The Department received the response to this supplemental questionnaire on October 31, 2003. On November 7, 2003, the Department issued a third supplemental questionnaire, the response to which Russo filed on November 12, 2003.

We conducted verification of Russo's sales and cost information from November 10, 2003, through November 21, 2003.

Scope of Review

Imports covered by this review are shipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

Excluded from the scope of this review are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by the Instituto Mediterraneo di Certificazione, by Bioagricoop Scrl, by QC&I International Services, by Ecocert Italia, by Consorzio per il Controllo dei Prodotti Biologici, or by Associazione Italiana per l'Agricoltura Biologica.

The merchandise subject to review is currently classifiable under item 1902.19.20 of the *Harmonized Tariff Schedule of the United States ("HTSUS")*. Although the *HTSUS* subheading is provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Scope Rulings and Anti-Circumvention Inquiries

The Department has issued the following scope rulings to date:

(1) On August 25, 1997, the Department issued a scope ruling that multicolored pasta, imported in kitchen display bottles of decorative glass that are sealed with cork or paraffin and bound with raffia, is excluded from the scope of the antidumping and countervailing duty orders. *See* Memorandum from Edward Easton to Richard Moreland, dated August 25, 1997, on file in the CRU.

(2) On July 30, 1998, the Department issued a scope ruling, finding that multipacks consisting of six one-pound packages of pasta that are shrink-wrapped into a single package are within the scope of the antidumping and countervailing duty orders. *See* letter from Susan H. Kuhbach, Acting Deputy Assistant Secretary for Import Administration, to Barbara P. Sidari, Vice President, Joseph A. Sidari Company, Inc., dated July 30, 1998, which is available in the CRU.

(3) On October 23, 1997, the petitioners requested that the Department initiate an anti-circumvention investigation of Barilla, an Italian producer and exporter of pasta. The Department initiated the investigation on December 8, 1997 (62 FR 65673). On October 5, 1998, the Department issued its final determination that Barilla's importation of pasta in bulk and subsequent repackaging in the United States into packages of five pounds or less constitutes circumvention, with respect to the antidumping duty order on pasta from Italy pursuant to section 781(a) of the Tariff Act of 1930, as amended ("the Act") and 19 CFR 351.225(b). *See Anti-circumvention Inquiry of the Antidumping Duty Order on Certain Pasta from Italy: Affirmative Final Determination of Circumvention of the Antidumping Duty Order*, 63 FR 54672 (October 13, 1998).

(4) On October 26, 1998, the Department self-initiated a scope inquiry to determine whether a package weighing over five pounds as a result of allowable industry tolerances is within the scope of the antidumping and countervailing duty orders. On May 24, 1999, we issued a final scope ruling finding that, effective October 26, 1998, pasta in packages weighing or labeled up to (and including) five pounds four ounces is within the scope of the antidumping and countervailing duty orders. *See* Memorandum from John Brinkmann to Richard Moreland, dated May 24, 1999, which is available in the CRU.

(5) On April 27, 2000, the Department self-initiated an anti-circumvention inquiry to determine whether importation by Pastificio F.lli Pagani S.p.A. ("Pagani") of pasta in bulk and subsequent repackaging in the United States into packages of five pounds or

[1] New World Pasta Company; Dakota Growers Pasta Company; Borden Foods Corporation; and American Italian Pasta Company.

[2] **Note:** due to a clerical error, this **Federal Register** notice was published reporting a preliminary results due date of January 2, 2004. The correct deadline for these preliminary results is December 29, 2003.

less constitutes circumvention with respect to the antidumping and countervailing duty orders on pasta from Italy, pursuant to section 781(a) of the Act and 19 CFR 351.225(b). *See Certain Pasta from Italy: Notice of Initiation of Anti-circumvention Inquiry of the Antidumping and Countervailing Duty Orders*, 65 FR 26179 (May 5, 2000). On September 19, 2003, we published affirmative final determinations on the anti-circumvention inquiry. See Anti-circumvention Inquiry of the Antidumping and Countervailing Duty Orders on Certain Pasta from Italy: Affirmative Final Determinations of Circumvention of Antidumping and Countervailing Duty Orders, 68 FR 54888 (September 19, 2003).

Verification

As provided in section 782(i) of the Act, we conducted verification of the sales and cost information provided by Russo. We used standard verification procedures, including on-site inspection of the manufacturer's and its affiliate's facilities and examination of relevant sales and financial records. Our verification results are detailed in the verification reports placed in the case file in the CRU. We made certain minor revisions to certain sales and cost data based on verification findings. *See* December 24, 2003, memorandum to James Terpstra from Alicia Kinsey and Brian Ledgerwood, regarding verification of the sales response of Pastificio Carmine Russo S.p.A. (Russo) in the New Shipper Review of the Antidumping Duty Order of Certain Pasta from Italy ("Russo's sales verification report"); *see also* December 24, 2003, memorandum to Neal M. Halper, through Theresa L. Caherty, from Michael P. Harrison, regarding verification of the cost of production and constructed value response of Russo in the New Shipper Review of the Antidumping Duty Order of Certain Pasta from Italy ("Russo's cost verification report"); *see also* December 24, 2003, Analysis Memorandum for Pastificio Carmine Russo S.p.A. ("Russo's calculation memorandum"), on file in the CRU.

Affiliation and Collapsing

In Russo's May 7, 2003, response to the Department's questionnaire, Russo indicated that it is affiliated with a company that produces subject merchandise. On September 26, 2003, the Department issued a supplemental questionnaire to Russo seeking additional information about its affiliate. On October 2, 2003, petitioners submitted comments on Russo's May 7, 2003, questionnaire response. Petitioners' comments included a request that the Department seek additional information about its affiliate. In Russo's October 24, 2003, response to the Department's supplemental questionnaire, Russo provided additional information regarding the nature of the company and its production of subject merchandise. Although Russo acknowledges that the companies are affiliated, it has argued that the two companies should not be collapsed for purposes of this new shipper review.

Section 771(33) of the Act considers the following persons, among others, to be affiliated: Any officer or director of an organization and the organization; persons directly or indirectly owning, controlling, or holding, with power to vote, five percent or more of the outstanding stock or shares of an organization and the organization; two or more persons directly or indirectly controlling, controlled by, or under common control with, any person; and any person who controls any other person and that person.

Section 351.401(f)(1) of the Department's regulations states that in an antidumping proceeding, the Department "will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production." Section 351.401(f)(2) identifies factors to be considered to determine whether a significant potential for manipulation exists. However, it is not necessary to consider these factors if, under section 351.401(f)(1), the production facilities would require substantial re-tooling to restructure manufacturing priorities. *See Slater Steels Corp.* v. *United States*, Slip Op. 03–108 (CIT August 21, 2003) at 7, fn. 8; *see also Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Bar from Germany*, 67 FR 3159 (January 23, 2002) and accompanying Issues and Decisions Memorandum at Comment 15 (January 23, 2002).

During the POR, Russo's affiliate held a controlling interest of Russo's outstanding shares. Based on this information, and documentation presented in the questionnaire responses and at verification that evidence a corporate grouping, the Department has determined that Russo has sufficiently established that the two companies are affiliated. *See* the December 24, 2003, memorandum to Melissa Skinner from James Terpstra, Re: Whether to Collapse Pastificio Carmine Russo S.p.A. ("Russo") and its affiliate in the Preliminary Results ("Russo Collapsing Memo"), in the case file in the CRU. *See also* Russo's sales and cost verification reports, also in the case file in the CRU.

Having determined that the two companies are affiliated, the Department must next examine whether the producers have production facilities for similar or identical products that would not require "substantial retooling * * * in order to restructure manufacturing priorities." Based on Russo's questionnaire responses, and evidence gathered at verification, the Department has preliminarily determined that the two companies' production facilities would require substantial retooling to restructure manufacturing priorities. Russo produces only commodity pasta through automation, while its affiliate only produces hand-made pasta using artisan production techniques. Russo's affiliate is not capable of producing commodity pasta shapes, nor is Russo capable of producing hand-made pasta using artisan production techniques without substantial retooling. Due to the proprietary nature of the facts on which this determination is based, *see* the Russo Collapsing Memo for a more detailed analysis.

On the basis of this information, the Department has preliminarily determined not to collapse Russo and its affiliate, pursuant to section 351.401(f)(1) of the Department's regulations.

Product Comparisons

In accordance with section 771(16) of the Act, we first attempted to match contemporaneous sales of products sold in the United States and comparison markets that were identical with respect to the following characteristics: (1) Pasta shape; (2) type of wheat; (3) additives; and (4) enrichment. When there were no sales of identical merchandise in the home market to compare with U.S. sales, we compared U.S. sales with the most similar product based on the characteristics listed above, in descending order of priority.

For purposes of the preliminary results, where appropriate, we have calculated the adjustment for differences in merchandise based on the difference in the variable cost of manufacturing ("VCOM") between each U.S. model and the most similar home market model selected for comparison.

Comparisons to Normal Value

To determine whether sales of certain pasta from Italy were made in the United States at less than NV, we compared the EP to the NV, as described in the "Export Price" and "Normal Value" sections of this notice. In accordance with section 777A(d)(2) of the Act, we calculated monthly weighted-average prices for NV and compared these to individual U.S. transactions. *See* Russo's sale verification report and Russo's calculation memorandum, available in the CRU.

Export Price

For the price to the United States, we used EP in accordance with section 772(a) of the Act. We calculated EP because all of Russo's U.S. sales of subject merchandise were sold directly to the first unaffiliated purchaser in the United States prior to importation. We based EP on the packed free-on-board ("FOB") prices to the first unaffiliated customer in, or for exportation to, the United States. When appropriate, we reduced these prices to reflect any discounts.

In accordance with section 772(c)(2) of the Act, we made deductions, where appropriate, for movement expenses including inland freight from plant or warehouse to port of exportation, foreign brokerage, handling and loading charges, and export duties. In addition, when appropriate, we increased EP by an amount equal to the countervailing duty rate attributed to export subsidies in the most recently completed administrative review, in accordance with section 772(c)(1)(C) of the Act.

Russo reported the resale of subject merchandise that it purchased in Italy from unaffiliated producers. In those situations in which an unaffiliated producer of the subject pasta knew at the time of the sale that the merchandise was destined for the United States, the relevant basis for the EP would be the price between that producer and the respondent. *See Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Administrative Review and Notice of Determination Not to Revoke Order,* 63 FR 50867, 50876 (September 23, 1998). In the instant review, we determined that it was reasonable to assume that the unaffiliated producers knew or had reason to know at the time of sale that the ultimate destination of the merchandise was the United States because virtually all enriched pasta is sold to the United States. *See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Intent to Revoke Antidumping Duty Order in Part: Certain Pasta from Italy,* 65 FR 4867, 4869 (August 8, 2000). This decision was upheld in the final results of that review. Accordingly, consistent with our methodology in prior reviews (*see id.*), when Russo purchased pasta from other producers and we were able to identify resales of this merchandise to the United States, we excluded these sales of the purchased pasta from the margin calculation.

Normal Value

A. Selection of Comparison Markets

To determine whether there was a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared Russo's volume of home market sales of the foreign like product to the volume of its U.S. sales of the subject merchandise. Pursuant to sections 773(a)(1)(B) and 773(a)(1)(C) of the Act, because Russo had an aggregate volume of home market sales of the foreign like product that was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined that Russo's home market was viable.

B. Cost of Production Analysis

1. Calculation of COP

Before making any comparisons to NV, we conducted a COP analysis of Russo, pursuant to section 773(b) of the Act, to determine whether the respondent's comparison market sales were made below the COP. We calculated the COP based on the sum of the cost of materials and fabrication for the foreign like product, plus amounts for selling, general, and administrative expenses ("SG&A") and packing, in accordance with section 773(b)(3) of the Act. We relied on the respondent's information as submitted, except in instances where we used data with minor revisions based on verification findings. *See* Russo's calculation memorandum on file in the CRU, for a description of any minor revisions that we made.

2. Test of Comparison Market Prices

As required under section 773(b)(2) of the Act, we compared the weighted-average COP to the per-unit price of the comparison market sales of the foreign like product, to determine whether these sales had been made at prices below the COP within an extended period of time in substantial quantities, and whether such prices were sufficient to permit the recovery of all costs within a reasonable period of time. We determined the net comparison market prices for the below-cost test by subtracting from the gross unit price any applicable movement charges, discounts, rebates, direct and indirect selling expenses (also subtracted from the COP), and packing expenses.

3. Results of COP Test

Pursuant to section 773(b)(2)(C)(i) of the Act, where less than 20 percent of Russo's sales of subject merchandise were at prices less than the COP, we did not disregard any below-cost sales of that product because we determined that the below-cost sales were not made in "substantial quantities." Where 20 percent or more of Russo's sales of subject merchandise were at prices less than the COP, we determined such sales to have been made in "substantial quantities." *See* section 773(b)(2)(C) of the Act. Russo's sales were made within an extended period of time in accordance with section 773(b)(2)(B) of the Act, because they were made over the course of the POR, which was a period of not less than six months. We compared prices to POR-average costs and we determined that such sales were not made at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. Therefore, for purposes of this administrative review, we disregarded Russo's below-cost sales made in substantial quantities and used the remaining sales as the basis for determining NV, in accordance with section 773(b)(1) of the Act. *See* Russo's calculation memorandum on file in the CRU, for our calculation methodology and results.

C. Calculation of Normal Value Based on Comparison Market Prices

We calculated NV based on ex-works, FOB, or delivered prices to comparison market customers. We made deductions from the starting price, when appropriate, for handling, loading, inland freight, discounts, and rebates. In accordance with sections 773(a)(6)(A) and (B) of the Act, we added U.S. packing costs and deducted comparison market packing, respectively. In addition, we made circumstance of sale ("COS") adjustments for direct expenses, including imputed credit expenses, advertising, warranty expenses, and commissions, in accordance with section 773(a)(6)(C)(iii) of the Act.

We also made adjustments, in accordance with 19 CFR 351.410(e), for indirect selling expenses incurred on

comparison market or U.S. sales where commissions were granted on sales in one market but not in the other, the "commission offset." Specifically, where commissions are incurred in one market, but not in the other, we will limit the amount of such allowance to the amount of the other selling expenses incurred in the one market or the commissions allowed in the other market, whichever is less.

When comparing U.S. sales with comparison market sales of similar, but not identical, merchandise, we also made adjustments for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act and section 351.411 of the Department's regulations. We based this adjustment on the difference in VCOM between the foreign like product and subject merchandise, using POR-average costs.

Sales of pasta purchased by the respondent from unaffiliated producers and resold in the comparison market were treated in the same manner described above in the "Export Price" section of this notice.

D. Level of Trade

In accordance with section 773(a)(1)(B) of the Act, we determined NV based on sales in the home market at the same level of trade ("LOT") as the EP sales.

Pursuant to section 351.412(c)(2) of the Department's regulations, to determine whether home market sales were at a different LOT, we examined stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated (or arm's-length) customers. If the home market sales are at a different LOT and the differences affect price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make a LOT adjustment under section 773(a)(7)(A) of the Act.

Based on our analysis of the facts of this new shipper review, we preliminarily determine that there is no appreciable difference in the selling functions between the sales on which NV is based and the export transactions. Therefore, we did not find different levels of trade in the two markets. For a detailed description of our LOT methodology and a summary of our LOT findings for these preliminary results, *see* Russo's calculation memorandum, on file in the CRU.

Currency Conversion

For purposes of these preliminary results, we made currency conversions in accordance with section 773A(a) of the Act, based on the official exchange rates published by the Federal Reserve.

Preliminary Results of New Shipper Review

As a result of our review, we preliminarily determine that the following percentage weighted-average margin exists for Russo for the period July 1, 2002, through December 31, 2002:

Manufacturer/exporter	Margin (percent)
Pastificio Carmine Russo S.p.A.	9.75

The Department will disclose the calculations performed within five days of the date of publication of this notice to the parties of this proceeding in accordance with 19 CFR 351.224(b). An interested party may request a hearing within 30 days of publication of these preliminary results. *See* 19 CFR 351.310(c). Any hearing, if requested, ordinarily will be held 44 days after the date of publication of these preliminary results, or the first working day thereafter. Interested parties may submit case briefs no later than 30 days after the date of publication of these preliminary results. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs limited to issues raised in such briefs, may be filed no later than 35 days after the date of publication. *See* 19 CFR 351.309(d).

Parties who submit arguments are requested to submit with the argument (1) a statement of the issue, and (2) a brief summary of the argument. Further, parties submitting briefs are requested to provide the Department with an additional copy of the public version of any such briefs on diskette. The Department will issue the final results of this review, which will include the results of its analysis of issues raised in any such comments, or at a hearing, if requested, within 120 days of publication of these preliminary results.

Assessment Rate

Pursuant to 19 CFR 351.212(b), the Department will calculate an assessment rate for each importer of the subject merchandise produced by Russo. Upon issuance of the final results of this new shipper review, if any importer-specific assessment rates calculated in the final results are above *de minimis* (*i.e.*, at or above 0.5 percent), the Department will issue appraisement instructions directly to the CBP to assess antidumping duties on appropriate entries by applying the assessment rate to the entered value of the merchandise. For assessment purposes, we calculated importer-specific assessment rates for the subject merchandise produced by Russo by aggregating the dumping margins for all U.S. sales to each importer and dividing the amount by the total entered value of the sales to that importer.

Cash Deposit Requirements

To calculate the cash deposit rate for Russo in this new shipper review, we divided its total dumping margin by the total net value of Russo's sales during the review period.

The following deposit rate will be effective upon publication of the final results of this new shipper review for shipments of certain pasta produced by Russo entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: the cash deposit rate for Russo will be the rate established in the final results of this review; if the rate is less than 0.5 percent and, therefore, *de minimis*, the cash deposit will be zero. These cash deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

Notification to Importers

This notice serves as a preliminary 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 and countervailing duties occurred and the subsequent assessment of double antidumping duties.

This new shipper review is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: December 24, 2003.

Holly A. Kuga,

Acting Assistant Secretary for Import Administration.

[FR Doc. 04–77 Filed 1–2–04; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Fire Test Measurement Needs

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice of meeting.

SUMMARY: The National Institute of Standards and Technology (NIST) announces its intent to hold a meeting to discuss measurement needs for fire testing laboratories. The meeting will be held at the NIST Gaithersburg campus, on January 20 and 21, 2004, and is open to all interested parties.

DATES: The meeting will begin at 1 p.m. on January 20, 2004, and conclude at noon on January 21, 2004. Those wishing to attend must register by January 15, 2004.

ADDRESSES: The meeting will be held in room B245 of the Polymers Building at the NIST Gaithersburg Campus, 100 Bureau Drive, Gaithersburg, MD.

FOR FURTHER INFORMATION CONTACT: Those wishing to attend should contact Dr. William Grosshandler at the National Institute of Standards and Technology, Mail Stop 8660, 100 Bureau Drive, Gaithersburg, MD, 20899–8660, or by e-mail at *william.grosshandler@nist.gov* or by telephone at (301) 975–2310.

SUPPLEMENTARY INFORMATION: Commerce involving a multitude of materials, construction products, consumer products and fire protection systems is regulated to ensure the fire safety of the public. Standard test methods have been developed over the past 100 years, many based upon research conducted at NIST, that enable these materials and products to be rated as acceptable (or not) for various applications, depending upon regulations enforced by the authority having jurisdiction. By in large, these test methods are prescriptive in nature. The ratings or classifications obtained from these tests provide a relative measure of the one product versus another, but often there is little relation between a rating or classification and the performance of the product or material in an actual fire situation. The distinction between one rating or classification and the next may not be justified by the variability in the behavior of the material or product and the ability to conduct the test in a precise manner. Fire testing is hampered by the complexity of the physical, thermal and chemical processes involved, the variability of the environment under which the product is expected to perform, the fact that fire performance is often an afterthought in the design process, and the high stakes (*i.e.*, potential for loss of life and property) associated with being wrong in the rating. The concern for public safety is countered by a concern not to unreasonably hamper market forces or to put up trade barriers. The following questions arising from the complexity of the fire testing arena, originally brought up at a NIST workshop on fire test measurements in June, 2001, are in need of further discussion:

- How can we promote best practices for fire testing?
- What are the major sources of measurement uncertainty in standard fire tests?
- How can new fire measurement technologies be transitioned into practice, operators be trained, and round-robin testing be better coordinated?
- Is there a need for a clearing house for information on international harmonization and performance-based codes that impact fire testing?
- Can the interests of North American fire testing laboratories be best preserved through scientific understanding and best practices?
- How can two-way communications between fire testing laboratories and code officials, manufacturers of regulated materials and products, and consumer interest groups be improved?

The meeting will be held at the NIST Gaithersburg campus, on January 20 and 21, 2004, and is open to all interested parties.

Dated: December 22, 2003.

Hratch G. Semerjian,

Acting Deputy Director.

[FR Doc. 04–36 Filed 1–2–04; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

The 89th Interim Meeting of the National Conference on Weights and Measures

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Announcement of public meeting of the National Conference on Weights and Measures.

SUMMARY: Notice is hereby given that the interim meeting of the National Conference on Weights and Measures will be held January 25 through January 28, 2004, at the Hyatt Regency Bethesda, Bethesda, Maryland. This meeting is open to the public. The National Conference on Weights and Measures is an organization of weights and measures enforcement officials of the States, counties, and cities of the United States, and private sector representatives. The interim meeting of the Conference brings together enforcement officials, other government officials, and representatives of business, industry, trade associations, and consumer organizations to discuss subjects that related to the field of weights and measures technology and administration. Pursuant to (15 U.S.C. 272(b)(6)), the National Institute of Standards and Technology supports the National Conference on Weights and Measures in order to promote uniformity among the States in the complexity of laws, regulations, methods, and testing equipment that comprises regulatory control by the States of commercial weighing and measuring.

DATES: January 25–28, 2004.

ADDRESSES: Hyatt Regency Bethesda, Bethesda, Maryland.

FOR FURTHER INFORMATION CONTACT: Henry V. Oppermann, Chief, NIST, Weights and Measures Division, 100 Bureau Drive, Stop 2600, Gaithersburg, MD 20899–2600. Telephone (301) 975–4004, or e-mail: *owm@nist.gov.*

Dated: December 23, 2003.

Hratch G. Semerjian,

Acting Deputy Director.

[FR Doc. 04–10 Filed 1–2–04; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122903C]

Proposed Information Collection; Comment Request; Standardized Application and Performance Report Formats for NMFS Noncompetitive Grants

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before March 5, 2004.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW,

Washington, DC 20230 (or via the Internet at *dHynek@doc.gov)*.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to JoAnna Grable, (301) 713–1364, or at *JoAnna.Grable@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

In 2003, NOAA awarded approximately 600 grants for sponsored fishery-related activities involving about $350 million in Federal funds. About 60% of the total number of fishery grant awards (360) were made on a noncompetitive basis. Many of these noncompetitive grants provide pass through funds to states and other entities to support such ongoing activities as: fisheries research and data collection, participation in international fisheries commissions, fishery management council operations, and the operation of fish hatcheries.

This information collection will provide noncompetitive grant applicants and recipients with standardized guidance on information required by the National Marine Fisheries Service (NMFS) in a project narrative (as part of a grant application) and the information required in interim and final performance reports. The information collection will assist NOAA and NMFS staff in the review and management of the noncompetitive grants.

Currently, NMFS does not require grant applicants and recipients of noncompetitive grants to provide standardized information in the project narratives (application) and performance reports. Applicants for and recipients of noncompetitive grants provide information they deem appropriate, or information prescribed by their particular organization. NMFS requests applicants to provide standardized information in project narrative to aid Agency staff in determining whether proposed activities are: allowed under the funding authority; considered technically sound; investigators qualified; and budget costs correlate to proposed work activities. Similarly, NMFS requests recipients of noncompetitive grants to provide standardized information about ongoing or completed grant activities to assist staff in evaluating and certifying whether the recipient is meeting or has met the goals and objectives established in the award agreement.

II. Method of Collection

The Agency will send a letter or e-mail to noncompetitive grant applicants and include a written format describing what information is required in the project narrative portion of a grant application. When the application is approved for funding, the Agency will include interim and final performance report formats as a special award condition to the grant agreement. These report formats will prescribe all information that must be included by the recipient in performance reports.

III. Data

OMB Number: None.

Form Number: None.

Type of Review: Regular submission.

Affected Public: State, Local or Tribal Government; not-for- profit institutions; business or other for profit organizations; and household or individuals.

Estimated Number of Respondents: 360.

Estimated Time Per Response: 10 hours for a Project Narrative; 5 hours for a Progress Report; and 15 hours for a Final Report.

Estimated Total Annual Burden Hours: 12,600.

Estimated Total Annual Cost to Public: $21,960.

IV. Request for Comments

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: December 23, 2003.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 04–93 Filed 1–2–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122903F]

Mid-Atlantic Fishery Management Council; Public Meetings

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

ACTION: Notice of public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council) and its Demersal Species Committee (meeting as a Council committee of the whole together with the Atlantic States Marine Fisheries Commission's Summer Flounder, Scup, and Black Sea Bass Board), Ecosystems Committee, and Squid, Mackerel, Butterfish Committee will hold a public meeting.

DATES: The meeting will be held on Tuesday, January 20, through Thursday, January 22, 2004. See **SUPPLEMENTARY INFORMATION** for specific dates and times.

ADDRESSES: This meeting will be held at the Old Town Holiday Inn Select, 480 King Street, Old Town Alexandria, VA, telephone: 703–549–6080.

Council address: Mid-Atlantic Fishery Management Council, 300 S. New Street, Dover, DE 19904, telephone: 302–674–2331.

FOR FURTHER INFORMATION CONTACT: Daniel T. Furlong, Executive Director, Mid-Atlantic Fishery Management Council; telephone: 302–674–2331, ext. 19.

SUPPLEMENTARY INFORMATION: On Tuesday, January 20, the Demersal Species Committee meeting as a Council Committee of the Whole with the Atlantic States Marine Fisheries Commission's Summer Flounder, Scup, and Black Sea Bass Board will meet from 3 p.m. to 5 p.m. On Wednesday, January 21, The Ecosystems Committee will meet from 8 a.m. to 10 a.m. The Squid, Mackerel, Butterfish Committee will meet from 10 a.m. to noon. Council will meet from 1 p.m. to 5 p.m. On Thursday, January 22, Council will meet from 8 a.m. until approximately 3 p.m.

Agenda items for the Council's committees and the Council itself are: Address Framework 5 multi-year specification action for summer flounder, scup, and black sea bass; Address how to deal with rebuilt stocks, and review essential fish habitat (EFH) issues and develop comments on NMFS EFH final rule, address use of habitat areas of particular concerns and marine

protected areas in Mid-Atlantic exclusive economic zone and consider renaming the Ecosystem Committee; Finalize issues to be addressed for Amendment 9 public hearing draft and address issues to be included in Amendment 10 to the Atlantic Mackerel, Squid, and Butterfish fishery management plan; Receive briefing from NMFS officials on its fishery dependent data collection systems (recreational and commercial) and receive comment on the proposed regulations for electronic dealer reporting; Receive update on NMFS bycatch activities; Receive report on cooperative research activities involving National Fisheries Institute-SMC, Rutgers University, Northeast Fisheries Science Center; Receive report on most recent Stock Assessment Workshop/Stock Assessment Research Committee process; Receive and hear committee and organizational reports, and act on any new and/or continuing business, *e.g.*, reinitiation of tilefish limited entry system.

Although non-emergency issues not contained in this agenda may come before the Council for discussion, these issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final actions to address such emergencies.

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Joanna Davis at the Council (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: December 30, 2003.

Richard W. Surdi,

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

[FR Doc. E4–196 Filed 01–02–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122903E]

New England Fishery Management Council; Public Meetings

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Social Sciences Advisory Committee in January, 2004 to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: The meeting will be held on Wednesday, January 21, 2004 at 10 a.m.

ADDRESSES: The meeting will be held at the Holiday Inn, 31 Hampshire Street, Mansfield, MA 02048; telephone: (508) 339–2200.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council (978) 465–0492.

SUPPLEMENTARY INFORMATION: The Social Science Advisory Committee will review progress on the development of Amendment 1 to the Herring Fishery Management Plan (FMP) including social and economic data and analytical approaches being utilized in the Herring Amendment 1 Draft Environmental Impact Statement (DSEIS).

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting dates.

Dated: December 30, 2003.

Richard W. Surdi,

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

[FR Doc. E4–197 Filed 01–02–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 122303J]

Marine Mammals; File No. 1048–1717

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

ACTION: Issuance of permit.

SUMMARY: Notice is hereby given that Dr. Peter J. Stein, Scientific Solutions, Inc., Nashua, New Hampshire, has been issued a permit to take the marine mammals listed below for purposes of. scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376, *www.nmfs.noaa.gov/prot__res*; and

Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

FOR FURTHER INFORMATION CONTACT: Tammy Adams or Steve Leathery, (301)713–2289.

SUPPLEMENTARY INFORMATION: On November 5, 2003, notice was published in the **Federal Register** (68 FR 62563) that a request for a scientific research permit to take gray whales (*Eschrtictius robustus*), endangered blue whales (*Balaenoptera musculus*), endangered fin whales (*B. physalus*), endangered humpback whales (*Megaptera novaeangliae*), minke whales (*B. acutorostrata*), endangered sei whales (*B. borealis*), endangered sperm whales (*Physeter macrocephalus*), harbor porpoise (*Phocoena phocoena*), Dall's porpoise (*Phocoenoides dalli*), Pacific white-sided dolphins (*Lagenorhynchus obliquidens*), bottlenose dolphins (*Tursiops truncatus*), Risso's dolphins (*Grampus griseus*), short-beaked common dolphins (*Delphinus delphis*), northern right whale dolphins (*Lissodephis borelais*), killer whales (*Orcinus orca*), short-finned pilot whales (*Globicephala macrorhynchus*), Baird's beaked whales (*Berardius bairdii*), mesoplodont beaked whales (*Mesoplodon spp.*), Cuvier's beaked whales (*Ziphius cavirostris*), California sea lions (*Zalophus californianus*), harbor seals (*Phoca vitulina*), threatened Guadalupe fur seals (*Arctocephalus*

townsendi), northern elephant seals (*Mirounga angustirostris*), northern fur seals (*Callorhinus ursinus*), and threatened Steller sea lions (*Eumetopias jubatus*) had been submitted by the above-named individual and that a draft environmental assessment had been prepared on the proposed research. An EA has been prepared with a finding of no significant impact. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

The permit authorizes Dr. Stein to expose up to 1200 gray whales, 200 minke whales, 150 harbor porpoise, 150 Dall's porpoise, 400 Pacific white-sided dolphin, 150 bottlenose dolphin, 2000 Risso's dolphin, 2000 short-beaked common dolphin, 1200 northern right whale dolphin, 200 killer whales, 200 short-finned pilot whales, 30 Baird's beaked whales, 30 Cuvier's beaked whales, 30 Mesoplodont beaked whales, 500 California sea lions, 500 harbor seals, 500 northern elephant seals, and 200 northern fur seals to sounds from low-power high-frequency "whale-finder" sonars per year offshore of central California. The purpose of the proposed research is to validate and improve the ability of whale-finder sonar systems to detect marine mammals without adversely affecting them.

Dated: December 24, 2003.

Tammy C. Adams,

Acting Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 04–91 Filed 1–2–04; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF DEFENSE

Office of the Secretary of Defense

Meeting of the DoD Advisory Group on Electron Devices

AGENCY: Advisory Group on Electron Devices, Department of Defense.

ACTION: Notice.

SUMMARY: The DoD Advisory Group on Electron Devices (AGED) announces a closed session meeting.

DATES: The meeting will be held at 0900, Wednesday, January 14, 2004.

ADDRESSES: The meeting will be held at Palisades Institute for Research Services, 1745 Jefferson Davis Highway, Suite 500, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Mr. Eric Carr, AGED Secretariat, 1745 Jefferson Davis Highway, Crystal Square Four, Suite 500, Arlington, Virginia 22202.

SUPPLEMENTARY INFORMATION: The mission of the Advisory Group is to provide advice to the Under Secretary of Defense for Acquisition, Technology and Logistics to the Director of Defense Research and Engineering (DDR&E), and through the DDR&E to the Director, Defense Advanced Research Projects Agency and the Military Departments in planning and managing an effective and economical research and development program in the area of electron devices.

The AGED meeting will be limited to review of research and development programs which the Military Departments propose to initiate with industry, universities or in their laboratories. The agenda for this meeting will include programs on Radiation Hardened Devices, Microwave Tubes, Displays and Lasers. The review will include details of classified defense programs throughout.

In accordance with section 10(d) of Public Law 92–463, as amended, (5 U.S.C. App. section 10(d)), it has been determined that this Advisory Group meeting concerns matters listed in 5 U.S.C. 552b(c)(1), and that accordingly, this meeting will be closed to the public.

Dated: December 24, 2003.

L.M. Bynum,

Alternate, OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 04–27 Filed 1–2–04; 8:45 am]

BILLING CODE 5001–06–M

DEPARTMENT OF DEFENSE

Department of the Army

Privacy Act of 1974; System of Records

AGENCY: Department of the Army, DoD.

ACTION: Notice to alter a system of records.

SUMMARY: The Department of the Army is proposing to alter a system of records notice in its existing inventory of records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

The Department of the Army is proposing to alter the existing system of records to expand the category of individuals covered, the category of records being maintained, and the purposes for collecting and maintaining the records.

DATES: This proposed action will be effective without further notice on February 4, 2004, unless comments are received which result in a contrary determination.

ADDRESSES: Department of the Army, Freedom of Information/Privacy Act Office, U.S. Army Records Management and Declassification Agency, ATTN: TAPC–PDD–FP, 7798 Cissna Road, Suite 205, Springfield, VA 22153–3166.

FOR FURTHER INFORMATION CONTACT: Ms. Janice Thornton at (703) 806–7137/DSN 656–7137.

SUPPLEMENTARY INFORMATION: The Department of the Army systems of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on December 16, 2003, to the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individuals," dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 24, 2003.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

A0040–5a DASG

SYSTEM NAME:

DoD Health Surveillance/Assessment Registries (April 4, 2003, 68 FR 16484).

CHANGES:

* * * * *

SYSTEM NAME:

Delete entry and replace with "Defense Medical Surveillance System."

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "Department of Defense military personnel (active and reserve) and their family members; DoD civilian personnel deploying with the Armed Forces; applicants for military service; and individuals who participate in DoD health surveys."

CATEGORIES OF RECORDS IN THE SYSTEM:

Delete entry and replace with "The Defense Medical Surveillance System contains up-to-date and historical data on diseases and medical events (*e.g.*, hospitalizations, ambulatory visits, reportable diseases, HIV tests, acute respiratory diseases, and health risk

appraisals) and longitudinal data on personnel and deployments.

Information in this system of records originates from personnel systems, medical records, health surveys (*e.g.*, Pentagon Post Disaster Health Assessment) and/or health assessments made from specimen collections (remaining serum from blood samples) from which serologic tests can be performed (serum number, specimen locator information, collection date, place of collection).

Records being maintained include individual's name, Social Security Number, date of birth, sex, branch of service, home address, age, medical treatment facility, condition of medical and physical health and capabilities, responses to survey questions, register number assigned, and similar records, information and reports, relevant to the various registries; and specimen collections (remaining serum from blood samples) from which serologic tests can be performed (serum number, specimen locator information, collection date, place of collection)."

* * * * *

PURPOSE(S):

Delete entry and replace with "The Defense Medical Surveillance System (DMSS) supports a systematic collection, analysis, interpretation, and reporting of standardized, population based data for the purposes of characterizing and countering medical threats to a population's health, well being, and performance.

The Army Medical Surveillance Activity, which operates the DMSS, routinely publishes summaries of notifiable diseases, trends of illnesses of special surveillance interest and field reports describing outbreaks and case occurrences in the *Medical Surveillance Monthly Report,* the principal vehicle for disseminating medical surveillance information of broad interest. Through DMSS, The Army Medical Surveillance Activity provides the sole link between the DoD Serum Repository and other databases. This repository contains over 32 million frozen serum specimens and is the largest of its kind in the world."

* * * * *

RETRIEVABILITY:

Delete entry and replace with "Information is retrieved by individual's name, Social Security Number, registry number and specimen number."

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Chief of Army Medical Surveillance Activity, The Surgeon General, Headquarters, Department of the Army, 5109 Leesburg Pike, Falls Church, VA 22041–3258."

* * * * *

RECORD SOURCE CATEGORIES:

Delete entry and replace with "From the individual, personnel and medical records, and mortality reports."

* * * * *

A0040–5a DASG

SYSTEM NAME:

Defense Medical Surveillance System.

SYSTEM LOCATION:

U.S. Army Center for Health Promotion and Prevention Medicine, 5158 Blackhawk Road, Aberdeen Proving Ground, MD 21010–5403; and

Army Medical Surveillance Activity, Building T–20, Room 213, 6900 Georgia Avenue, NW., Washington, DC 20307–5001.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Department of Defense military personnel (active and reserve) and their family members; DoD civilian personnel deploying with the Armed Forces; applicants for military service; and individuals who participate in DoD health surveys.

CATEGORIES OF RECORDS IN THE SYSTEM:

The Defense Medical Surveillance System contains up-to-date and historical data on diseases and medical events (*e.g.*, hospitalizations, ambulatory visits, reportable diseases, HIV tests, acute respiratory diseases, and health risk appraisals) and longitudinal data on personnel and deployments.

Information in this system of records originates from personnel systems, medical records, health surveys (*e.g.*, Pentagon Post Disaster Health Assessment) and/or health assessments made from specimen collections (remaining serum from blood samples) from which serologic tests can be performed (serum number, specimen locator information, collection date, place of collection).

Records being maintained include individual's name, Social Security Number, date of birth, sex, branch of service, home address, age, medical treatment facility, condition of medical and physical health and capabilities, responses to survey questions, register number assigned, and similar records, information and reports, relevant to the various registries; and specimen collections (remaining serum from blood samples) from which serologic tests can be performed (serum number, specimen locator information, collection date, place of collection).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 3013, Secretary of the Army, 10 U.S.C. 8013, Secretary of the Air Force, 10 U.S.C. 5013, Secretary of the Navy; DoD Instruction 1100.13, Surveys of DoD Personnel; DoD Directive 6490.2, Joint Medical Surveillance; DoD Directive 6490.3, Implementation and Application of Joint Medical Surveillance for Deployments; and E.O. 9397 (SSN).

PURPOSE(S):

The Defense Medical Surveillance System (DMSS) supports a systematic collection, analysis, interpretation, and reporting of standardized, population based data for the purposes of characterizing and countering medical threats to a population's health, well being, and performance.

The Army Medical Surveillance Activity, which operates the DMSS, routinely publishes summaries of notifiable diseases, trends of illnesses of special surveillance interest and field reports describing outbreaks and case occurrences in the *Medical Surveillance Monthly Report,* the principal vehicle for disseminating medical surveillance information of broad interest. Through DMSS, the Army Medical Surveillance Activity provides the sole link between the DoD Serum Repository and other databases. This repository contains over 32 million frozen serum specimens and is the largest of its kind in the world.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD "Blanket Routine Uses" set forth at the beginning of the Army's compilation of systems of records notices also apply to this system, except that these routine uses do not apply to the Serum Repository.

Note: This system of records contains individually identifiable health information. The DoD Health Information Privacy Regulation (DoD 6025.18–R) issued pursuant to the Health Insurance Portability and Accountability Act of 1996, applies to most such health information. DoD 6025.18–R may place additional procedural requirements on the uses and disclosures of such information beyond those found in the Privacy Act of

1974 or mentioned in this system of records notice.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records in file folders and electronic storage media.

RETRIEVABILITY:

Information is retrieved by individual's name, Social Security Number, registry number, and specimen number.

SAFEGUARDS:

Records are maintained within secured buildings in areas accessible only to persons having official need, and who therefore are properly trained and screened. Automated segments are protected by controlled system passwords governing access to data.

RETENTION AND DISPOSAL:

Records are destroyed when no longer needed for reference and for conducting business.

SYSTEM MANAGER(S) AND ADDRESS:

Chief of Army Medical Surveillance Activity, The Surgeon General, Headquarters, Department of the Army, 5109 Leesburg Pike, Falls Church, VA 22041–3258.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Commander, U.S. Army Center for Health Promotion and Prevention Medicine, 5158 Blackhawk Road, Aberdeen Proving Ground, MD 21010–5403.

For verification purposes, individual should provide their full name, Social Security Number, any details which may assist in locating record, and their signature.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Commander, U.S. Army Center for Health Promotion and Prevention Medicine, 5158 Blackhawk Road, Aberdeen Proving Ground, MD 21010–5403.

For verification purposes, individual should provide their full name, Social Security Number, any details which may assist in locating record, and their signature.

CONTESTING RECORD PROCEDURES:

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340–21; 32 CFR part 505; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

From the individual, personnel and medical records, and mortality reports.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 04–21 Filed 1–2–04; 8:45 am]
BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Logistics Agency

Privacy Act of 1974; Systems of Records

AGENCY: Defense Logistics Agency, DoD.

ACTION: Notice to add a system of records.

SUMMARY: The Defense Logistics Agency proposes to add a system of records notice to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This action will be effective without further notice on February 4, 2004 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Privacy Act Officer, Headquarters, Defense Logistics Agency, ATTN: DSS–B, 8725 John J. Kingman Road, Suite 2533, Fort Belvior, VA 22060–6221.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Salus at (703) 767–6183.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on December 16, 2003, to the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: December 24, 2003.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

S600.40

SYSTEM NAME:

Readiness and Accountability Records.

SYSTEM LOCATION:

Customer Operations and Readiness, Headquarters Defense Logistics Agency, 8725 John J. Kingman, Road, Stop 4141, Fort Belvoir, VA 22060–6221, and the heads of DLA field activities. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Military members assigned to DLA, employees, and contractors who are injured, made ill, involuntarily absent, or otherwise unaccounted for as a result of contingent or hostile operations.

CATEGORIES OF RECORDS IN THE SYSTEM:

Name; Social Security Number; age; home addresses (surface and electronic); home telephone numbers; duty assignment data; and details of the incident, including status reports.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 1501 *et seq.*, Missing Persons; 29 U.S.C. 651 *et seq.*, The Occupational Safety and Health Act of 1970 (OSHA); E.O. 9397 (SSN); E.O. 12196, Occupational Safety and Health Programs for Federal Employees; 29 CFR 1960, Subpart I, Recordkeeping and Reporting Requirements for Federal Occupational Safety and Health Programs.

PURPOSE(S):

Information is maintained to account for individuals during contingent or hostile operations; to comply with reporting requirements; to analyze readiness; and to prepare statistical reports as required.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To the Department of Labor to comply with the requirement to report Federal civilian employee on-the-job accidents (29 CFR part 1960).

To the primary next of kin, other family members or a previously designated person, upon request, to comply with 10 U.S.C. 1501 and 1506.

The DoD 'Blanket Routine Uses' set forth at the beginning of DLA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are stored in paper and electronic formats.

RETRIEVABILITY:

Retrieved by name, Social Security Number, or hostile/contingent area.

SAFEGUARDS:

Records are maintained in a controlled area with physical entry restricted by the use of badges, card swipe, or sign-in protocols. Electronic records are deployed on an accredited, password controlled system utilizing system-generated forced password change protocols. Users are trained to lock or shutdown their workstations when leaving the work area. Paper records are maintained in areas accessible only to DLA personnel who must use the records to perform their duties. Records are secured in locked or guarded buildings, locked offices, or locked cabinets during non-duty hours.

RETENTION AND DISPOSAL:

Records are destroyed 2 years after no further action is required or when no longer needed, whichever is later.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Customer Operations and Readiness (J–4), Headquarters, Defense Logistics Agency, 8725 John J. Kingman Road, Stop 4141, Fort Belvoir, VA 22060–6221; and the heads of DLA field level activities. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Privacy Act Officer, Defense Logistics Agency, ATTN: DSS–B, 8725 John J. Kingman Road, Stop 6220, Fort Belvoir, VA 22060–6221, or the Privacy Act Officer of the particular DLA field activity involved. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address inquiries to the Privacy Act Officer, Defense Logistics Agency, ATTN: DSS–B, 8725 John J. Kingman Road, Stop 6220, Fort Belvoir, VA 22060–6221, or the Privacy Act Officer of the particular DLA field activity involved. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.

CONTESTING RECORD PROCEDURES:

The DLA rules for accessing records, for contesting contents and appealing initial agency determinations are contained in 32 CFR part 323 or may be obtained from the Privacy Act Officer, Headquarters, Defense Logistics Agency, ATTN: DSS–B, 8725 John J. Kingman Road, Stop 6220, Fort Belvoir, VA 22060–6221.

RECORD SOURCE CATEGORIES:

Record subjects, commanders, supervisors, medical units, security offices, police and fire departments, investigating officers, and witnesses.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 04–25 Filed 1–2–04; 8:45 am]
BILLING CODE 5001–06–U

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Intent [To Prepare a Programmatic Environmental Impact Statement] for a Proposed Introduction of the Oyster Species, Crassostrea Ariakensis, Into the Tidal Waters of Maryland and Virginia To Establish a Naturalized, Reproducing, and Self-Sustaining Population of This Oyster Species

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice of intent.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is the lead Federal agency. The Virginia Marine Resources Commission (VMRC) on behalf of the Commonwealth of Virginia and the Maryland Department of Natural Resources (MDNR) on behalf of the State of Maryland are the lead state agencies (States). The lead agencies, in cooperation with the U.S. Environmental Protection Agency (EPA), the National Oceanographic and Atmospheric Administration (NOAA), and the U.S. Fish and Wildlife Service (FWS), announce their intent to prepare a programmatic Environmental Impact Statement (EIS) to evaluate alternative approaches to increasing oyster populations into the tidal waters of Maryland and Virginia (Chesapeake and coastal bays) to provide the following benefits. The benefits of a rehabilitated oyster resource include the potential for improved water quality, creation of aquatic habitat, and the re-establishment of an economically viable oyster industry preserving the region's culture associated with working waterman.

The proposed action to be evaluated in the EIS will be a proposal by the states to introduce the Asian oyster species, Crassostrea ariakensis, propagated from existing 3rd or later generation of the Oregon stock of this species, into the tidal waters of Maryland and Virginia to increase oyster populations. The States and the Corps will continue native oyster (C. virginica) restoration efforts throughout the Chesapeake Bay.

DATES: MEETINGS: Public scoping meetings will be held January 26, 2004, 7 p.m. at MD DNR, Tawes Building, Annapolis, MD 21401 and January 28, 2004 at 6 p.m. at the VMRC, 2600 Washington Avenue, Newport News, VA.

COMMENTS: Submit comments by February 20, 2004.

ADDRESSES: Written comments on the scope of the programmatic EIS or request for information should be sent to Mr. Peter Kube at the U.S. Army Corps of Engineers, Regulatory Branch, 803 Front Street, Norfolk, VA 23510 or sent via e-mail at *peter.r.kube@usace.army.mil*.

FOR FURTHER INFORMATION CONTACT: Questions about the proposed action and Draft EIS can be answered by Mr. Peter Kube at the Corps, (757) 441–7504, Mr. Thomas O'Connell, Fisheries Service, MDNR, 410–260–8261, or Mr. Jack Travelstead, VMRC, (757) 247–2247.

SUPPLEMENTARY INFORMATION:

Proposed Action

The State of Maryland and Commonwealth of Virginia propose to introduce the oyster species, Crassostrea ariakensis, into the tidal waters of Maryland and Virginia, beginning in 2005 or as soon as a rigorous, scientifically based EIS can be undertaken and a Record of Decision prepared, for the purpose of establishing a naturalized, reproducing, and self-sustaining population of this oyster species. Diploid C. ariakensis would be propagated from existing 3rd or later generation of the Oregon stock of this species, in accordance with the

International Council for the Exploration of the Sea's (ICES) 1994 Code of Practices on the Introductions and Transfers of Marine Organisms. Deployment of diploid C. ariakensis from hatcheries is proposed to occur first on State designated sanctuaries separate from native oyster restoration projects, where harvesting would be prohibited permanently, and then on harvest reserve and special management areas where only selective harvesting would be allowed.

The States further propose to continue native oyster (C. virginica) restoration efforts with the Corps throughout the Chesapeake Bay by using the best available restoration strategies and stock assessment techniques, including the maintenance and expansion of the existing network of sanctuaries and harvest reserves, enhancing reproduction through broodstock enhancement, and supplementing natural recruitment of this species with hatchery produced spat.

The objective of this proposal and continuing restoration of native populations is to establish a self-sustaining oyster population that reaches a level of abundance in Chesapeake Bay that would support sustainable harvests comparable to harvest levels during the period 1920–1970. The benefits of a rehabilitated oyster population may include: Improving water clarity by filtering phytoplankton, suspended solids and organic particles from the water, providing important reef habitat for oysters, finfish, crabs and a diversity of other species; enhancing essential fish habitat, rehabilitating an oyster population capable of supporting an economically viable oyster industry, and preserving the Chesapeake Bay's communities and culture associated with working waterman.

Purpose and Need

Oysters are a keystone species in the Bay ecosystem. Oyster management in Chesapeake Bay has failed to prevent native oyster populations from declining to less than one percent of their historic levels in the face of harvest pressures, habitat loss and the two parasites MSX and Dermo. A need exists to restore the ecological role of oysters in the Bay and the economic benefits of a commercial fishery through native oyster restoration and/or an ecologically compatible non-native oyster species that would restore these lost functions. Introduction of C. ariakensis would only be attempted if it is determined that the benefits of the introduction would outweigh negative impacts, giving consideration to effects on the ecology of the Bay, potential for introduction of new diseases or parasites, restoration of native oysters, potential for C. ariakensis to become self-sustaining, and alternatives to the proposed action.

Preliminary Alternatives to the Proposed Action

It is anticipated that the following alternatives to the proposed action will be evaluated in the EIS:

Alternative 1—No Action—Not taking the proposed action: Continue Maryland's present Oyster Restoration and Repletion Programs, and Virginia's Oyster Restoration Program under current program and resource management policies and available funding using the best available restoration strategies and stock assessment techniques.

Alternative 2—Expand native Oyster Restoration Program: Expand, improve, and accelerate Maryland's Oyster Restoration and Repletion Programs, and Virginia's Oyster Restoration Program in collaboration with Federal and private partners. This work would include, but not be limited to an assessment of clutch limitations and long-term solutions for this problem and the development, production, and deployment of large quantities of disease resistant strain(s) of C. Virginia (Eastern Oyster) for broodstock enhancement.

Alternative 3—Harvest Moratorium: Implement a temporary harvest moratorium on native oysters and an oyster industry compensation (buy-out) program in Maryland and Virginia or a program under which displaced oystermen are offered on-water work in a restoration program.

Alternative 4—Aquaculture: Establish and/or expand State-assisted, managed or regulated aquaculture operations in Maryland and Virginia using the native oyster species.

Alternative 5—Aquaculture: Establish State-assisted, managed or regulated aquaculture operations in Maryland and Virginia using suitable triploid, non-native oyster species.

Alternative 6—Introduce and Propagate and Alternative Oyster Species (Other than C. ariakensis) or an Alternative Strain of C. ariakensis: Introduce and propagate in the State-sponsored, managed or regulated oyster restoration programs in Maryland and Virginia, a disease resistant oyster species other than C. ariakensis, or an alternative strain of C. ariakensis, from waters outside the U.S. in accordance with the ICES 1994 Code of Practices on the Introductions and Transfers of Marine Organisms.

Alternative 7—Combination of Alternatives

Programmatic EIS Process

Scoping Process

The programmatic EIS process begins with the publication of this notice of intent. This public notice establishes the beginning of the scoping period. The scoping period will continue for 3 weeks after the last public scoping meeting.

The lead and cooperating agencies will conduct an open scoping and public involvement process during the development of the programmatic EIS. The scoping process is the key to preparing a concise EIS an clarifying the significant issues to be analyzed in depth. Public concerns on issues, studies needed, alternatives to be examined, procedures and other related matters would be addressed during scoping. The purpose of the scoping meetings is to assist the Corps, MDNR, VMRC, NOAA, EPA, and FWS representatives in defining the issues that will be evaluated in the EIS.

The lead agencies invite Federal agencies, State and local governments, Native American Tribes and the public to comment on the scope of this programmatic EIS. The lead agencies will hold scoping meetings to receive public input on the alternatives to the proposed action and the range of issues to be addressed in the programmatic EIS. Written scoping comments will be considered in the preparation of the draft programmatic EIS (*see* **DATES**). Comments postmarked or received by e-mail after specified date will be considered to the extent practicable.

Two public scoping meetings will be held at the locations indicated above (*see* **DATES**). Further information will be published in local newspapers in advance of the meetings. Any necessary changes will be announced in the local media.

Each public scoping meeting will begin with a briefing on the state of *C. virginica* in the Chesapeake Bay and its tributaries, the status of restoration efforts, preliminary programmatic EIS alternatives, and the proposed action of the programmatic EIS. Copies of the meeting handouts will be available to anyone unable to attend by contacting MDNR or VMRC as described above under **ADDRESSES**. Following the initial presentation, MDNR, VMRC, and Corps representatives will answer scope-related questions and accept comments.

EIS Preparation

Development of the draft programmatic EIS will begin after the

close of the public scoping period. Technical and advisory support will be obtained from lead and cooperating agencies and organizations. Preparation of the programmatic EIS will also be supported by concurrent research sponsored by the MDNR and NOAA and by others.

A scientific advisory panel will advise on the research that is essential for the EIS, appropriate analytical methods for use of existing data, quality assurance for data, analytical results to be used in the EIS, and comment on the general sufficiency of the scientific research used in the EIS.

Schedule

Subject to the availability of funds, the existing schedule anticipates an expedited process to produce a programmatic EIS leading to a record of decision. The draft programmatic EIS is expected to be available for public review in the spring of 2005 or as quickly as a rigorous, scientifically based EIS can be produced. Public meetings may be held following the notice of availability of the draft programmatic EIS. Following the Record of Decision (ROD) of the Programmatic EIS, site-specific deployment of non-native oysters may be subject to regulatory requirements of the Rivers and Harbors Act and the Clean Water Act, National Environmental p act NEPA.

Issues To Be Addressed

The following issues have been identified for analysis in the programmatic EIS. The list is tentative and intended to facilitate public comment on the scope of the programmatic EIS. The lead agencies specifically invite suggestions for the addition or deletion of items on this list:

(1) Pathogen disease and virus risk analysis associated with introduction of a non-native oyster;

(2) Life history and biology of *Crassostrea ariakensis*;

(3) Socioeconomic effects toward commercial and recreational activities in the Chesapeake Bay;

(4) Production of a comprehensive risk assessment and oyster growth, mortality and demographic model;

(5) Development of a model to determine the specific locations and scenarios and the outcome of introduction in these specific locations;

(6) Development of management practices for an introduction of a non-native species and study of the habitat requirements of the Asian oyster;

(7) Other appropriate studies identified by the National Academy of Sciences in its report Non-Native Oysters in the Chesapeake Bay (NRC, 2003);

(8) Development of a model for the expansion, improvement and acceleration of oyster restoration programs in Maryland and Virginia, including locations, scenarios and outcomes of expansions in specific locations.

(9) Development of management practices for implementation of expanded, improved and accelerated oyster restoration programs in Maryland and Virginia, and;

(10) Any other issues identified as part of the public scoping process.

Other Environmental Review and Consultations

To the fullest extent possible, the programmatic EIS will be integrated with analysis and consultation required by the Endangered Species Act of 1973, as amended (Pub. L. 93–205; 16 U.S.C. 1532 *et seq.*); the Magnuson-Stevens Fishery Conservation and Management Act, as amended (Pub. L. 94–265; 16 U.S.C. 1801, *et seq.*), the National Historic Preservation Act of 1966, as amended (Pub. L. 89–655; 16 U.S.C. 470. *et seq.*); the Fish and Wildlife Coordination Act of 1958, as amended (Pub. L. 85–624; 16 U.S.C., *et seq.*); the Coastal Zone Management Act of 1972, as amended (Pub. L. 92–583; 16 U.S.C. 1451, *et seq.*); and the Clean Water Act of 1977, as amended (Pub. L. 92–500; 33 U.S.C. 1251, *et seq.*); Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403 *et seq.*); Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990, as amended (16 U.S.C. 4701 *et seq.*); Lacey Act, as amended (18 U.S.C. 42), The 1993 Chesapeake Bay Policy for the Introduction of Non-Indigenous Aquatic Species and applicable and appropriate Executive Orders.

Yvonne J. Prettyman-Beck,

Colonel, Corps of Engineers Commanding.

[FR Doc. 04–73 Filed 1–2–04; 8:45 am]

BILLING CODE 3710–EN–M

DEPARTMENT OF DEFENSE

Department of the Army

Intent To Prepare a Joint Draft Environmental Impact Statement/ Environmental Impact Report for the Wilson Creek/Oak Glen Creek Feasibility Study in the City of Yucaipa, San Bernardino County, CA; Correction

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Meeting date correction.

SUMMARY: The public scoping meetings scheduled for January 14, 2004 published in the **Federal Register** on Monday, December 29, 2003 (68 FR 74949) has been rescheduled. The public scoping meeting will now be held on February 4, 2004 from 6 p.m. to 9 p.m. at the City of Yucaipa Council Chambers, 34272s Yucaipa Boulevard, Yucaipa, CA.

FOR FURTHER INFORMATION CONTACT: Ms. Lois Goodman, Environmental Coordinator, telephone (213)–452–3869.

Luz D. Ortiz,

Army Federal Register Liaison Officer.

[FR Doc. 04–72 Filed 1–2–04; 8:45 am]

BILLING CODE 3710–KF–M

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Availability of Government-Owned Invention; Available for Licensing

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The invention listed below is assigned to the United States Government as represented by the Secretary of the Navy and is available for licensing by the Department of the Navy. Patent application 10,672,273: Mounting System for Intermodal Container.

ADDRESSES: Requests for copies of the invention cited should be directed to: Naval Surface Warfare Center, Crane Div, Code OCF, Bldg 64, 300 Highway 361, Crane, IN 47522–5001.

FOR FURTHER INFORMATION CONTACT: Mr. Darrell Boggess, Naval Surface Warfare Center, Crane Div, Code OCF, Bldg 64, 300 Highway 361, Crane, IN 47522–5001, telephone (812) 854–1130. To download an application for license, *see: http://www.crane.navy.mil/newscommunity/TechTrans_CranePatents.asp?bhcp=1*

(Authority: 35 U.S.C. 207, 37 CFR part 404)

Dated: December 22, 2003.

S.K. Melancon,

Paralegal Specialist, Office of the Judge Advocate General, Alternate Federal Register Liaison Officer.

[FR Doc. 04–74 Filed 1–2–04; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF DEFENSE

Department of the Navy

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DoD.

ACTION: Notice to amend systems of records.

SUMMARY: The Department of the Navy is amending three systems of records notices in its existing inventory of records systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on February 4, 2004 unless comments are received which result in a contrary determination.

ADDRESSES: Send comments to Department of the Navy, PA/FOIA Policy Branch, Chief of Naval Operations, N09B10, 2000 Navy Pentagon, Washington, DC 20350–2000.

FOR FURTHER INFORMATION CONTACT: Mrs. Doris Lama at (202) 685–6545 or DSN 325–6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy's record system notices for records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The Department of the Navy proposes to amend a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The changes to the system of records are not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of new or altered systems reports. The records system being amended is set forth below, as amended, published in its entirety.

SUPPLEMENTARY INFORMATION: The Department of the Navy systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The specific changes to the records systems being amended are set forth below followed by the notices, as amended, published in their entirety. The proposed amendments are not within the purview of subsection (r) of the Privacy Act of 1974, (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: December 24, 2003.

L.M. Bynum,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

N05211–1

SYSTEM NAME:

Privacy Act Request Files and Tracking System (May 9, 2003, 68 FR 24959).

CHANGES:

SYSTEM IDENTIFIER:

Delete entry and replace with 'NM05211–1'.

* * * * *

SYSTEM LOCATION:

Delete first paragraph and replace first with 'Organizational elements of the Department of the Navy. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*'

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with '5 U.S.C. 552a, The Privacy Act of 1974, as amended; 10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; E.O. 9397 (SSN); Secretary of the Navy Instruction 5211.5D, Department of the Navy Privacy Act Program.'

* * * * *

CONTESTING RECORD PROCEDURES:

Delete entry and replace with 'The Department of the Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.'

* * * * *

NM05211–1

SYSTEM NAME:

Privacy Act Request Files and Tracking System.

SYSTEM LOCATION:

Organizational elements of the Department of the Navy. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*

Commander, U.S. Joint Forces Command, 1562 Mitscher Avenue, Suite 200, Norfolk, VA 23551–2488.

Commander, U.S. Pacific Command, P.O. Box 64028, Camp H.M. Smith, HI 96861–4028.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who request information concerning themselves which is in the custody of the Department of the Navy or who request access to or amendment of such records in accordance with the Privacy Act of 1974, as amended.

CATEGORIES OF RECORDS IN THE SYSTEM:

Letters, memoranda, legal opinions, messages, and miscellaneous documents relating to an individual's request for access to or amendment of records concerning that person, including letters authorizing release to another individual, letters of denial, appeals, statements of disagreements, and related documents accumulated in processing requests received under the Privacy Act of 1974. Names, addresses, and other personal identifiers of the individual requester. Database which tracks action from start to finish.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 552a, The Privacy Act of 1974, as amended; 10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; E.O. 9397 (SSN); Secretary of the Navy Instruction 5211.5D, Department of the Navy Privacy Act Program.

PURPOSE(S):

To track, process, and coordinate individual requests for access and amendment of personal records; to process appeals on denials of requests for access or amendment to personal records; to compile information for reports, and to ensure timely response to requesters.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' set forth at the beginning of the Navy's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Maintained in file folders, microform, microfilm, manual/computerized databases, and/or optical disk.

RETRIEVABILITY:

Name of requester; year request filed; serial number of response letter; case file number; etc.

SAFEGUARDS:

Records are accessed by custodian of the record system and by persons responsible for servicing the record system in performance of their official duties. Records are stored in locked cabinets or rooms. Computerized databases are password protected and accessed by individuals who have a need to know.

RETENTION AND DISPOSAL:

Granted requests, responses to requests for non-existent records, responses to requesters who provide inadequate descriptions and responses to requesters who fail to pay agency reproduction fees that are not appealed are destroyed 2 years after date of reply; requests which are denied and are appealed are destroyed after 5 years; requests which are amended are retained for 4 years; requests for amendment which are refused are destroyed after 3 years; disclosure accounting forms are retained for the life of the record of 5 years after the disclosure, whichever is later; and privacy act databases are destroyed after 5 years.

SYSTEM MANAGER(S) AND ADDRESS:

Policy Official: Chief of Naval Operations (N09B10), 2000 Navy Pentagon, Washington, DC 20350–2000.

RECORD HOLDERS:

Organizational elements of the Department of the Navy. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*

Commander, U.S. Joint Forces Command, 1562 Mitscher Avenue, Suite 200, Norfolk, VA 23551–2488; and

Commander, U.S. Pacific Command, P.O. Box 64028, Camp H.M. Smith, HI 96861–4028. Official mailing addresses are published as an appendix to the Navy's compilation of systems of records notices.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the commanding officer of the activity in question. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*

The request must be signed and contain the full name of the individual and one or more of the following kinds of information: Year request filed; serial number of response letter; case file number.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the commanding officer of the activity in question. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*

The request must be signed and contain the full name of the individual and one or more of the following kinds of information: Year request filed; serial number of response letter; case file number.

CONTESTING RECORD PROCEDURES:

The Department of the Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

From the individual, Navy organizations, Department of Defense components, and other Federal, State, and local government agencies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

During the course of a Privacy Act (PA) action, exempt materials from other systems of records may become part of the case records in this system of records. To the extent that copies of exempt records from those 'other' systems of records are entered into these PA case records, the Department of the Navy hereby claims the same exemptions for the records as they have in the original primary systems of records of which they are a part.

Department of the Navy exemption rules have been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) published in 32 CFR part 701, Subpart G. For additional information contact the system manager.

N05380–1

SYSTEM NAME:

Combined Federal Campaign/Navy Relief Society (May 9, 2003, 68 FR 24959).

CHANGES:

SYSTEM IDENTIFIER:

Delete entry and replace with 'NM05380–1'.

SYSTEM NAME:

Delete entry and replace with 'Combined Federal Campaign/Navy and Marine Corps Relief Society'.

SYSTEM LOCATION:

Delete first paragraph and replace with 'Organizational elements of the Department of the Navy. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*'

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with '10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; and, E.O.s 9397 (SSN), 10927 and 12353'.

PURPOSE(S):

Delete entry and replace with 'To manage the Combined Federal Campaign and Navy and Marine Corps Relief Society Fund drives and provide the respective campaign coordinator with necessary information. Payroll deduction contribution data is supplied to the Defense Finance and Accounting Service.'

* * * * *

NM05380–1

SYSTEM NAME:

Combined Federal Campaign/Navy and Marine Corps Relief Society.

SYSTEM LOCATION:

Organizational elements of the Department of the Navy. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*

Commander, U.S. Joint Forces Command, 1562 Mitscher Avenue, Suite 200, Norfolk, VA 23551–2488.

Commander, U.S. Pacific Command, P.O. Box 64028, Camp H.M. Smith, HI 96861–4028.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All assigned personnel.

CATEGORIES OF RECORDS IN THE SYSTEM:

Names, addresses, Social Security Numbers, payroll identifying data, contributor cards and lists.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; and, E.O.s 9397 (SSN), 10927 and 12353.

PURPOSE(S):

To manage the Combined Federal Campaign and Navy and Marine Corps Relief Society Fund drives and provide the respective campaign coordinator with necessary information. Payroll

deduction contribution data is supplied to the Defense Finance and Accounting Service.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' that appear at the beginning of the Navy's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Manual and computerized records.

RETRIEVABILITY:

Name, Social Security Number, and organization.

SAFEGUARDS:

Access is provided on need-to-know basis only. Manual records are maintained in file cabinets under the control of authorized personnel during working hours. The office space in which the file cabinets are located is locked outside of official working hours. Computer terminals are located in supervised areas. Access to computerized data is controlled by password or other user code system.

RETENTION AND DISPOSAL:

Records are maintained for one year or completion of next equivalent campaign and then destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Commanding officer of the activity in question. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the commanding officer of the naval activity where currently or previously employed. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*

The request should include full name, Social Security Number, address of the individual concerned, and should be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address written inquiries to the commanding officer of the naval activity where currently or previously employed. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*

The request should include full name, Social Security Number, address of the individual concerned, and should be signed.

CONTESTING RECORD PROCEDURES:

The Department of the Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Individual; payroll files; personnel files.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

N05720–1

SYSTEM NAME:

FOIA Request Files and Tracking System (April 13, 2001, 66 FR 19158).

CHANGES:

SYSTEM IDENTIFIER:

Delete entry and replace with 'NM05720–1'.

* * * * *

SYSTEM LOCATION:

Delete entry and replace with 'Organizational elements of the Department of the Navy. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*'

* * * * *

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Delete entry and replace with '5 U.S.C. 552, the Freedom of Information Act, as amended; 10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; E.O. 9397 (SSN); and Secretary of the Navy Instruction 5720.42F, Department of the Navy Freedom of Information Act Program.'

* * * * *

NM05720–1

SYSTEM NAME:

FOIA Request Files and Tracking System.

SYSTEM LOCATION:

Organizational elements of the Department of the Navy. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who request access to information under the provisions of the Freedom of Information Act (FOIA) or make an appeal under the FOIA.

CATEGORIES OF RECORDS IN THE SYSTEM:

FOIA request, copies of responsive records (redacted and released), correspondence generated as a result of the request, cost forms, memoranda, legal opinions, messages, and miscellaneous documents which related to the request.

Database used to track requests from start to finish and formulate response letters may contain names, addresses, and other personal identifiers of the individual requester.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 552, the Freedom of Information Act, as amended; 10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; E.O. 9397 (SSN); and Secretary of the Navy Instruction 5720.42F, Department of the Navy Freedom of Information Act Program.

PURPOSE(S):

To track, process, and coordinate requests/appeals/litigation made under the provisions of the FOIA.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To individuals who file FOIA requests for access to information on who has made FOIA requests and/or what is being requested under FOIA.

The DoD 'Blanket Routine Uses' set forth at the beginning of the Navy's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Maintained in file folders, microform, microfilm, manual/computerized databases, and/or optical disk.

RETRIEVABILITY:

Name of requester; year request filed; serial number of response letter; case file number; etc.

SAFEGUARDS:

Records are accessed by custodian of the record system and by persons responsible for servicing the record system in performance of their official duties. Records are stored in cabinets or rooms, which are not viewable by individuals who do not have a need to know. Computerized databases are password protected and accessed by individuals who have a need to know.

RETENTION AND DISPOSAL:

Granted requests, no record responses, and/or responses to requesters who fail to adequately described the records being sought or fail to state a willingness to pay processing fees are destroyed 2 years after date of reply. Requests which are denied in whole or in part, appealed, or litigated are destroyed 6 years after final action.

SYSTEM MANAGER(S) AND ADDRESS:

Policy Official: Chief of Naval Operations (N09B10), 2000 Navy Pentagon, Washington, DC 20350–2000.

RECORD HOLDERS:

Organizational elements of the Department of the Navy. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system should address written inquiries to the Freedom of Information Act coordinator or commanding officer of the activity in question. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*

The request should contain the full name of the individual and one or more of the following kinds of information: year request filed; serial number of response letter; case file number. Requests must also be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system should address written inquiries to the Freedom of Information Act coordinator or commanding officer of the activity in question. Official mailing addresses are published in the Standard Navy Distribution List (SNDL) that is available at *http://neds.nebt.daps.mil/sndl.*

The request should contain the full name of the individual and one or more of the following kinds of information: year request filed; serial number of response letter; case file number. Requests must also be signed.

CONTESTING RECORD PROCEDURES:

The Department of the Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

From the individual, Navy organizations, Department of Defense components, and other Federal, state, and local government agencies.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

During the course of a FOIA action, exempt materials from other systems of records may in turn become part of the case records in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this FOIA case record, the Department of the Navy hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary systems of records which they are a part.

Department of the Navy exemption rules have been promulgated in accordance with requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) published in 32 CFR part 701, Subpart G. For additional information contact the system manager.

[FR Doc. 04–26 Filed 1–2–04; 8:45 am]

BILLING CODE 5001–06–U

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7606–5; OAR–2003–0049]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; Transportation Conformity Determinations for Federally Funded and Approved Transportation Plans, Programs and Projects Under the New 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards, EPA ICR Number 2130.01

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA has submitted a proposed Information Collection Request (ICR) to the Office of Management and Budget (OMB) for review and approval. This is a request for new information collection requirements in EPA's proposed rule regarding conformity requirements for areas designated nonattainment under the new 8-hour ozone and $PM_{2.5}$ national ambient air quality standards. This ICR describes the nature of the information collection and its estimated burden and cost. EPA is soliciting comments on specific aspects of the proposed information collection as described below.

DATES: Comments must be submitted on or before March 5, 2004.

ADDRESSES: Submit your comments, referencing docket ID number OAR–2003–0049, to (1) EPA online using EDOCKET (our preferred method), by email to *a-and-r-Docket@epa.gov,* Attention Air Docket ID No. OAR–2003–0049, or by mail to: Air Docket, Environmental Protection Agency, Mailcode: 6102T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OAR–2003–0049, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), 725 17th Street, NW., Washington, DC 20503, Attention: Desk Officer for EPA.

FOR FURTHER INFORMATION CONTACT: Meg Patulski, State Measures and Conformity Group, Transportation and Regional Programs Division, U.S. Environmental Protection Agency, 2000 Traverwood Road, Ann Arbor, MI 48105; telephone number: (734) 214–4842; fax number: (734) 214–4052; email address: *patulski.meg@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has established a public docket for the proposed rule regarding conformity requirements for areas designated nonattainment under the new 8-hour ozone and $PM_{2.5}$ national ambient air quality standards (November 5, 2003, 68 FR 62690), which includes ICR 2130.01, under Docket ID No. OAR–2003–0049. Interested parties can obtain a copy of the ICR 2130.01 Supporting Statement in Docket ID No. OAR–2003–0049, and submit comments during the public comment period for today's notice. The Supporting Statement includes further information regarding the how EPA derived the burden and cost estimates described below.

The docket is available for public viewing at the Air 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 Air Docket is (202) 566–1742. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at *http://www.epa.gov/edocket.* Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the docket ID number identified above.

Any comments related to this ICR should be submitted to EPA and OMB within 60 days of this notice. EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EDOCKET as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EDOCKET. The entire printed comment, including the copyrighted material, will be available in the public docket. Although identified as an item in the official docket, information claimed as CBI, or whose disclosure is otherwise restricted by statute, is not included in the official public docket, and will not be available for public viewing in EDOCKET. For further information about the electronic docket, *see* EPA's **Federal Register** notice describing the electronic docket at 67 FR 38102 (May 31, 2002), or go to *http://www.epa.gov/edocket.*

Title: Transportation Conformity Determinations for Federally Funded and Approved Transportation Plans, Programs and Projects Under the New 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards, EPA ICR Number 2130.01.

Abstract: Transportation conformity determinations are required under Clean Air Act section 176(c) (42 U.S.C. 7506(c)) to ensure that federally supported transportation activities are consistent with ("conform to") the purpose of the state air quality implementation plan (SIP). Conformity to the purpose of the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the relevant air quality standards. Transportation conformity applies under EPA's conformity regulations at 40 CFR part 93, subpart A, to areas that are designated nonattainment and those redesignated to attainment after 1990 ("maintenance areas" with plans developed under Clean Air Act section 175A) for transportation-related criteria pollutants. The Clean Air Act gives EPA the statutory authority to establish the criteria and procedures for determining whether transportation activities conform to the SIP.

On November 5, 2003, EPA proposed conformity requirements for areas designated nonattainment under the new 8-hour ozone and $PM_{2.5}$ national ambient air quality standards (NAAQS or "standards"; 68 FR 62690). EPA has submitted this ICR to address the additional burden associated with making conformity determinations for the new standards over the first three years after nonattainment designations. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal. Specifically, the ICR includes additional burden estimates for conducting conformity determinations on transportation plans, transportation improvements programs (TIPS) and projects in the following types of metropolitan and isolated rural areas:

- Brand new nonattainment areas that have never demonstrated conformity for any pollutant and standard;
- Existing nonattainment and maintenance areas with previous conformity experience that will be demonstrating conformity for an additional pollutant (*e.g.*, existing areas that will be doing conformity for $PM_{2.5}$, a new pollutant not previously covered by the rule); and
- New nonattainment counties that may be added to some existing 1-hour ozone areas that expand under the 8-hour ozone standard.

The information collection requirements of EPA's existing transportation conformity rule are covered under the Department of Transportation's (DOT's) ICR entitled, "Metropolitan and Statewide Transportation Planning," with the OMB Control Number 2132–0529. The DOT ICR accounts for conformity burden in 1-hour ozone, CO, PM_{10}, and NO_2 nonattainment and maintenance areas. EPA's ICR includes only the incremental burden associated with making conformity determinations for the new standards, including start-up costs that areas will incur in the first three years after nonattainment designations (*e.g.*, rule familiarization and conformity training in brand new areas). This ICR does not address the development of transportation plans and TIPs or motor vehicle emissions budgets, since these documents are developed to meet other requirements.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9 and are identified on the form and/or instrument, if applicable.

The EPA would like to solicit comments to:

(i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(ii) Evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(iii) Enhance the quality, utility, and clarity of the information to be collected; and

(iv) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Burden Statement: The ICR estimates the annual state and local burden for conformity activities in each metropolitan nonattainment area that incurs additional burden under the new ozone and $PM_{2.5}$ standards to be 325 hours/year at a cost of $16,320/year. Additional federal burden associated with conformity for each of these metropolitan nonattainment areas is approximately 127 hours/year at a cost of $6,400/year. Average State and local burden associated with conformity for each isolated rural nonattainment area that incurs new burden under the new standards is 42 hours/year at a cost of $2,111/year. New federal burden associated with each of these areas is calculated to be 10 hours/year at a cost of $503/year.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and

maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: State and local entities affected by this ICR include metropolitan planning organizations, local transit agencies, State departments of transportation, and State and local air quality agencies. Federal agencies affected by this ICR include the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), and EPA.

Estimated Number of Respondents: This ICR estimates that approximately 86 metropolitan and isolated rural areas designated nonattainment for one or both of the new 8-hour ozone and $PM_{2.5}$ standards will incur additional burden.

Frequency of Response: The information collections described in this ICR must be completed before a transportation plan, TIP or project conformity determination is made. Transportation plans must be found to conform at least every three years. TEA–21 and DOT's planning regulations require that TIPs be updated at least every two years, therefore, a conformity determination on the TIP in metropolitan areas is required at least every two years. Conformity determinations on projects in metropolitan and isolated rural areas are required on an as needed basis. This ICR assumes that areas with additional burden will complete approximately 1,510 total plan, TIP and project-level conformity determinations every year.

Estimated Total Annual Hour Burden: The ICR estimates a total annual burden to all Federal, State and local agency respondents over the 3-year period covered by this ICR to be 35,683 hours. Total annual burden for State and local agencies alone is 25,669, while the total annual burden for Federal agency respondents is 10,014 hours.

Estimated Total Annual Cost: The total annual cost to all Federal, State and local agency respondents over the 3-year period covered by this ICR is estimated to be approximately $1,793,072. The annual cost for all State and local agencies is $1,289,869, while the annual cost portion for Federal agency respondents is $503,203.

Changes in the Estimates: Not applicable. This is a new ICR submission, rather than a change to an existing EPA ICR.

Dated: December 23, 2003.

Leila Cook,

Acting Director, Transportation and Regional Programs Division, Office of Transportation and Air Quality.

[FR Doc. 04–12 Filed 1–2–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7603–8]

Agency Information Collection Activities OMB Responses

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This document announces the Office of Management and Budget's (OMB) responses to Agency clearance requests, in compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

FOR FURTHER INFORMATION CONTACT: Susan Auby (202) 566–1672, or e-mail at *auby.susan@epa.gov* and please refer to the appropriate EPA Information Collection Request (ICR) Number.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency Clearance Requests

OMB Approvals

EPA ICR No. 1381.07; Recordkeeping and Reporting Requirements for Solid Waste Disposal Facilities and Practices; in 40 CFR part 258; OMB Number 2050–0122; was approved 11/24/2003; expires 11/30/2006.

EPA ICR No. 0029.08; NPDES Modification and Variance Requests; in 40 CFR 122.62–122.64, 40 CFR 122.21(m)(1–2 & 4–6), 40 CFR 122.21(n)(1 & 3), 40 CFR 122.41(l)(1, 3, 8), 40 CFR 501.15(b)(8, 12), 40 CFR 122.24(l)(2, 8), 40 CFR 122.42(a)(1–2), 40 CFR 122.47(b)(4), 40 CFR 122.41(h), 40 CFR 124.53–124.54, 40 CFR 501.15(c)(2), 40 CFR 125.30 40 CFR 122.29(b); was approved 11/19/2003; OMB Number 2040–0068; expires 11/30/2006.

EPA ICR No. 1500.05; National Estuary Program; in 40 CFR 36.9000–36.9070; was approved 11/19/2003; OMB Number 2040–0138; expires 11/30/2006.

EPA ICR No. 0168.08; NPDES and Sewage Sludge Management State Programs; in 40 CFR part 122, 40 CFR 123.21–123.24, 40 CFR 123.26–123.29, 40 CFR 123.43–123.45, 40 CFR 123.62–123.64, 40 CFR 124.53–124.54, 40 CFR part 125, 40 CFR part 501, 40 CFR 123.26(e), 40 CFR 123.26(e)(5), 40 CFR 123.41(a), 40 CFR 501.21, 40 CFR 501.34, 40 CFR 501.11, 40 CFR 501.16, 40 CFR 123.26(b)(2)&(3), 40 CFR 124.53 & 124.54, 40 CFR 123.43 & 123.44, 40 CFR 501.14, 40 CFR 123.45, 40 CFR 501.21, 40 CFR 123.21, 40 CFR 123.64, 40 CFR 123.26(b)(1)&(2)&(3), 40 CFR 123.43 & 123.44(i); was approved 11/19/2003; OMB Number 2040–0057; expires 11/30/2006.

EPA ICR No. 0827.06; Construction Grants Program; in 40 CFR 35.2015, 35.2025, 35.2034, 35.2040, 35.2105, 35.2106, 35.2107, 35.2110, 35.2114, 35.2118, 35.2120, 35.2127, 35.2130, 35.2140, 35.2211, 35.2212, 35.2215, 35.2216, and 35.2218; was approved 11/18/2003; OMB Number 2040–0027; expires 11/30/2006.

EPA ICR No. 1803.04; Drinking Water State Revolving Fund Program; in 40 CFR part 35, subpart L; was approved 11/17/2003; OMB Number 2040–0185; expires 11/30/2006.

EPA ICR No. 1654.04; Reporting Requirements under EPA's Water Alliances for Voluntary Efficiency (WAVE) Program; was approved 11/14/2003; OMB Number 2040–0164; expires 11/30/2006.

EPA ICR No. 1814.03; National Health Protection Survey of Beaches; was approved 11/14/2003; OMB Number 2040–0189; expires 11/30/2006.

EPA ICR No. 0220.09; Clean Water Act Section 404 State-Assumed Programs; in 40 CFR 233.10–233.52; was approved 11/14/2003; OMB Number 2040–0168; expires 11/30/2006.

EPA ICR No. 0909.07; Construction Grants Delegation to States; in 40 CFR 35.3010 and 35.3030 was approved 11/14/2003; OMB Number 2040–0095; expires 11/30/2006.

Disapproved

EPA No. 2087.01; Concentrated Aquatic Animal Production Effluent Guidelines (Proposed Rule); was disapproved by OMB 11/14/2003.

EPA No. 2097.01; National Primary Drinking Water Regulation; Long Term 2 Enhanced Surface Water Treatment Rule (Proposed Rule); was disapproved by OMB 11/18/2003.

EPA No. 2068.01; Stage 2 Disinfectants and Disinfection Byproducts Rule (Proposed Rule); was disapproved by OMB on 11/18/2003.

Dated: December 17, 2003.

Doreen Sterling,

Acting Director, Collection Strategies Division.

[FR Doc. 04–85 Filed 1–2–04; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7607–2]

Air Pollution Control; Proposed Administrative Action on Clean Air Act Grant to the Puerto Rico Environmental Quality Board

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed administrative action to revoke grant with request for comments and notice of opportunity for public hearing.

SUMMARY: Section 105(c)(1) of the Clean Air Act (CAA), 42 U.S.C. 7405(c)(1), provides that "[n]o [air pollution control] agency shall receive any grant under this section during any fiscal year when its expenditures of non-Federal funds for recurrent expenditures for air pollution control programs [maintenance of effort or MOE level] will be less than its expenditures were for such programs during the preceding fiscal year." Although the Puerto Rico Environmental Quality Board (PREQB) has successfully completed its Fiscal Year 2002 air pollution control program, PREQB is unable to demonstrate that it has satisfied the statutory maintenance of effort requirement for its Fiscal Year 2002 Clean Air Act section 105 grant. Since PREQB did not satisfy the statutory requirement for the maintenance of effort for Fiscal Year 2002, EPA intends to revoke PREQB's Fiscal Year 2002 Clean Air Act section 105 grant. Pursuant to section 105(e) of the CAA, the EPA is providing prior notice of its intent to revoke PREQB's Fiscal Year 2002 Clean Air Act section 105 grant. The proposed administrative action does not otherwise impact the air pollution control program already carried out by PREQB during Fiscal Year 2002, which ended on September 30, 2002. When the proposed action is final, PREQB will be eligible to receive future CAA Section 105 grants to support its air pollution control program.

DATES: Comments and/or requests for a public hearing must be received by EPA at the address stated below by February 4, 2004.

ADDRESSES: Comments may be submitted either by mail or electronically. Written comments should be mailed to Carl-Axel Soderberg, Director, Caribbean Environmental Protection Division, United States Environmental Protection Agency—Region 2, Centro Europa Building, 1492 Ponce de Leon Avenue, Suite 417, Santurce, Puerto Rico 00907–4127. Electronic comments could be sent either to *soderberg.carl@epa.gov* or to *http://www.regulations.gov*, which is an alternative method for submitting electronic comments to EPA. Go directly to *http://www.regulations.gov*, then select "Environmental Protection Agency" at the top of the page and use the "go" button. Please follow the on-line instructions for submitting comments.

FOR FURTHER INFORMATION CONTACT: Carl-Axel Soderberg, Director, Caribbean Environmental Protection Division, United States Environmental Protection Agency—Region 2, Centro Europa Building, 1492 Ponce de Leon Avenue, Suite 417, Santurce, Puerto Rico 00907–4127, Telephone: (787) 977–5814, Email Address: *soderberg.carl@epa.gov* FAX: (787) 289–7982.

SUPPLEMENTARY INFORMATION: The EPA's implementing regulations at 40 CFR 35.146(a) reiterate the CAA section 105(c)(1) MOE requirement.

This notice constitutes a request for public comment and an opportunity for public hearing as required by the Clean Air Act and EPA's implementing regulations at 40 CFR 35.148(b). All written comments received by February 4, 2004 on this proposal will be considered. EPA will conduct a public hearing on this proposal if EPA finds, on the basis of written requests for a public hearing, that the issues raised are substantial or a significant degree of public interest in this proposal has been expressed; written requests for a hearing must be received by EPA at the address above by February 4, 2004.

If no written request for a hearing is received or if EPA determines that the issues raised are insubstantial or no significant degree of public interest in this proposed action has been expressed, EPA will proceed to the final action on this grant.

Dated: December 24, 2003.

Kathleen Callahan,

Acting Regional Administrator, Region 2.

[FR Doc. 04–84 Filed 1–2–04; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

[CO–001–0078; FRL–7607–1]

Adequacy Status of the Greeley, Colorado Carbon Monoxide Revised Maintenance Plan for Transportation Conformity Purposes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of adequacy.

SUMMARY: In this document, EPA is notifying the public that we have found that the motor vehicle emissions budgets in the Greeley, Colorado carbon monoxide (CO) revised maintenance plan, that was submitted by the Governor on June 20, 2003, are adequate for conformity purposes. On March 2, 1999, the DC Circuit Court ruled that budgets in submitted State Implementation Plans (SIPs) cannot be used for conformity determinations until EPA has affirmatively found them adequate. As a result of our finding, the North Front Range Transportation & Air Quality Planning Council, the City of Greeley, the Colorado Department of Transportation and the U.S. Department of Transportation are required to use the motor vehicle emissions budgets from this submitted maintenance plan for future conformity determinations.

DATES: This finding is effective January 20, 2004.

FOR FURTHER INFORMATION CONTACT: Tim Russ, Air & Radiation Program (8P-AR), United States Environmental Protection Agency, Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466, (303) 312–6479. The letter documenting our finding is available at EPA's conformity Web site: *http://www.epa.gov/otaq/transp/conform/adequacy.htm*.

SUPPLEMENTARY INFORMATION: Throughout this document wherever "we", "us", or "our" are used we mean EPA.

This action is simply an announcement of a finding that we have already made. We sent a letter to the Colorado Air Pollution Control Division on October 29, 2003, stating that the motor vehicle emissions budgets in the submitted Greeley revised CO maintenance plan are adequate. This finding has also been announced on our conformity Web site at *http://www.epa.gov/otaq/transp/conform/adequacy.htm*.

Transportation conformity is required by section 176(c) of the Clean Air Act. Our conformity rule requires that transportation plans, programs, and projects conform to SIPs and establishes

the criteria and procedures for determining whether or not they do. Conformity to a SIP means that transportation activities will not produce new air quality violations, worsen existing violations, or delay timely attainment of the national ambient air quality standards.

The criteria by which we determine whether a SIP's motor vehicle emission budgets are adequate for conformity purposes are outlined in 40 CFR 93.118(e)(4). Please note that an adequacy review is separate from our completeness review, and it also should not be used to prejudge our ultimate approval of the SIP. Even if we find a budget adequate, the SIP could later be disapproved, and vice versa.

We've described our process for determining the adequacy of submitted SIP budgets in a memo entitled, "Conformity Guidance on Implementation of March 2, 1999 Conformity Court Decision," dated May 14, 1999. We followed this guidance in making our adequacy determination.

For the reader's ease, we have excerpted the motor vehicle emission budgets from the Greeley revised CO maintenance plan and they are as follows: Interim year budgets; for the years from 2005 through 2009, the budget is 63 tons per day of CO, and for the years from 2010 through 2014, the budget is 62 tons per day of CO. The final year budget, for the year 2015 and beyond, is 60 tons per day of CO.

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

Dated: December 5, 2003.

Patricia D. Hull,

Acting Regional Administrator, Region VIII.

[FR Doc. 04–83 Filed 1–2–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7606–8]

Notice of Availability of Draft Aquatic Life Criteria Document for Nonylphenol and Request for Scientific Views

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability and request for scientific views.

SUMMARY: This notice informs the public about the availability of a draft aquatic life criteria document for nonylphenol and requests scientific views. The Clean Water Act (CWA) requires the Environmental Protection Agency to develop and publish, and from time to time revise, criteria for water accurately reflecting the latest scientific knowledge. When final, these criteria will provide EPA's recommendations to States and authorized Tribes as they establish their water quality standards as State or Tribal law or regulation. Once established, an EPA water quality criterion does not substitute for the CWA or EPA regulations, nor is it a regulation. It cannot impose legally binding requirements on the EPA, States, authorized Tribes or the regulated community. State and tribal decision makers have discretion to adopt approaches that differ from EPA's guidance on a case-by-case basis. At this time the Agency is not making a final recommendation. Rather the Agency is requesting scientific views on the draft document.

DATES: All scientific information must be submitted to the Agency on or before April 5, 2004.

ADDRESSES: Scientific views must be submitted electronically, by mail, or through hand-delivery/courier. Follow detailed instructions as provided in section C of the **SUPPLEMENTARY INFORMATION** section.

Copies of the criteria document entitled, *Draft Ambient Aquatic Life Water Quality Criteria for Nonylphenol* (EPA–822–R–03–029) may be obtained from EPA's Water Resource Center by phone at (202) 566–1729, or by e-mail to *center.water.resource@epa.gov* or by conventional mail to: EPA Water Resource Center, 4101T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. You can also download the document from EPA's Web site at *http://www.epa.gov/waterscience/criteria/nonylphenol/*.

FOR FURTHER INFORMATION CONTACT: Frank Gostomski, Health and Ecological Criteria Division (4304T), U.S. EPA, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; (202) 566–1105; *gostomski.frank@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Interested Entities

Entities potentially interested in today's notice are those that produce, use, or regulate nonylphenol. Categories and entities interested in today's action include:

Category	Examples of interested entities
State/Local/Tribal Government.	States and Tribes
Nonylphenol Dischargers.	Sewage treatment plants
Nonylphenol Users	Producers of surfactants

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be interested by this notice. This table lists the types of entities that EPA is now aware could potentially be interested by this action. Other types of entities not listed in the table could also be interested.

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

1. *Docket.* EPA has established an official public docket for this notice under Docket ID No. OW–2003–0080. The official public docket consists of the documents specifically referenced in this notice, any scientific views received, and other information related to this notice. 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 Water 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 Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426. To view these documents materials, please call ahead to schedule an appointment. Every user is entitled to copy 266 pages per day before incurring a charge. The Docket may charge 15 cents a page for each page over the 266-page limit plus an administrative fee of $25.00.

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

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view scientific views, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket,

will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in section I.B.

It is important to note that EPA's policy is that scientific views, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless your views and information contain copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a scientific view containing copyrighted material, EPA will provide a reference to that material in the version of the scientific view that is placed in EPA's electronic public docket. The entire printed scientific view, including the copyrighted material, will be available in the public docket.

Scientific views submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Scientific views that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

C. How and To Whom Do I Submit Scientific Views?

You may submit scientific views 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 scientific views. Please ensure that your scientific views are submitted within the specified period. Scientific views received after the close of the review period will be marked "late." EPA is not required to consider these late scientific views.

1. *Electronically.* If you submit electronic information 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 scientific views. 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 scientific information and allows EPA to contact you in case EPA cannot read your scientific views due to technical difficulties or needs further information on the substance of your scientific views. EPA's policy is that EPA will not edit your scientific views, and any identifying or contact information provided in the body of the scientific views will be included as part of the scientific views that are placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your scientific views due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your scientific views.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit scientific views to EPA electronically is EPA's preferred method for receiving scientific views. Go directly to EPA Dockets at *http://www.epa.gov/edocket,* and follow the online instructions for submitting scientific views. To access EPA's electronic public docket from the EPA Internet Home Page, select "Information Sources," "Dockets," and "EPA Dockets." Once in the system, select "search," and then key in Docket ID No. OW–2003–0080. 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 information.

ii. *E-mail.* Scientific views may be sent by electronic mail (e-mail) to *OW-Docket@epa.gov,* Attention Docket No. OW–2003–0080. 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 with scientific views 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 information that is placed in the official public docket, and made available in EPA's electronic public docket.

iii. *Disk or CD–ROM.* You may submit scientific views on a disk or CD–ROM that you mail to the mailing address identified in section I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. *By Mail.* Send your scientific views to: Water Docket in the EPA Docket Center, Environmental Protection Agency, Mailcode 4101T, 1200 Pennsylvania Ave., NW, Washington, DC 20460, Attention Docket ID No. OW–2001–0010.

3. *By Hand Delivery or Courier.* Deliver your scientific views to: Water Docket, EPA Docket Center, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC, Attention Docket ID No. OW–2001–0080. Such deliveries are only accepted during the Docket's normal hours of operation as identified in section I.B.1.

D. What Should I Consider as I Prepare My Scientific Views for EPA?

You may find the following suggestions helpful for preparing your scientific views:

1. Explain your scientific 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 scientific views.

4. Provide specific examples to illustrate your concerns.

5. Offer alternatives.

6. Make sure to submit your scientific views by the deadline identified.

7. 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 scientific views.

II. Background and Today's Notice

A. What Are Recommended Water Quality Criteria?

Recommended water quality criteria represent the concentrations of a chemical in water at or below which aquatic life are protected from acute and chronic adverse effects of the chemical. Section 304(a)(1) of the Clean Water Act (CWA) requires EPA to develop and publish, and from time to time revise, criteria for water accurately reflecting the latest scientific knowledge. Water quality criteria developed under section 304(a) are based solely on data and scientific judgments. They do not consider economic impacts or the technological feasibility of meeting the criteria in ambient water. Section 304(a) criteria provide guidance to States and Tribes in adopting water quality standards. The criteria also provide a scientific basis for EPA to develop

Federally promulgated water quality standards under section 303(c) of the CWA.

B. What Is Nonylphenol and Why Are We Concerned About It?

Nonylphenol is an organic chemical produced in large quantities in the United States. It is used as an intermediate chemical to produce nonionic surfactants of the nonylphenol ethoxylate type. The nonionic surfactants are used as oil soluble detergents and emulsifiers to produce anionic detergents, lubricants, antistatic agents, high performance textile scouring agents, emulsifiers for agrichemicals, antioxidants for rubber manufacture, and lubricant oil additives. Environmental exposure occurs mainly from its release as a breakdown product from industrial and domestic sewage treatment plant effluents but may also occur from industrial manufacture, distribution releases, and other sources. Nonylphenol is moderately soluble and resistant to natural degradation in water. Because of nonylphenol's chemical properties and widespread use as a chemical intermediate, concerns have been raised over the potential risks posed by exposure of aquatic organisms to it. For these reasons, EPA has developed draft ambient water quality criteria for nonylphenol.

C. What Are the Draft National Recommended Water Quality Criteria for Nonylphenol?

Freshwater

Aquatic life should not be affected unacceptably if the: One-hour average concentration of nonylphenol does not exceed 27.9 ug/l more than once every three years on the average (Acute Criterion); and Four-day average concentration of nonylphenol does not exceed 5.9 ug/l more than once every three years on the average (Chronic Criterion).

Saltwater

Aquatic life should not be affected unacceptably if the: One-hour average concentration of nonylphenol does not exceed 6.7 ug/l more than once every three years on the average (Acute Criterion); and Four-day average concentration of nonylphenol does not exceed 1.4 ug/l more than once every three years on the average (Chronic Criterion).

D. Why Is EPA Notifying the Public About the Draft Nonylphenol Criteria Document?

Today, EPA is notifying the public about the availability of this draft aquatic life criteria document for nonylphenol to elicit scientific input on this document. EPA notified the public of its intent to develop aquatic life criteria for nonylphenol in the **Federal Register** on October 29, 1999 (64 FR 58409). At that time EPA made available to the public all references identified by a recent literature review and solicited any additional pertinent data or scientific views that would be useful in developing the draft aquatic life criteria for nonylphenol. EPA is now making the draft aquatic life criteria document for nonylphenol available to the public and soliciting scientific input.

E. Where Can I Find More Information on EPA's Revised Process for Developing New or Revised Criteria?

The Agency published detailed information about its revised process for developing and revising criteria in the **Federal Register** on December 10, 1998 (63 FR 68354) and in the EPA document entitled, *National Recommended Water Quality—Correction* (EPA 822–Z–99–001, April 1999). The purpose of the revised process is to provide expanded opportunities for public input, and to make the criteria development process more efficient.

Dated: December 27, 2003.

Geoffrey H. Grubbs,

Director, Office of Science and Technology.

[FR Doc. 04–81 Filed 1–2–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7606–9]

Notice of Availability of Final Aquatic Life Criteria Document for Tributyltin (TBT)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: This notice informs the public of the availability of a final aquatic life criteria document for tributyltin (TBT). The Clean Water Act (CWA) requires the Environmental Protection Agency (EPA) to develop and publish, and from time to time revise, criteria for water accurately reflecting the latest scientific knowledge. When final, these criteria provide EPA's recommendations to States and authorized Tribes as they establish their water quality standards as State or Tribal law or regulation. Once established, an EPA water quality criterion does not substitute for the CWA or EPA regulations, nor is it a regulation. It cannot impose legally binding requirements on the EPA, States, authorized Tribes or the regulated community. State and tribal decision makers have discretion to adopt approaches that differ from EPA's guidance on a case-by-case basis. At this time the Agency is making a final recomendation for TBT.

ADDRESSES: Copies of the criteria document entitled, *Ambient Aquatic Life Water Quality Criteria for Tributyltin (TBT)—Final (EPA–822–R–03–031)* may be obtained from EPA's Water Resource Center by phone at (202) 566–1729, or by e-mail to *center.water.resource@epa.gov* or by conventional mail to: EPA Water Resource Center, 4101T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. You can also download the document from EPA's Web site at *http://www.epa.gov/waterscience/criteria/tributyltin/.*

FOR FURTHER INFORMATION CONTACT: Frank Gostomski, Health and Ecological Criteria Division (4304T), U.S. EPA, 1200 Pennsylvania Avenue, NW., Washington, DC 20460; (202) 566–1105; *gostomski.frank@epa.gov*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Interested Entities

Entities potentially interested in today's notice are those that produce, use, or regulate TBT. Categories and entities interested in today's notice include:

Category	Examples of interested entities
State/Local/Tribal Government.	States and Tribes
TBT Dischargers	Shipyard repair facilities
TBT Users	Producers of antifouling paints

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be interested in this notice. This table lists the types of entities that EPA is now aware could potentially be interested in this notice. Other types of entities not listed in the table could also be interested.

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

1. *Docket.* EPA has established an official public docket for this notice under Docket ID No. OW–2002–0003. The official public docket consists of the documents specifically referenced in this notice, any scientific views received, and other information related

to this notice. 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 Water 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 Public Reading Room is (202) 566–1744, and the telephone number for the Water Docket is (202) 566–2426. To view these documents materials, please call ahead to schedule an appointment. Every user is entitled to copy 266 pages per day before incurring a charge. The Docket may charge 15 cents a page for each page over the 266-page limit plus an administrative fee of $25.00.

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

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at *http://www.epa.gov/edocket/* to view scientific views, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

II. Background and Today's Notice

A. What Are Recommended Water Quality Criteria?

Recommended water quality criteria are the concentrations of a chemical in water at or below which aquatic life are protected from acute and chronic adverse effects of the chemical. Section 304(a)(1) of the Clean Water Act (CWA) requires EPA to develop and publish, and from time to time revise, criteria for water accurately reflecting the latest scientific knowledge. Water quality criteria developed under section 304(a) are based solely on data and scientific judgments. They do not consider economic impacts or the technological feasibility of meeting the criteria in ambient water. Section 304(a) criteria provide guidance to States and Tribes in adopting water quality standards. The criteria also provide a scientific basis for EPA to develop Federally promulgated water quality standards under section 303(c) of the CWA.

B. What Is Tributyltin (TBT) and Why Are We Concerned About It?

TBT is an organotin compound used primarily as a biocide in antifouling paints. It is extremely toxic to aquatic organisms. Environmental exposure occurs mainly from its application as a biocide in antifouling paints applied to ship hulls to keep barnacles and other fouling organisms from attaching to the hull. TBT remains effective over long periods because it is released from the hull into the water column over time. TBT is extremely stable and resistant to natural degradation in water. Because of TBT's high toxicity and the potential exposure of aquatic organisms to it, EPA has developed ambient water quality criteria for it.

C. What Are the National Recommended Water Quality Criteria for TBT?

Freshwater

Aquatic life should not be affected unacceptably if the: One-hour average concentration of TBT does not exceed 0.46 ug/l more than once every three years on the average (Acute Criterion); and Four-day average concentration of TBT does not exceed 0.072 ug/l more than once every three years on the average (Chronic Criterion).

Saltwater

Aquatic life should not be affected unacceptably if the: One-hour average concentration of TBT does not exceed 0.42 ug/l more than once every three years on the average (Acute Criterion); and Four-day average concentration of TBT does not exceed 0.0074 ug/l more than once every three years on the average (Chronic Criterion).

D. Why Is EPA Notifying the Public About the Final TBT Criteria Document?

Today, EPA is notifying the public that this final aquatic life criteria document for TBT is available. In the **Federal Register** on August 7, 1997 (62 FR 42554), EPA notified the public that a draft aquatic life criteria document for TBT was available and solicited scientific input. Based on the information and data submitted, EPA updated the draft document and made revised criteria available to the public for scientific input in a **Federal Register** notice on December 27, 2002 (67 FR 79090). EPA is now making the final aquatic life criteria document for TBT available to the public.

E. Where Can I Find More Information on EPA's Revised Process for Developing New or Revised Criteria?

The Agency published detailed information about its revised process for developing and revising criteria in the **Federal Register** on December 10, 1998 (63 FR 68354), and in the EPA document entitled, *National Recommended Water Quality—Correction* (EPA 822–Z–99–001, April 1999). The purpose of the revised process is to provide expanded opportunities for public input, and to make the criteria development process more efficient.

Dated: December 23, 2003.

Geoffrey H. Grubbs,

Director, Office of Science and Technology.

[FR Doc. 04–82 Filed 1–2–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7606–4]

Grant Warehouse Time-Critical Removal Site Notice of Proposed Administrative Settlement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comment.

SUMMARY: In accordance with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, notice is hereby given that a proposed Agreement and Covenant Not to Sue (Prospective Purchaser Agreement) associated with the Grant Warehouse Time-Critical Removal Site ("Site") was executed by the United States Environmental Protection Agency (EPA) on December 22, 2003. The proposed Prospective Purchaser Agreement would resolve certain potential claims of the United States under sections 106 and 107(a) of CERCLA, 42 U.S.C. 9606 and 9607(a), against the Portland Development Commission ("PDC"), an urban renewal agency of the city of Portland, Oregon.

DATES: Comments must be submitted on or before January 20, 2004.

ADDRESSES: The proposed Prospective Purchaser Agreement and additional background documents relating to the settlement are available for public inspection at the U.S. Environmental Protection Agency, 1200 Sixth Ave., Seattle, WA 98101. A copy of the proposed settlement may be obtained from Dean Ingemansen, Assistant

Regional Counsel (ORC–158), Office of Regional Counsel, U.S. EPA Region 10, Seattle, WA 98101. Comments should reference "Portland Development Commission PPA, Grant Warehouse Time-Critical Removal Site" and "Docket No. CERCLA–10–2004–0022" and should be addressed to Dean Ingemansen at the above address.

FOR FURTHER INFORMATION CONTACT: Dean Ingemansen, Assistant Regional Counsel (ORC–158), Office of Regional Counsel, U.S. EPA Region 10, Seattle, WA 98101; phone: (206) 553–1744; fax: (206) 553–0163; e-mail: *ingemansen.dean@epa.gov.*

SUPPLEMENTARY INFORMATION: PDC plans to purchase the Site property, located at 3368 N.E. Martin Luther King, Jr. Blvd., Portland, Oregon, and consisting of Lots 29, 30, and 31 in Block 13, Albina, City of Portland, as part of the city's redevelopment of the Martin Luther King Boulevard corridor in NE Portland. PDC will purchase the property for its appraised value of $177,000.00, complete remediation of the property, and then redevelop the property which is located in a low-income, environmental justice community. PDC's redevelopment plans include construction of some low-income housing and more desirable retail businesses.

PDC is also planning to complete remediation of the Site property to a level that will allow for unrestricted use. EPA's time-critical removal action in 1998 and 1999 merely addressed the immediate environmental threats posed by the uncontrolled storage of hazardous substances at the Site, whereas PDC's additional cleanup actions will allow for residential as well as commercial uses at the Site. PDC has budgeted approximately $514,000 for remediation of the site property and for tearing down the warehouse itself. Part of this budget includes a $200,000 Brownfields Site Remediation grant from EPA.

At the same time as EPA is entering into this PPA, the United States is also entering into a consent decree with the current Site owner, Mr. Erwin Grant. The consent decree provides that Mr. Grant will sell the Site property to PDC for its appraised fair market value of $177,000.00, and that Mr. Grant will pass on to EPA one-half of that amount, or $88,500.00 in cash, which will be placed into the EPA Hazardous Substances Superfund. Mr. Grant will then receive contribution protection and a covenant not to sue from the United States. The United States Department of Justice has published a notice in the **Federal Register** requesting comments on the consent decree. Persons interested in submitting comments on the proposed consent decree should address those comments to the following: Assistant Attorney General, Environment and Natural Resources Division, PO Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to United States of America v. Erwin Grant and Real Property Located at 3368 N.E. Martin Luther King, Jr. Boulevard, D.J. Ref. 90–11–3–06611/1.

The Brownfields grant requires PDC to take title to the property before EPA can finalize the grant. EPA Headquarters has given PDC until January 29, 2004, to take title to the Site property. If PDC fails to take title by that date, the grant funding will no longer be available. EPA Headquarters has informed Region 10 and PDC that no extensions will be granted. As such, EPA is allowing fifteen days for public comment on the PPA. For fifteen calendar days following the date of publication of this notice, EPA will receive written comments relating to the proposed Prospective Purchaser Agreement. EPA's response to any comments received will be available for public inspection at the U.S. Environmental Protection Agency, 1200 Sixth Ave., Seattle, WA 98101.

Dated: December 23, 2003.

L. John Iani,

Regional Administrator, Region 10.

[FR Doc. 04–13 Filed 1–2–04; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7606–3]

Notice of Availability of Draft National Pollution Discharge Elimination System (NPDES) General Permit for Discharges at Hydroelectric Generating Facilities in the States of MA and New Hampshire and Indian Lands in the State of Massachusetts

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability of Draft NPDES General Permits MAG360000 and NHG360000: extension of comment period.

SUMMARY: In response to requests from sources that may be eligible for coverage under this general permit, EPA, Region 1 is extending the comment period for its Draft National Pollutant Discharge Elimination System (NPDES) general permit for specific discharges at Hydroelectric Generating Facilities to certain waters of the States of Massachusetts and New Hampshire and Indian Lands in the State of Massachusetts. The Notice of Availability for this General Permit was published in the **Federal Register** on Friday, November 28, 2003 (68 FR 66826).

DATES: The comment period is being extended from December 29, 2003 to January 16, 2004. Comments must be received or postmarked by midnight on January 16, 2004. Interested persons may submit comments on the draft general permit as part of the administrative record to the EPA–Region 1 at the address given below. Within the comment period, interested persons may also request in writing a public hearing pursuant to 40 CFR 124.12 concerning the draft general permit. All public comments or requests for a public hearing must be submitted to the address below.

ADDRESSES: Written comments may be hand delivered or mailed to: EPA–Region 1, Office of Ecosystem Protection (CPE), 1 Congress Street, Suite 1100, Boston, Massachusetts 02114–2023 and also sent via e-mail to *wandle.bill@epa.gov.* No facsimiles (faxes) will be accepted. The draft permit is based on an administrative record available for public review at EPA–Region 1, Office of Ecosystem Protection (CPE), 1 Congress Street, Suite 1100, Boston, Massachusetts 02114–2023. Copies of information in the record are available upon request. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Additional information concerning the draft permit may be obtained between the hours of 8 a.m. and 4 p.m. Monday through Friday excluding holidays from: William Wandle, Office of Ecosystem Protection, Environmental Protection Agency, 1 Congress Street, Suite 1100 (CPE), Boston, MA 02114—2023, telephone: 617–918–1605, e-mail: *wandle.bill@epa.gov*

SUPPLEMENTARY INFORMATION: The draft general permit may be viewed over the Internet via the EPA–Region 1 Web site for dischargers in Massachusetts at *http://www.epa.gov/ne/npdes/mass.html* and for dischargers in New Hampshire at *http://www.epa.gov/ne/npdes/newhampshire.html.*

Dated: December 18, 2003.

Robert W. Varney,

Regional Administrator, USEPA, Region 1.

[FR Doc. 04–14 Filed 1–2–04; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

Federal Advisory Committee Act Notice of Public Meeting

AGENCY: Federal Communications Commission.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463, as amended, this notice advises interested persons that the Advisory Committee on Diversity for Communications in the Digital Age has been established and is holding its second meeting, which will be held at the Federal Communications Commission in Washington, DC. The Diversity Committee was established by the Federal Communications Commission to examine current opportunities and develop recommendations for policies and practices that will further enhance the ability of minorities and women to participate in telecommunications and related industries.

DATES: January 26, 2004, 2 p.m. to 5 p.m.

ADDRESSES: Federal Communications Commission, Commission Meeting Room, Room TW–C305, 445 12th St. SW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Jane E. Mago, Designated Federal Officer of the Committee on Diversity, or Maureen C. McLaughlin, Alternate Designated Federal Officer of the Committee on Diversity, 445 12th St. SW., Washington, DC 20554; telephone 202–418–2030, e-mail *Jane.Mago @fcc.gov, Maureen.Mclaughlin@fcc.gov.* Press Contact, Audrey Spivak, Office of Public Affairs, 202–418–0512, *aspivak@fcc.gov.*

SUPPLEMENTARY INFORMATION: The Diversity Committee was established by the Federal Communications Commission to examine current opportunities and develop recommendations for policies and practices that will further enhance the ability of minorities and women to participate in telecommunications and related industries. The Diversity Committee will tap the expertise of high-level players in the communications sector as well as the financial and technology communities. The Diversity Committee will prepare periodic and final reports to aid the FCC in its oversight responsibilities and its regulatory reviews in this area. In conjunction with such reports and analyses, the Diversity Committee will make recommendations to the FCC concerning the need for any guidelines, incentives, regulations or other policy approaches to promote diversity of participation in the communications sector. The Diversity Committee will also develop a description of best practices within the communications sector for promoting diversity of participation.

Information concerning the activities of the Diversity Committee can be reviewed at the Committee's Web site <*http://www.fcc.gov/DiversityFAC*>. Material relevant to the January 26th meeting will be posted there. Members of the general public may attend the meeting. The Federal Communications Commission will attempt to accommodate as many people as possible. However, admittance will be limited to the seating available. A live RealAudio feed will be available over the Internet; information on how to tune in can be found at the Commission's Web site <*http://www.fcc.gov*>.

The public may submit written comments to the Council's designated Federal Officer before the meeting.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

[FR Doc. 04–39 Filed 1–2–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL HOUSING FINANCE BOARD

[No. 2003–N–12]

Federal Home Loan Bank Members Selected for Community Support Review

AGENCY: Federal Housing Finance Board.

ACTION: Notice.

SUMMARY: The Federal Housing Finance Board (Finance Board) is announcing the Federal Home Loan Bank (Bank) members it has selected for the 2002–03 eighth quarter review cycle under the Finance Board's community support requirements regulation. This notice also prescribes the deadline by which Bank members selected for review must submit Community Support Statements to the Finance Board.

DATES: Bank members selected for the 2002–03 eighth quarter review cycle under the Finance Board's community support requirements regulation must submit completed Community Support Statements to the Finance Board on or before February 27, 2004.

ADDRESSES: Bank members selected for the 2002–03 eighth quarter review cycle under the Finance Board's community support requirements regulation must submit completed Community Support Statements to the Finance Board either by regular mail at the Federal Housing Finance Board, Office of Supervision, Community Investment and Affordable Housing, 1777 F Street, NW., Washington, DC 20006, or by electronic mail at *FITZGERALDE@FHFB.GOV.*

FOR FURTHER INFORMATION CONTACT: Emma J. Fitzgerald, Program Analyst, Office of Supervision, Community Investment and Affordable Housing, by telephone at 202/408–2874, by electronic mail at *FITZGERALDE@FHFB.GOV,* or by regular mail at the Federal Housing Finance Board, 1777 F Street, NW., Washington, DC 20006.

SUPPLEMENTARY INFORMATION:

I. Selection for Community Support Review

Section 10(g)(1) of the Federal Home Loan Bank Act (Bank Act) requires the Finance Board to promulgate regulations establishing standards of community investment or service Bank members must meet in order to maintain access to long-term advances. *See* 12 U.S.C. 1430(g)(1). The regulations promulgated by the Finance Board must take into account factors such as the Bank member's performance under the Community Reinvestment Act of 1977 (CRA), 12 U.S.C. 2901 *et seq.*, and record of lending to first-time homebuyers. *See* 12 U.S.C. 1430(g)(2). Pursuant to section 10(g) of the Bank Act, the Finance Board has promulgated a community support requirements regulation that establishes standards a Bank member must meet in order to maintain access to long-term advances, and review criteria the Finance Board must apply in evaluating a member's community support performance. *See* 12 CFR part 944. The regulation includes standards and criteria for the two statutory factors—CRA performance and record of lending to first-time homebuyers. 12 CFR 944.3. Only members subject to the CRA must meet the CRA standard. 12 CFR 944.3(b). All members, including those not subject to CRA, must meet the first-time homebuyer standard. 12 CFR 944.3(c).

Under the rule, the Finance Board selects approximately one-eighth of the members in each Bank district for community support review each calendar quarter. 12 CFR 944.2(a). The Finance Board will not review an institution's community support performance until it has been a Bank member for at least one year. Selection for review is not, nor should it be construed as, any indication of either the financial condition or the

community support performance of the member.

Each Bank member selected for review must complete a Community Support Statement and submit it to the Finance Board by the February 27, 2004 deadline prescribed in this notice. 12 CFR 944.2(b)(1)(ii) and (c). On or before January 26, 2004, each Bank will notify the members in its district that have been selected for the 2002–03 eighth quarter community support review cycle that they must complete and submit to the Finance Board by the deadline a Community Support Statement. 12 CFR 944.2(b)(2)(i). The member's Bank will provide a blank Community Support Statement Form, which also is available on the Finance Board's Web site: *http://WWW.FHFB.GOV*. Upon request, the member's Bank also will provide assistance in completing the Community Support Statement.

The Finance Board has selected the following members for the 2002–03 eighth quarter community support review cycle:

Member	City	State
Federal Home Loan Bank of Boston—District 1		
Savings Bank of Danbury	Danbury	Connecticut.
American Eagle Federal Credit Union	East Hartford	Connecticut.
VantisLife Insurance Company	East Hartford	Connecticut.
The Dime Savings Bank of Norwich	Norwich	Connecticut.
Stafford Savings Bank	Stafford Springs	Connecticut.
Sikorsky Federal Credit Union	Stratford	Connecticut.
Torrington Savings Bank	Torrington	Connecticut.
Constitution State Corporate Credit Union, Inc	Wallingford	Connecticut.
Webster Bank	Waterbury	Connecticut.
Maine State Employees Credit Union	Augusta	Maine.
Biddeford Savings Bank	Biddeford	Maine.
Atlantic Regional Federal Credit Union	Brunswick	Maine.
Ocean National Bank	Kennebunk	Maine.
Rainbow Federal Credit Union	Lewiston	Maine.
Community Credit Union	Lewiston	Maine.
Ste. Croix Regional Federal Credit Union	Lewiston	Maine.
Sebasticook Valley Federal Credit Union	Pittsfield	Maine.
Greater Portland Municipal Credit Union	South Portland	Maine.
Town and County Federal Credit Union	South Portland	Maine.
Evergreen Credit Union	Westbrook	Maine.
The Provident Bank	Amesbury	Massachusetts.
Athol-Clinton Co-operative Bank	Athol	Massachusetts.
Citizens Bank of Massachusetts	Boston	Massachusetts.
Massachusetts State Employees Credit Union	Boston	Massachusetts.
Mercantile Bank and Trust Company	Boston	Massachusetts.
Brookline Municipal Credit Union	Brookline	Massachusetts.
Metropolitan Credit Union	Chelsea	Massachusetts.
Postal Community Credit Union	East Boston	Massachusetts.
Everett Co-operative Bank	Everett	Massachusetts.
St. Anne's Credit Union of Fall River, Mass	Fall River	Massachusetts.
I.C. Federal Credit Union	Fitchburg	Massachusetts.
Holyoke Credit Union	Holyoke	Massachusetts.
Hyde Park Cooperative Bank	Hyde Park	Massachusetts.
Jeanne d'Arc Credit Union	Lowell	Massachusetts.
TeleCom Cooperative Bank	Malden	Massachusetts.
St. Mary's Credit Union	Marlborough	Massachusetts.
Pilgrim Co-operative Bank	Marshfield	Massachusetts.
Medway Co-operative Bank	Medway	Massachusetts.
Merrimac Savings Bank	Merrimac	Massachusetts.
Millbury National Bank	Millbury	Massachusetts.
Direct Federal Credit Union	Needham	Massachusetts.
The Village Bank	Newton	Massachusetts.
Merrimack Valley Federal Credit Union	North Andover	Massachusetts.
Greylock Federal Credit Union	Pittsfield	Massachusetts.
Legacy Banks	Pittsfield	Massachusetts.
Bridgewater Savings Bank	Raynham	Massachusetts.
The Cooperative Bank	Roslindale	Massachusetts.
Saugus Federal Credit Union	Saugus	Massachusetts.
Member Plus Credit Union	Somerville	Massachusetts.
Winter Hill Bank	Somerville	Massachusetts.
MBTA Employees Credit Union	South Boston	Massachusetts.
Mt. Washington Co-operative Bank	South Boston	Massachusetts.
The Savings Bank	Wakefield	Massachusetts.
Wakefield Co-operative Bank	Wakefield	Massachusetts.
Webster Five Cents Savings Bank	Webster	Massachusetts.
Webster First Federal Credit Union	Webster	Massachusetts.
Massachusetts Credit Union Share Insurance Corporation	Westborough	Massachusetts.
Mutual Federal Savings Bank of Plymouth County	Whitman	Massachusetts.
Winchester Savings Bank	Winchester	Massachusetts.
Eastern Corporate Federal Credit Union	Woburn	Massachusetts.

Member	City	State
Ledyard National Bank	Hanover	New Hampshire.
Monadnock Community Bank	Peterborough	New Hampshire.
Pemigewasset National Bank	Plymouth	New Hampshire.
Northeast Credit Union	Portsmouth	New Hampshire.
Woodsville Guaranty Savings Bank	Woodsville	New Hampshire.
The Peoples Credit Union	Middleton	Rhode Island.
Pawtucket Credit Union	Pawtucket	Rhode Island.
Coastway Credit Union	Providence	Rhode Island.
Fleet National Bank	Providence	Rhode Island.
Vermont Development Credit Union	Burlington	Vermont.
Community National Bank	Derby	Vermont.
The First National Bank of Orwell	Orwell	Vermont.
Wells River Savings Bank	Wells River	Vermont.
Federal Home Loan Bank of New York—District 2		
Summit Federal Savings & Loan Association	Dunellen	New Jersey.
Sterling Bank	Mt. Laurel	New Jersey.
Roselle Savings Bank	Roselle	New Jersey.
Greater Community Bank	Totowa	New Jersey.
Sun National Bank	Vineland	New Jersey.
Valley National Bank	Wayne	New Jersey.
Marathon National Bank of New York	Astoria	New York.
Seneca Federal Savings and Loan Association	Baldwinsville	New York.
Ballston Spa National Bank	Ballston Spa	New York.
Bath National Bank	Bath	New York.
New York National Bank	Bronx	New York.
The Dime Savings Bank of Williamsburgh	Brooklyn	New York.
The North Country Savings Bank	Canton	New York.
Community Bank, National Association	Canton	New York.
Carthage Federal Savings and Loan Association	Carthage	New York.
Lake Shore Savings & Loan Association	Dunkirk	New York.
Ellenville National Bank	Ellenville	New York.
City National Bank & Trust Company	Gloversville	New York.
Sound Federal Savings and Loan Association	Mamaroneck	New York.
North Fork Bank	Melville	New York.
Interaudi Bank	New York	New York.
Ridgewood Savings Bank	New York	New York.
Alliance Bank, NA	Oneida	New York.
The Seneca Falls Savings Bank	Seneca Falls	New York.
Geddes Federal Savings and Loan Association	Syracuse	New York.
The National Bank of Delaware County	Walton	New York.
RG Premier Bank of PR	Hato Rey	Puerto Rico.
Banco Popular de Puerto Rico	San Juan	Puerto Rico.
EuroBank	San Juan	Puerto Rico.
Federal Home Loan Bank of Pittsburgh—District 3		
Chase Manhattan Bank USA, N.A	Wilmington	Delaware.
Sun East Federal Credit Union	Aston	Pennsylvania.
Allegiance Bank of North America	Bala Cynwyd	Pennsylvania.
Philadelphia Indemnity Insurance Company	Bala Cynwyd	Pennsylvania.
Philadelphia Insurance Company	Bala Cynwyd	Pennsylvania.
The First National Bank of Berwick	Berwick	Pennsylvania.
American Eagle Savings Bank	Boothwyn	Pennsylvania.
Commerce Bank/Harrisburg, N.A	Camp Hill	Pennsylvania.
First National Bank of Canton	Canton	Pennsylvania.
Croydon Savings Bank	Croydon	Pennsylvania.
FNB Bank, N.A	Danville	Pennsylvania.
Bank of Lancaster County, N.A	East Petersburg	Pennsylvania.
Marquette Savings Bank	Erie	Pennsylvania.
First United National Bank	Fryburg	Pennsylvania.
Adams County National Bank	Gettysburg	Pennsylvania.
First National Bank of Greencastle	Greencastle	Pennsylvania.
Legacy Bank of Harrisburg	Harrisburg	Pennsylvania.
Huntingdon Savings Bank	Huntingdon	Pennsylvania.
Huntingdon Valley Bank	Huntingdon Valley	Pennsylvania.
First Commonwealth Bank	Indiana	Pennsylvania.
Abington Bank	Jenkintown	Pennsylvania.
Reliance Federal Credit Union	King of Prussia	Pennsylvania.
The Merchants National Bank of Kittanning	Kittanning	Pennsylvania.
Fulton Bank	Lancaster	Pennsylvania.
Citizens National Bank	Lansford	Pennsylvania.
The First National Bank of Lilly	Lilly	Pennsylvania.

Member	City	State
Millennium Bank	Malvern	Pennsylvania.
Savings and Loan Association of Milton, Pa	Milton	Pennsylvania.
The First National Bank of Newport	Newport	Pennsylvania.
Progress Bank	Norristown	Pennsylvania.
The Northumberland National Bank	Northumberland	Pennsylvania.
First National Bank of Palmerton	Palmerton	Pennsylvania.
Tioga Franklin Savings Bank	Philadelphia	Pennsylvania.
United Savings Bank	Philadelphia	Pennsylvania.
Fidelity Bank PaSb	Pittsburgh	Pennsylvania.
Landmark Community Bank	Pittston	Pennsylvania.
Wilmington Trust of Pennsylvania	Villanova	Pennsylvania.
West Milton State Bank	West Milton	Pennsylvania.
PeoplesBank, a Codurus Valley Company	York	Pennsylvania.
Citizens National Bank of Berkeley Springs	Berkeley Springs	West Virginia.
Bank of Charles Town	Charles Town	West Virginia.
Star USA Federal Credit Union	Charleston	West Virginia.
Davis Strust Company	Elkins	West Virginia.
Pendleton County Bank	Franklin	West Virginia.
Guaranty Bank & Trust Company	Huntington	West Virginia.
Summit Community Bank	Moorefield	West Virginia.
Capon Valley Bank	Wardensville	West Virginia.
First National Bank in West Union	West Union	West Virginia.
The Citizens Bank of Weston, Inc	Weston	West Virginia.
Federal Home Loan Bank of Atlanta—District 4		
First National Bank of Central Alabama	Aliceville	Alabama.
The First National Bank of Atmore	Atmore	Alabama.
Alabama Central Credit Union	Birmingham	Alabama.
Regions Bank	Birmingham	Alabama.
The Bank	Birmingham	Alabama.
Farmers and Merchants Bank	Centre	Alabama.
Merchants & Farmers Bank of Greene County	Eutaw	Alabama.
First Lowndes Bank, Incorporated	Fort Deposit	Alabama.
Alabama Teachers Credit Union	Gadsden	Alabama.
First Metro Bank	Muscle Shoals	Alabama.
Farmers and Merchants Bank	Piedmont	Alabama.
West Alabama Bank & Trust	Reform	Alabama.
Bank Independent	Sheffield	Alabama.
First Southern National Bank	Stevenson	Alabama.
Turnberry Bank	Aventura	Florida.
Palm Beach County Bank	Boynton Beach	Florida.
Coast Bank of Florida	Bradenton	Florida.
Horizon Bank	Bradenton	Florida.
Riverside Bank of the Gulf Coast	Cape Cora	Florida.
Gulf State Community Bank	Carrabelle	Florida.
EuroBank	Coral Gables	Florida.
Destin Bank	Destin	Florida.
Englewood Bank	Englewood	Florida.
City County Credit Union of Fort Lauderdale	Fort Lauderdale	Florida.
First Community Bank of Southwest Florida	Fort Myers	Florida.
Beach Community Bank	Fort Walton Beach	Florida.
Equitable Bank	Ft. Lauderdale	Florida.
Florida Citizens Bank	Gainesville	Florida.
First Bank of Indiantown	Indiantown	Florida.
Jax Federal Credit Union	Jacksonville	Florida.
The Jacksonville Bank	Jacksonville	Florida.
Jacksonville Fireman's Credit Union	Jacksonville	Florida.
CNB National Bank	Lake City	Florida.
Community United Bank of Florida	Lake Mary	Florida.
Heritage Bank of Florida	Lutz	Florida.
BAC Florida Bank	Miami	Florida.
Executive National Bank	Miami	Florida.
Gulf Bank	Miami	Florida.
Fifth Third Bank, Florida	Naples	Florida.
Madison Bank	Palm Harbor	Florida.
Sunshine State FS&L Association	Plant City	Florida.
Dorsey State Bank	Abbeville	Georgia.
Wheeler County State Bank	Alamo	Georgia.
First National Bank of South Georgia	Albany	Georgia.
Integrity Bank	Alpharetta	Georgia.
Sumter Bank & Trust Company	Americus	Georgia.
Colony Bank Ashburn	Ashburn	Georgia.
Community National Bank	Ashburn	Georgia.

Member	City	State
The National Bank of Georgia	Athens	Georgia.
Bank of America Georgia, NA	Atlanta	Georgia.
Capitol City Bank & Trust Company	Atlanta	Georgia.
United Community Bank	Blairsville	Georgia.
Atlantic National Bank	Brunswick	Georgia.
Peoples Bank & Trust	Buford	Georgia.
United National Bank	Cairo	Georgia.
Bartow County Bank	Cartersville	Georgia.
Peoples Community Bank	Colquitt	Georgia.
Columbus Bank and Trust	Columbus	Georgia.
First National Bank	Covington	Georgia.
Lumpkin County Bank	Dahlonega	Georgia.
Bank of Dawson	Dawson	Georgia.
Bank of Terrell	Dawson	Georgia.
Horizon Bank	Decatur	Georgia.
Global Commerce Bank	Doraville	Georgia.
Farmers State Bank	Dublin	Georgia.
First National Bank of Gwinnett	Duluth	Georgia.
Heritage Bank	Jonesboro	Georgia.
Charter Bank and Trust Company	Marietta	Georgia.
First Capital Bank	Norcross	Georgia.
Waycross Bank & Trust	Waycross	Georgia.
UnitedBank	Zebulon	Georgia.
The Harbor Bank of Maryland	Baltimore	Maryland.
Educational Systems Employees Federal C.U	Bladensburg	Maryland.
The National Bank of Cambridge	Cambridge	Maryland.
First Peoples Community Federal Credit Union	Cumberland	Maryland.
The Peoples Bank of Maryland	Denton	Maryland.
Freedom of Maryland Federal Credit Union	EA–APG (Aberdeen)	Maryland.
County First Bank	La Plata	Maryland.
Bank of Ocean City	Ocean City	Maryland.
Farmers and Merchants Bank	Upperco	Maryland.
Old Line National Bank	Waldorf	Maryland.
Westminster Union Bank	Westminster	Maryland.
High Country Bank	Boone	North Carolina.
New Century Bank	Dunn	North Carolina.
Four Oaks Bank & Trust Company	Four Oaks	North Carolina.
Alamance National Bank	Graham	North Carolina.
SterlingSouth Bank & Trust Company	Greensboro	North Carolina.
BB & T of SC	Lumberton	North Carolina.
Bank of Carolinas	Mocksville	North Carolina.
Trinity Bank	Monroe	North Carolina.
Bank of Currituck	Moyock	North Carolina.
Bank of Oak Ridge	Oak Ridge	North Carolina.
North State Bank	Raleigh	North Carolina.
First-Citizens Bank & Trust Company	Raleigh	North Carolina.
Roanoke Rapids Savings Bank, SSB	Roanoke Rapids	North Carolina.
KS Bank	Smithfield	North Carolina.
Jackson Savings Bank, S.S.B	Sylva	North Carolina.
Tarboro Savings Bank, SSB	Tarboro	North Carolina.
Members Credit Union	Winston Salem	North Carolina.
Security Federal Bank	Aiken	South Carolina.
Bank of Anderson	Anderson	South Carolina.
Lowcountry National Bank	Beaufort	South Carolina.
Summit National Bank	Greenville	South Carolina.
CapitalBank	Greenwood	South Carolina.
Palmetto State Bank	Hampton	South Carolina.
Hartsville Community Bank, N.A	Hartsville	South Carolina.
Beach First National Bank	Myrtle Beach	South Carolina.
Nexity Bank	Myrtle Beach	South Carolina.
Newberry Federal Savings Bank	Newberry	South Carolina.
First National Bank of the South	Spartanburg	South Carolina.
Highlands Union Bank	Abingdon	Virginia.
The First Bank and Trust Company	Abingdon	Virginia.
Treasury Bank, N.A	Alexandria	Virginia.
Common Wealth One Federal Credit Union	Alexandria	Virginia.
The First National Bank of Altavista	Altavista	Virginia.
Bank of Clarke County	Berryville	Virginia.
Guaranty Bank	Charlottesville	Virginia.
Constellation Federal Credit Union	Falls Church	Virginia.
Capital One, F.S.B	Falls Church	Virginia.
The Bank of Floyd	Floyd	Virginia.
Miners and Merchants Bank and Trust Company	Grundy	Virginia.
Rockingham Heritage Bank	Harrisonburg	Virginia.

Member	City	State
Bank of Northumberland, Inc	Heathsville	Virginia.
The Bank of Marion	Marion	Virginia.
Heritage Bank and Trust	Norfolk	Virginia.
Bank of Essex	Tappahannock	Virginia.
Resource Bank	Virginia Beach	Virginia.
The Fauquier Bank	Warrenton	Virginia.
Federal Home Loan Bank of Cincinnati—District 5		
Town Square Bank, Inc	Ashland	Kentucky.
The Peoples Exchange Bank of Beattyville	Beattyville	Kentucky.
Central Appalachian Peoples Federal Credit Union	Berea	Kentucky.
Farmers State Bank	Booneville	Kentucky.
American Bank & Trust Company, Inc	Bowling Green	Kentucky.
Citizens First Bank, Inc	Bowling Green	Kentucky.
The First National Bank of Brooksville	Brooksville	Kentucky.
Brownsville Deposit Bank	Brownsville	Kentucky.
Heritage Bank, Inc	Burlington	Kentucky.
Bank of Caneyville	Caneyville	Kentucky.
Clinton Bank	Clinton	Kentucky.
Bank of Corbin	Corbin	Kentucky.
Bank of Ohio County	Dundee	Kentucky.
Elkton Bank and Trust Company	Elkton	Kentucky.
Farmers Deposit Bank	Eminence	Kentucky.
The Bank of Kentucky	Florence	Kentucky.
First Federal Savings Bank of Frankfort	Frankfort	Kentucky.
The Commercial Bank of Grayson	Grayson	Kentucky.
The First National Bank of Grayson	Grayson	Kentucky.
Ohio Valley National Bank	Henderson	Kentucky.
Hyden Citizens Bank	Hyden	Kentucky.
Citizens Guaranty Bank	Irvine	Kentucky.
The First National Bank of Jackson	Jackson	Kentucky.
Citizens Bank & Trust Company of Jackson	Jackson	Kentucky.
Peoples Bank	Lebanon	Kentucky.
Lewisburg Banking Company	Lewisburg	Kentucky.
KUE Federal Credit Union	Lexington	Kentucky.
Members Heritage Federal Credit Union	Lexington	Kentucky.
University of Kentucky Federal Credit Union	Lexington	Kentucky.
First National Bank and Trust	London	Kentucky.
Park Federal Credit Union	Louisville	Kentucky.
Stock Yards Bank & Trust Company	Louisville	Kentucky.
The Peoples Bank	Marion	Kentucky.
Security Bank & Trust Company	Maysville	Kentucky.
The Citizens Bank	Morehead	Kentucky.
Citizens Bank of Campbell County, Inc	Newport	Kentucky.
First Farmers Bank & Trust Company	Owenton	Kentucky.
Paducah Bank & Trust Company	Paducah	Kentucky.
Kentucky Bank	Paris	Kentucky.
Salyersville National Bank	Salyersville	Kentucky.
Citizens Union Bank of Shelbyville	Shelbyville	Kentucky.
Somerset National Bank	Somerset	Kentucky.
Peoples Bank of Kentucky, Inc	Stanford	Kentucky.
Bank of the Mountains	West Liberty	Kentucky.
Winchester Federal Savings Bank	Winchester	Kentucky.
North Akron Savings Bank	Akron	Ohio.
The Andover Bank	Andover	Ohio.
The Sutton State Bank	Attica	Ohio.
United Bank, N.A	Bucyrus	Ohio.
Farmers National Bank	Canfield	Ohio.
The Cincinnatus Savings & Loan Company	Cheviot	Ohio.
Foundation Savings	Cincinnati	Ohio.
The Provident Bank	Cincinnati	Ohio.
Corporate One Federal Credit Union	Columbus	Ohio.
CME Federal Credit Union	Columbus	Ohio.
Prospect Bank	Columbus	Ohio.
The Union Bank Company	Columbus Grove	Ohio.
Cuyahoga Falls Savings Bank	Cuyahoga Falls	Ohio.
Heartland Federal Credit Union	Dayton	Ohio.
The State Bank and Trust Company	Defiance	Ohio.
Fremont Federal Credit Union	Fremont	Ohio.
The Ohio Valley Bank Company	Gallipolis	Ohio.
The Sycamore National Bank	Groesbeck	Ohio.
The Harrison Building and Loan Association	Harrison	Ohio.
Oak Hill Banks	Jackson	Ohio.

Member	City	State
Lebanon Citizens National Bank	Lebanon	Ohio.
Buckeye Community Bank	Lorain	Ohio.
The Lorain National Bank	Lorain	Ohio.
The Marion Bank	Marion	Ohio.
Minster Bank	Minster	Ohio.
The Mount Victory State Bank	Mount Victory	Ohio.
First National Bank of New Bremen	New Bremen	Ohio.
Farmers State Bank	New Madison	Ohio.
Miami Employees Federal Credit Union	Oxford	Ohio.
Desco Federal Credit Union	Portsmouth	Ohio.
Portage Community Bank	Ravenna	Ohio.
The Richwood Banking Company	Richwood	Ohio.
The Sherwood State Bank	Sherwood	Ohio.
The First National Bank of Sycamore	Sycamore	Ohio.
First Bank of Ohio	Tiffin	Ohio.
Great Lakes Credit Union, Inc	Toledo	Ohio.
The Citizens National Bank of Urbana	Urbana	Ohio.
Seven Seventeen Credit Union, Inc	Warren	Ohio.
National Bank and Trust Company	Wilmington	Ohio.
Woodsfield Savings Bank	Woodsfield	Ohio.
Community B&T Company of Cheatham County	Ashland City	Tennessee.
Citizens Bank & Trust Company	Atwood	Tennessee.
First South Bank	Bolivar	Tennessee.
Southeast Financial Credit Union	Brentwood	Tennessee.
UnumProvident Federal Credit Union	Chattanooga	Tennessee.
Southern Heritage Bank	Cleveland	Tennessee.
The Community Bank of East Tennessee	Clinton	Tennessee.
First Alliance Bank	Cordova	Tennessee.
Union Planters Bank, NA	Cordova	Tennessee.
Tristar Bank	Dickson	Tennessee.
First State Bank	Dresden	Tennessee.
Franklin National Bank	Franklin	Tennessee.
Tennessee Commerce Bank	Franklin	Tennessee.
Bank of Friendship	Friendship	Tennessee.
Renasant Bank	Germantown	Tennessee.
Dupont Community Credit Union	Hixon	Tennessee.
Cornerstone Community Bank	Hixson	Tennessee.
The First National Bank of LaFollette	LaFollette	Tennessee.
Academy Bank	Lebanon	Tennessee.
Bank of Perry County	Lobelville	Tennessee.
Bank of Mason	Mason	Tennessee.
McKenzie Banking Company	McKenzie	Tennessee.
Security Federal Savings Bank	McMinnville	Tennessee.
Financial Federal Savings Bank	Memphis	Tennessee.
First Tennessee Bank NA	Memphis	Tennessee.
Tri-State Bank of Memphis	Memphis	Tennessee.
Pinnacle National Bank	Nashville	Tennessee.
Community Trust & Banking Company	Ooletewah	Tennessee.
Bank of Ripley	Ripley	Tennessee.
First Community Bank of East Tennessee	Rogersville	Tennessee.
The Citizens Bank of East Tennessee	Rogersville	Tennessee.
Hardin County Bank	Savannah	Tennessee.
Peoples State Bank	Trenton	Tennessee.
First National Bank of Tullahoma	Tullahoma	Tennessee.
The Traders National Bank	Tullahoma	Tennessee.
Wayne County Bank	Waynesboro	Tennessee.
Federal Home Loan Bank of Indianapolis—District 6.		
Central National Bank & Trust Company	Attica	Indiana.
Hoosier Hills Credit Union	Bedford	Indiana.
Bloomfield State Bank	Bloomfield	Indiana.
IU Employees Federal Credit Union	Bloomington	Indiana.
Wayne Bank and Trust Company	Cambridge City	Indiana.
Heritage Community Bank	Columbus	Indiana.
Chiphone Federal Credit Union	Elkhart	Indiana.
Fire Police City County Federal Credit Union	Fort Wayne	Indiana.
MidWest America Federal Credit Union	Fort Wayne	Indiana.
Peoples State Bank of Francesville	Francesville	Indiana.
The Friendship State Bank	Friendship	Indiana.
Sand Ridge Bank	Highland	Indiana.
German American Bank	Jasper	Indiana.
Lafayette Bank & Trust	Lafayette	Indiana.
Union County National Bank	Liberty	Indiana.

Member	City	State
Lynnville National Bank	Lynnville	Indiana.
Citizens State Bank	New Castle	Indiana.
Notre Dame Federal Credit Union	Notre Dame	Indiana.
State Bank of Oxford	Oxford	Indiana.
First Federal Savings Bank	Rochester	Indiana.
1st Source Bank	South Bend	Indiana.
First National Bank of Valparaiso	Valparaiso	Indiana.
CentreBank	Veedersburg	Indiana.
The Merchants Bank & Trust Company	West Harrison	Indiana.
Centier Bank	Whiting	Indiana.
Motor Parts Federal Credit Union	Auburn Hills	Michigan.
Chemical Bank—Shoreline	Benton Harbor	Michigan.
State Bank of Caledonia	Caledonia	Michigan.
Chelsea State Bank	Chelsea	Michigan.
Century Bank and Trust	Coldwater	Michigan.
Southern Michigan Bank and Trust	Coldwater	Michigan.
First State Bank	Decatur	Michigan.
Detroit Commerce Bank	Detroit	Michigan.
Baybank	Gladstone	Michigan.
Founders Trust Personal Bank	Grand Rapids	Michigan.
West Michigan Community Bank	Hudsonville	Michigan.
The Miners State Bank of Iron River	Iron River	Michigan.
Peninsula Bank of Ishpeming	Ishpeming	Michigan.
Kent Commerce Bank	Kentwood	Michigan.
West Shore Bank	Ludington	Michigan.
The Dart Bank	Mason	Michigan.
Citizens State Bank	New Baltimore	Michigan.
Onsted State Bank	Onsted	Michigan.
Oxford Bank	Oxford	Michigan.
The Bank of Northern Michigan	Petoskey	Michigan.
Community Plus Savings Bank	Rochester Hills	Michigan.
Independent Bank	Rockford	Michigan.
Old Mission Bank	Sault Saint Marie	Michigan.
FirstBank—St. Johns	St. Johns	Michigan.
Berrien Teachers Credit Union	St. Joseph	Michigan.
TBA Education Credit Union	Traverse City	Michigan.
Warren Bank	Warren	Michigan.
Federal Home Loan Bank of Chicago—District 7		
State Bank of Augusta	Augusta	Illinois.
Benchmark Bank	Aurora	Illinois.
The Old Second National Bank of Aurora	Aurora	Illinois.
State Bank of Aviston	Aviston	Illinois.
Tompkins State Bank	Avon	Illinois.
Beardstown Savings s.b	Beardstown	Illinois.
First Bank, bc	Belvidere	Illinois.
Citizens Bank—Illinois, National Association	Berwyn	Illinois.
Bloomingdale Bank & Trust	Bloomington	Illinois.
Great Lakes Bank, National Association	Blue Island	Illinois.
Capstone Bank, N.A	Bourbonnais	Illinois.
Bowen State Bank	Bowen	Illinois.
The Bank of Lawrence County	Bridgeport	Illinois.
Brimfield Bank	Brimfield	Illinois.
MidAmerican National Bank	Canton	Illinois.
Marine Trust Company	Carthage	Illinois.
Bank of Chenoa	Chenoa	Illinois.
Buena Vista National Bank	Chester	Illinois.
Chester National Bank	Chester	Illinois.
Cosmopolitan Bank and Trust Company	Chicago	Illinois.
Lakeside Bank	Chicago	Illinois.
LaSalle Northwest National Bank	Chicago	Illinois.
Pacific Global Bank	Chicago	Illinois.
Pullman Bank and Trust Company	Chicago	Illinois.
The First Commercial Bank	Chicago	Illinois.
The Northern Trust Company	Chicago	Illinois.
Vesta Fire Insurance Corporation	Chicago	Illinois.
State Bank of Chrisman	Chrisman	Illinois.
Amicus FSB	Cicero	Illinois.
American Savings Bank of Danville	Danville	Illinois.
Republic Bank of Chicago	Darien	Illinois.
Citizens Community Bank of Decatur	Decatur	Illinois.
First National Bank of Decatur	Decatur	Illinois.
Community Bank Delavan	Delavan	Illinois.

Member	City	State
The First National Bank of Dieterich	Dieterich	Illinois.
First State Bank of Dix	Dix	Illinois.
East Dubuque Savings Bank	East Dubuque	Illinois.
Citizens Bank of Edinburg	Edinburg	Illinois.
Florists' Mutual Insurance Company	Edwardsville	Illinois.
The Bank of Edwardsville	Edwardsville	Illinois.
C.P. Burnett & Sons, Bankers	Eldorado	Illinois.
First State Bank of Eldorado	Eldorado	Illinois.
The Elgin State Bank	Elgin	Illinois.
Advantage National Bank	Elk Grove Village	Illinois.
First Bank & Trust	Evanston	Illinois.
Fairfield National Bank	Fairfield	Illinois.
Flora Savings Bank	Flora	Illinois.
Micro Switch Employee's Credit Union	Freeport	Illinois.
Marquette BankIllinois	Galesburg	Illinois.
Glasford State Bank	Glasford	Illinois.
Heritage Community Bank	Glenwood	Illinois.
The Bank of Godfrey	Godfrey	Illinois.
Golden State Bank	Golden	Illinois.
Goodfield State Bank	Goodfield	Illinois.
Farmers National Bank of Griggsville	Griggsville	Illinois.
Clay County State Bank	Louisville	Illinois.
Peoples State Bank of Mansfield	Mansfield	Illinois.
HomeStar Bank	Manteno	Illinois.
First Federal Savings Bank of Mascoutah	Mascoutah	Illinois.
First Federal Savings & Loan Association	Mattoon	Illinois.
Amcore Bank, N.A., Mendota	Mendota	Illinois.
Morton Community Bank	Morton	Illinois.
Mt. Morris Savings & Loan	Mt. Morris	Illinois.
The First National Bank of Mt. Pulaski	Mt. Pulaski	Illinois.
Oak Brook Bank	Oak Brook	Illinois.
TrustBank	Olney	Illinois.
First Federal Savings Bank	Ottawa	Illinois.
First Bank and Trust, S.B	Paris	Illinois.
Corn Belt Bank & Trust Company	Pittsfield	Illinois.
Bank of Rantoul	Rantoul	Illinois.
The First National Bank & Trust Company of Rochelle	Rochelle	Illinois.
Northwest Bank of Rockford	Rockford	Illinois.
1st Community Bank	Sherrard	Illinois.
Independent Bankers' Bank	Springfield	Illinois.
Sterling Federal Bank, FSB	Sterling	Illinois.
Streator Home Building and Loan Association	Streator	Illinois.
First National Bank of Sullivan	Sullivan	Illinois.
Thomson State Bank	Thomson	Illinois.
Tempo Bank, A FSB	Trenton	Illinois.
Heritage Bank of Central Illinois	Trivoli	Illinois.
Iroquois Federal Savings and Loan Association	Watseka	Illinois.
Bank of Waukegan	Waukegan	Illinois.
Wemple State Bank	Waverly	Illinois.
State Bank of Illinois	West Chicago	Illinois.
Abbottsford State Bank	Abbottsford	Wisconsin.
Sterling Bank	Barron	Wisconsin.
Brill State Bank	Brill	Wisconsin.
RidgeStone Bank	Brookfield	Wisconsin.
First Banking Center	Burlington	Wisconsin.
Cambridge State Bank	Cambridge	Wisconsin.
Community Bank of Cameron	Cameron	Wisconsin.
Chetek State Bank	Chetek	Wisconsin.
Northwestern Bank	Chippewa Falls	Wisconsin.
Bank of Buffalo	Cochrane	Wisconsin.
Community Bank of Central Wisconsin	Colby	Wisconsin.
Cuba City State Bank	Cuba City	Wisconsin.
DMB Community Bank	DeForest	Wisconsin.
Royal Credit Union	Eau Claire	Wisconsin.
Charter Bank Eau Claire	Eau Claire	Wisconsin.
Grafton State Bank	Grafton	Wisconsin.
Grand Marsh State Bank	Grand Marsh	Wisconsin.
Hartford Savings Bank	Hartford	Wisconsin.
Farmers State Bank	Hillsboro	Wisconsin.
Citizens State Bank	Hudson	Wisconsin.
The Bank of Kaukauna	Kaukauna	Wisconsin.
F&M Bank Wisconsin	Kaukauna	Wisconsin.
La Farge State Bank	La Farge	Wisconsin.
State Capitol Credit Union	Madison	Wisconsin.

Member	City	State
National Guardian Life Insurance Company	Madison	Wisconsin.
University of Wisconsin Credit Union	Madison	Wisconsin.
First National Bank in Manitowoc	Manitowoc	Wisconsin.
Investors Community Bank	Manitowoc	Wisconsin.
Farmers & Merchants Bank and Trust	Marinette	Wisconsin.
The Stephenson National Bank & Trust	Marinette	Wisconsin.
Marshfield Savings Bank	Marshfield	Wisconsin.
Mayville Savings Bank	Mayville	Wisconsin.
McFarland State Bank	McFarland	Wisconsin.
Lincoln County Bank	Merrill	Wisconsin.
North Milwaukee State Bank	Milwaukee	Wisconsin.
Wells Fargo Bank Wisconsin, National Assn	Milwaukee	Wisconsin.
Monona State Bank	Monona	Wisconsin.
First National Bank of Niagara	Niagara	Wisconsin.
Oostburg State Bank	Oostburg	Wisconsin.
United Bank	Osseo	Wisconsin.
Pigeon Falls State Bank	Pigeon Falls	Wisconsin.
Port Washington State Bank	Port Washington	Wisconsin.
Peoples State Bank	Prairie du Chien	Wisconsin.
Bank of Prairie du Sac	Prairie du Sac	Wisconsin.
Community State Bank of Prentice	Prentice	Wisconsin.
Community First Bank	Rosholt	Wisconsin.
First National Bank of Stoughton	Stoughton	Wisconsin.
Stratford State Bank	Stratford	Wisconsin.
Bank of Turtle Lake	Turtle Lake	Wisconsin.
First National Bank	Waupaca	Wisconsin.
Peoples State Bank	Wausau	Wisconsin.
State Bank of Withee	Withee	Wisconsin.
Federal Home Loan Bank of Des Moines—District 8		
The First National Bank of Akron	Akron	Iowa.
First Iowa State Bank	Albia	Iowa.
Farmers State Bank	Algona	Iowa.
Iowa State Bank	Algona	Iowa.
Ames Community Bank	Ames	Iowa.
Greater IA Credit Union	Ames	Iowa.
Rolling Hills Bank & Trust	Atlantic	Iowa.
Benton County State Bank	Blairstown	Iowa.
First State Bank	Britt	Iowa.
Poweshiek County Savings Bank	Brooklyn	Iowa.
Farmers & Merchant Bank & Trust	Burlington	Iowa.
1st Gateway Credit Union	Camanche	Iowa.
Great Western Bank	Clive	Iowa.
Carroll County State Bank	Carroll	Iowa.
Tri-County Bank & Trust	Cascade	Iowa.
Transamerica Life Insurance Company	Cedar Rapids	Iowa.
Center Point Bank & Trust Company	Center Point	Iowa.
Iowa State Bank	Clarksville	Iowa.
Citizens First Bank	Clinton	Iowa.
Clinton National Bank	Clinton	Iowa.
First State Bank of Colfax	Colfax	Iowa.
Frontier Savings Bank	Council Bluffs	Iowa.
Northwest Bank and Trust Company	Davenport	Iowa.
Viking State Bank & Trust	Decorah	Iowa.
Defiance State Bank	Defiance	Iowa.
Bankers Trust Company, N.A	Des Moines	Iowa.
First Central State Bank	DeWitt	Iowa.
Iowa Savings Bank	Dike	Iowa.
American Trust and Savings Bank	Dubuque	Iowa.
Du Trac Community Credit Union	Dubuque	Iowa.
Emmet County State Bank	Estherville	Iowa.
Employees Credit Union	Estherville	Iowa.
First Security State Bank	Evansdale	Iowa.
Manufacturers Bank & Trust Company	Forest City	Iowa.
The Garnavillo Savings Bank	Garnavillo	Iowa.
George State Bank	George	Iowa.
Union State Bank	Greenfield	Iowa.
Heritage Bank, N.A	Holstein	Iowa.
Iowa State Bank	Hull	Iowa.
United Bank of Iowa	Ida Grove	Iowa.
Iowa State Bank & Trust Company	Iowa City	Iowa.
University of Iowa Community Credit Union	Iowa City	Iowa.
Community Choice Credit Union	Johnston	Iowa.

Member	City	State
Primebank	Le Mars	Iowa.
Luana Savings Bank	Luana	Iowa.
Central State Bank	Muscatine	Iowa.
MidWestOne Bank & Trust	Oskaloosa	Iowa.
Central Valley Bank	Ottumwa	Iowa.
Bank Iowa.	Red Oak	Iowa.
Pioneer Bank	Sergeant Bluff	Iowa.
Central Bank	Storm Lake	Iowa.
First State Bank	Stuart	Iowa.
American Savings Bank	Tripoli	Iowa.
West Des Moines State Bank	West Des Moines	Iowa.
Farmers Trust & Savings Bank	Williamsburg	Iowa.
Rural American Bank—Ada	Ada	Minnesota.
Adrian State Bank	Adrian	Minnesota.
Security State Bank of Aitkin	Aitkin	Minnesota.
Americana National Bank	Albert Lea	Minnesota.
1st Regions Bank	Andover	Minnesota.
Annandale State Bank	Annandale	Minnesota.
First National Bank	Bagley	Minnesota.
First National Bank of Battle Lake	Battle Lake	Minnesota.
State Bank of Belle Plaine	Belle Plaine	Minnesota.
First Federal Bank	Bemidji	Minnesota.
Security Bank USA	Bemidji	Minnesota.
Preferred Bank	Big Lake	Minnesota.
State Bank of Blomkest	Blomkest	Minnesota.
Mid Minnesota. Federal Credit Union	Brainerd	Minnesota.
Bonanza Valley State Bank	Brooten	Minnesota.
Cenbank	Buffalo Lake	Minnesota.
Community Bank Corporation	Chaska	Minnesota.
Root River State Bank	Chatfield	Minnesota.
Crookston National Bank	Crookston	Minnesota.
Crow River State Bank	Delano	Minnesota.
Community Bank of the Red River Valley	East Grand Forks	Minnesota.
Crown Bank	Edina	Minnesota.
Excel Bank Minnesota.	Edina	Minnesota.
First National Bank of Elk River	Elk River	Minnesota.
The Bank of Elk River	Elk River	Minnesota.
Boundary Waters Community Bank	Ely	Minnesota.
Elysian Bank	Elysian	Minnesota.
Anchor Bank Farmington, N.A	Farmington	Minnesota.
Security State Bank of Fergus Falls	Fergus Falls	Minnesota.
First State Bank of Finlayson	Finlayson	Minnesota.
First State Bank of Fountain	Fountain	Minnesota.
State Bank of Gibbon	Gibbon	Minnesota.
Grand Marais State Bank	Grand Marais	Minnesota.
Grand Rapids State Bank	Grand Rapids	Minnesota.
First National Bank	Hawley	Minnesota.
State Bank of Hawley	Hawley	Minnesota.
Rural American Bank—Hector/Fairfax	Hector	Minnesota.
First National Bank of Herman	Herman	Minnesota.
Security State Bank of Hibbing	Hibbing	Minnesota.
Woodlands National Bank	Hinckley	Minnesota.
Stearns Bank Holdingford National Association	Holdingford	Minnesota.
Eastwood Bank	Kasson	Minnesota.
American Bank Lake City	Lake City	Minnesota.
Farmers State Bank	Madelia	Minnesota.
Security State Bank of Mankato	Mankato	Minnesota.
Pioneer Bank	Mapleton	Minnesota.
State Bank of McGregor	McGregor	Minnesota.
Kanabec State Bank	Mora	Minnesota.
Alliance Bank	New Ulm	Minnesota.
Farmers and Merchants State Bank of NY Mills, Inc.	New York Mills	Minnesota.
Valley Bank	North Mankato	Minnesota.
HomeTown Bank	Redwood Falls	Minnesota.
First National Bank of the North	Sandstone	Minnesota.
First National Bank of Sauk Centre	Sauk Centre	Minnesota.
Stearns Bank N.A	St. Cloud	Minnesota.
The Lake Bank N.A	Two Harbors	Minnesota.
Stearns Bank Upsala National Association	Upsala	Minnesota.
Mid-Central Federal Savings Bank	Wadena	Minnesota.
1st National Bank of Waseca	Waseca	Minnesota.
Arsenal Credit Union	Arnold	Missouri.
Bank 10	Belton	Missouri.
Bank of Belton	Belton	Missouri.

Member	City	State
Branson Bank	Branson	Missouri.
Vantage Credit Union	Bridgeton	Missouri.
Chariton County Bank	Brunswick	Missouri.
Mainstreet Bank	Bunceton	Missouri.
The First National Bank of Cainesville	Cainesville	Missouri.
Farmers State Bank	Cameron	Missouri.
Hometown Bank, N.A.	Carthage	Missouri.
First State Bank and Trust Company, Inc	Caruthersville	Missouri.
First Security State Bank of Southeast MO	Caruthersville	Missouri.
Citizens Bank of Charleston	Charleston	Missouri.
Citizens Bank & Trust Company	Chillicothe	Missouri.
First National Bank of Clinton	Clinton	Missouri.
Reliance Bank	Des Peres	Missouri.
Community Bank of El Dorado Springs	El Dorado Springs	Missouri.
United Security Bank	Fulton	Missouri.
First Bank of Missouri.	Gladstone	Missouri.
Bank of Holden	Holden	Missouri.
Hume Bank	Hume	Missouri.
Unico Bank	Irondale	Missouri.
Peoples Bank of Jamestown	Jamestown	Missouri.
Home Savings Bank	Jefferson City	Missouri.
Mid America Bank	Jefferson City	Missouri.
River Region Credit Union	Jefferson City	Missouri.
First State Bank of Joplin	Joplin	Missouri.
Commerce Bank, N.A.	Kansas City	Missouri.
First Bank of Kansas City	Kansas City	Missouri.
NorthStar Bank, National Association	Kansas City	Missouri.
Bank of Lee's Summit	Lee's Summit	Missouri.
The Farmers Bank of Lincoln	Lincoln	Missouri.
First National Bank of Mt. Vernon	Mt. Vernon	Missouri.
Community Bank & Trust	Neosho	Missouri.
Citizens Bank	New Haven	Missouri.
Bank Star	Pacific	Missouri.
The Paris National Bank	Paris	Missouri.
Bank Star of the LeadBelt	Park Hills	Missouri.
Phelps County Bank	Rolla	Missouri.
Systematic Savings and Loan Association	Springfield	Missouri.
Farmers & Merchants Bank	St. Clair	Missouri.
Allegiant Bank	St. Louis	Missouri.
Heartland Bank	St. Louis	Missouri.
Osage Valley Bank	Warsaw	Missouri.
McIntosh County Bank	Ashley	North Dakota.
First Security Bank-West	Beulah	North Dakota.
Kirkwood Bank and Trust Company	Bismarck	North Dakota.
Dakota Western Bank	Bowman	North Dakota.
First State Bank	Buxton	North Dakota.
United Valley Bank	Cavalier	North Dakota.
Western State Bank	Devils Lake	North Dakota.
Union State Bank of Hazen	Hazen	North Dakota.
The First State Bank of LaMoure	LaMoure	North Dakota.
Commercial Bank of Mott	Mott	North Dakota.
First National Bank & Trust Co. of Williston	Williston	North Dakota.
Citizens State Bank of Arlington	Arlington	South Dakota.
First State Bank	Armour	South Dakota.
First Fidelity Bank	Burke	South Dakota.
Deuel County National Bank	Clear Lake	South Dakota.
Farmers State Bank	Faith	South Dakota.
Merchants State Bank	Freeman	South Dakota.
Langford State Bank	Langford	South Dakota.
Community State Bank	Milbank	South Dakota.
Sunrise Bank Dakota	Onida	South Dakota.
Highmark Federal Credit Union	Rapid City	South Dakota.
Minnwest Bank Sioux Falls	Sioux Falls	South Dakota.
Federal Home Loan Bank of Dallas—District 9		
The First National Bank	Ashdown	Arkansas.
First Western Bank	Booneville	Arkansas.
First Bank of South Arkansas.	Camden	Arkansas.
Chambers Bank	Danville	Arkansas.
Decatur State Bank	Decatur	Arkansas.
First State Bank of DeQueen	DeQueen	Arkansas.
First Service Bank	Dermott	Arkansas.
Timberland Bank	El Dorado	Arkansas.

Member	City	State
The Bank of Fayetteville, N.A	Fayetteville	Arkansas.
Superior Bank	Fort Smith	Arkansas.
Farmers Bank	Hamburg	Arkansas.
Heritage Bank	Jonesboro	Arkansas.
Eagle Bank & Trust	Little Rock	Arkansas.
First National Bank in Mena	Mena	Arkansas.
First Security Bank	Mountain Home	Arkansas.
TrustBanc	Mountain Home	Arkansas.
Bank of Paragould	Paragould	Arkansas.
First State Bank	Plainview	Arkansas.
Portland Bank	Portland	Arkansas.
Arkansas State Bank	Siloam Springs	Arkansas.
First National Bank of Wynne	Wynne	Arkansas.
Peoples Bank of Louisiana	Amite	Louisiana.
First Bank	Baton Rouge	Louisiana.
Clinton Bank & Trust Company	Clinton	Louisiana.
Caldwell Bank and Trust	Columbia	Louisiana.
Tri-Parish Bank	Eunice	Louisiana.
Gibsland Bank & Trust Company	Gibsland	Louisiana.
First National Bank of Jeanerette	Jeanerette	Louisiana.
MidSouth National Bank	Lafayette	Louisiana.
South Lafourche Bank & Trust Company	Larose	Louisiana.
Merchants & Farmers Bank & Trust Company	Leesville	Louisiana.
Resource Bank	Mandeville	Louisiana.
Omni Bank	Metairie	Louisiana.
Bank of Montgomery	Montgomery	Louisiana.
Community First Bank	New Iberia	Louisiana.
Gulf Coast Bank & Trust Company	New Orleans	Louisiana.
United Bank & Trust Company	New Orleans	Louisiana.
First FS&LA of Allen Parish	Oakdale	Louisiana.
St. Landry Homestead	Opelousas	Louisiana.
Community Bank	Raceland	Louisiana.
First American Bank and Trust	Vacherie	Louisiana.
First Federal Savings and Loan	Aberdeen	Mississippi.
Farmers and Merchants Bank	Baldwyn	Mississippi.
Copiah Bank, N.A.	Hazlehurst	Mississippi.
Planters Bank & Trust Company	Indianola	Mississippi.
First American National Bank	Iuka	Mississippi.
Citizens Bank & Trust Company	Marks	Mississippi.
Pike County National Bank	McComb	Mississippi.
United Mississippi Bank	Natchez	Mississippi.
MS Telco Federal Credit Union	Pearl	Mississippi.
Western Bank	Alamogordo	New Mexico.
Bank of Albuquerque N.A.	Albuquerque	New Mexico.
Western Bank	Artesia	New Mexico.
Western Commerce Bank	Carlsbad	New Mexico.
Citizens Bank	Farmington	New Mexico.
Los Alamos National Bank	Los Alamos	New Mexico.
Portales National Bank	Portales	New Mexico.
Citizens Bank, N.A.	Abilene	Texas.
Anahuac National Bank	Anahuac	Texas.
Northwest National Bank of Arlington	Arlington	Texas.
First Bank	Azle	Texas.
First National Bank of Baird	Baird	Texas.
First National Bank of Ballinger	Ballinger	Texas.
Western American National Bank	Bedford	Texas.
Big Lake Bank, N.A.	Big Lake	Texas.
Blanco National Bank	Blanco	Texas.
Legend Bank, N.A.	Bowie	Texas.
Commercial National Bank	Brady	Texas.
Citizens National Bank of Breckenridge	Breckenridge	Texas.
First State Bank	Bremond	Texas.
First National Bank in Bronte	Bronte	Texas.
First National Bank	Bullard	Texas.
First Bank	Burkburnett	Texas.
First State Bank & Trust Company	Carthage	Texas.
Corsicana National Bank & Trust	Corsicana	Texas.
Stockmens National Bank	Cotulla	Texas.
The Coupland State Bank of Coupland	Coupland	Texas.
Bank of Texas, NA	Dallas	Texas.
Gateway National Bank	Dallas	Texas.
Pavillion Bank	Dallas	Texas.
State Bank of Texas	Dallas	Texas.
Signature Bank	Dallas	Texas.

Member	City	State
Northstar Bank of Texas	Denton	Texas.
First Bank & Trust East Texas	Diboll	Texas.
The First National Bank of Eagle Lake	Eagle Lake	Texas.
New First National Bank	El Campo	Texas.
The First National Bank of Emory	Emory	Texas.
The Enloe State Bank of Enloe	Enloe	Texas.
Greater South Texas Bank, FSB	Falfurrias	Texas.
Pecos County State Bank of Fort Stockton, Texas	Fort Stockton	Texas.
Colonial Life Insurance Company of Texas	Fort Worth	Texas.
Colonial Lloyds Insurance Company	Fort Worth	Texas.
Summit National Bank	Fort Worth	Texas.
Worth National Bank	Fort Worth	Texas.
Security State Bank and Trust	Fredericksburg	Texas.
The First State Bank of Gainesville	Gainesville	Texas.
Moody National Bank	Galveston	Texas.
First National Bank	George West	Texas.
First National Bank	Giddings	Texas.
Mills County State Bank	Goldthwaite	Texas.
First State Bank	Graham	Texas.
Heritage National Bank	Granbury	Texas.
Farmers State Bank	Groesbeck	Texas.
United Community Bank, N.A.	Highland Village	Texas.
Hondo National Bank	Hondo	Texas.
North Houston Bank	Houston	Texas.
Preferred Bank	Houston	Texas.
Sterling Bank	Houston	Texas.
State National Bank of Texas	Iowa Park	Texas.
TIB—The Independent BankersBank	Irving	Texas.
Jacksboro National Bank	Jacksboro	Texas.
Texas National Bank of Jacksonville	Jacksonville	Texas.
Bank of Jena	Jena	Texas.
Jourdanton State Bank	Jourdanton	Texas.
American Bank	Keller	Texas.
Laredo Federal Credit Union	Laredo	Texas.
South Texas National Bank	Laredo	Texas.
First Liberty National Bank	Liberty	Texas.
Huntington State Bank	Lufkin	Texas.
Bank of Commerce	McLean	Texas.
USAA Federal Savings Bank	San Antonio	Texas.
Sanderson State Bank	Sanderson	Texas.
First Bank of Snook	Snook	Texas.
The First National Bank of Trenton	Trenton	Texas.
National American Bank	Uvalde	Texas.
Van Horn State Bank	Van Horn	Texas.
Central National Bank	Waco	Texas.
Wallis State Bank	Wallis	Texas.
Federal Home Loan Bank of Topeka—District 10		
Colonial Bank	Aurora	Colorado.
FirstBank of Boulder	Boulder	Colorado.
FirstBank of Breckenridge	Breckenridge	Colorado.
Colorado Business Bank	Denver	Colorado.
First National Bank of Estes Park	Estes Park	Colorado.
Centennial Bank of the West	Fort Collins	Colorado.
FirstBank of Northern Colorado	Fort Collins	Colorado.
First National Bank-Colorado	Fowler	Colorado.
Union Colony Bank	Greeley	Colorado.
FirstBank of Tech Center	Greenwood Village	Colorado.
The Gunnison Bank and Trust Company	Gunnison	Colorado.
Red Rocks Federal Credit Union	Highlands Ranch	Colorado.
First State Bank	Idaho Springs	Colorado.
Valley State Bank	Lamar	Colorado.
FirstBank of Longmont	Longmont	Colorado.
Heritage Bank	Louisville	Colorado.
Equitable Savings and Loan Association	Sterling	Colorado.
FirstBank North	Westminster	Colorado.
State Bank of Wiley	Wiley	Colorado.
Stockgrowers State Bank of Ashland	Ashland	Kansas.
American Bank	Baxter Springs	Kansas.
The Bendena State Bank	Bendena	Kansas.
Commercial State Bank	Bonner Springs	Kansas.
The Citizens State Bank of Cheney	Cheney	Kansas.
The First National Bank of Clifton	Clifton	Kansas.

Member	City	State
The Citizens National Bank	Concordia	Kansas.
The First National Bank of Cunningham	Cunningham	Kansas.
State Bank of Downs	Downs	Kansas.
Mid America Bank	Esbon	Kansas.
Garden City State Bank	Garden City	Kansas.
First Kansas Bank & Trust Company	Gardner	Kansas.
The First National Bank of Girard	Girard	Kansas.
First National Bank	Goodland	Kansas.
American State Bank & Trust Co., NA	Great Bend	Kansas.
The First State Bank of Healy	Healy	Kansas.
Morrill & Janes Bank and Trust Company	Hiawatha	Kansas.
Farmers and Merchants Bank of Hill City	Hill City	Kansas.
Hillsboro State Bank	Hillsboro	Kansas.
Hoisington National Bank	Hoisington	Kansas.
First National Bank of Holcomb	Holcomb	Kansas.
Denison State Bank	Holton	Kansas.
Bank of Holyrood	Holyrood	Kansas.
The Howard State Bank	Howard	Kansas.
The Jamestown State Bank	Jamestown	Kansas.
The Nekoma State Bank	La Crosse	Kansas.
First State Bank & Trust Company	Larned	Kansas.
The Lawrence Bank	Lawrence	Kansas.
The State Bank of Lebo	Lebo	Kansas.
The First National Bank of Liberal	Liberal	Kansas.
Lyons Federal Savings	Lyons	Kansas.
Sunflower Bank	Salina	Kansas.
St. Marys State Bank	St. Marys	Kansas.
Emprise Bank	Wichita	Kansas.
Adams State Bank	Adams	Nebraska.
The Albion National Bank	Albion	Nebraska.
First National Bank of Albion	Albion	Nebraska.
Archer Cooperative Credit Union	Archer	Nebraska.
Heartland Community Bank	Bennet	Nebraska.
Farmers & Merchants State Bank	Bloomfield	Nebraska.
First National Bank of Chadron	Chadron	Nebraska.
Bank of Clarks	Clarks	Nebraska.
Citizens State Bank	Clearwater	Nebraska.
Farmers Bank of Cook	Cook	Nebraska.
Jennings State Bank	Davenport	Nebraska.
Farmers State Bank	Dodge	Nebraska.
Commercial State Bank	Elsie	Nebraska.
Filley Bank	Filley	Nebraska.
The First National Bank of Gordon	Gordon	Nebraska.
Hastings State Bank	Hastings	Nebraska.
Security National Bank	Laurel	Nebraska.
Great Western Bank	Omaha	Nebraska.
American National Bank	Omaha	Nebraska.
Valley Bank and Trust Company	Scottsbluff	Nebraska.
Security First Bank	Sidney	Nebraska.
Iowa—Nebraska State Bank	South Sioux City	Nebraska.
Wahoo State Bank	Wahoo	Nebraska.
Citizens Bank & Trust Company	Ardmore	Oklahoma.
Peoples State Bank	Blair	Oklahoma.
1st Bank & Trust	Broken Bow	Oklahoma.
First Bank of Chandler	Chandler	Oklahoma.
Union Bank of Chandler	Chandler	Oklahoma.
The First National Bank of Coweta	Coweta	Oklahoma.
The First National Bank of Davis, Oklahoma	Davis	Oklahoma.
Edmond Bank and Trust	Edmond	Oklahoma.
Great Plains National Bank	Elk City	Oklahoma.
First Capital Bank	Guthrie	Oklahoma.
American Exchange Bank	Henryetta	Oklahoma.
The Idabel National Bank	Idabel	Oklahoma.
Bank of Locust Grove	Locust Grove	Oklahoma.
The Guarantee State Bank	Mangum	Oklahoma.
The Bank, National Association	McAlester	Oklahoma.
Grant County Bank	Medford	Oklahoma.
First National Bank	Midwest City	Oklahoma.
Citizens State Bank	Morrison	Oklahoma.
All America Bank	Mustang	Oklahoma.
Americrest Bank	Oklahoma City	Oklahoma.
Bridgeview Bank, N.A. of Oklahoma City, OK	Oklahoma City	Oklahoma.
Frontier State Bank	Oklahoma City	Oklahoma.
Quail Creek Bank, N.A	Oklahoma City	Oklahoma.

Member	City	State
The Community State Bank	Poteau	Oklahoma.
The Exchange Bank	Skiatook	Oklahoma.
First National Bank of Stigler	Stigler	Oklahoma.
Stroud National Bank	Stroud	Oklahoma.
Bank of Oklahoma	Tulsa	Oklahoma.
Tulsa National Bank	Tulsa	Oklahoma.
Waurika National Bank	Waurika	Oklahoma.
Federal Home Loan Bank of San Francisco—District 11		
First National Bank of Nevada	Scottsdale	Arizona.
National Bank of Arizona	Tempe	Arizona.
Pacific Crest Bank	Agoura Hlls	California.
Mid-State Bank	Arroyo Grande	California.
America's Christian Credit Union	Brea	California.
Jackson Federal Bank	Brea	California.
First California Bank	Camarillo	California.
Merchants Bank of California, N.A.	Carson	California.
Tri Counties Bank	Chico	California.
Chino Commercial Bank, N.A.	Chino	California.
North Island Financial Credit Union	Chula Vista	California.
Alliance Bank	Culver City	California.
First Northern Bank of Dixon	Dixon	California.
Western State Bank	Duarte	California.
Community National Bank	Fallbrook	California.
SCE Federal Credit Union	Irwindale	California.
First National Bank of North County	Lake San Marcos	California.
Cedars Bank	Los Angeles	California.
FAA First Federal Credit Union	Los Angeles	California.
Hanmi Bank	Los Angeles	California.
Manufacturers Bank	Los Angeles	California.
Peninsula Bank of Commerce	Millbrae	California.
Kaiperm Federal Credit Union	Oakland	California.
World Savings Bank, F.S.B.	Oakland	California.
Citizens Business Bank	Ontario	California.
First Security Thrift Company	Orange	California.
Cupertino National Bank	Palo Alto	California.
LA Financial Federal Credit Union	Pasadena	California.
Bank of the Sierra	Porterville	California.
Plumas Bank	Quincy	California.
Inland Empire National Bank	Riverside	California.
First American Bank	Rosemead	California.
American River Bank	Sacramento	California.
Cabrillo Credit Union	San Diego	California.
Mission Federal Credit Union	San Diego	California.
Point Loma Credit Union	San Diego	California.
San Diego Metropolitan Credit Union	San Diego	California.
University & State Employees Credit Union	San Diego	California.
America California Bank	San Francisco	California.
First Republic Bank	San Francisco	California.
National American Bank	San Francisco	California.
North Coast Bank	Santa Rosa	California.
Union Safe Deposit Bank	Stockton	California .
Federal Home Loan Bank of Seattle—District 12		
Alaska USA Federal Credit Union	Anchorage	Alaska.
Alaska Pacific Bank	Juneau	Alaska.
First Hawaiian Bank	Honolulu	Hawaii.
Hawaii National Bank	Honolulu	Hawaii.
West Oahu Community Federal Credit Union	Kapolei	Hawaii.
Idaho Independent Bank	Coeur D'Alene	Idaho.
Bank of Idaho	Idaho Falls	Idaho.
Belt Valley Bank	Belt	Montana.
Flathead Bank of Bigfork	Bigfork	Montana.
Yellowstone Teachers' Credit Union	Billings	Montana.
Wells Fargo Bank MT	Billings	Montana.
First Boulder Valley Bank	Boulder	Montana.
First Citizens Bank, N.A.	Columbia Falls	Montana.
First Madison Valley Bank	Ennis	Montana.
Heritage State Bank	Fort Benton	Montana.
First State Bank of Fort Benton	Fort Benton	Montana.
Little Horn State Bank	Hardin	Montana.
Yellowstone Bank	Laurel	Montana.

Member	City	State
Montana First Credit Union	Missoula	Montana.
Montana State Bank	Plentywood	Montana.
United States National Bank of Red Lodge	Red Lodge	Montana.
Valley Bank of Ronan	Ronan	Montana.
First Security Bank of West Yellowstone	West Yellowstone	Montana.
Central Williamette Credit Union	Albany	Oregon.
Family Security Bank	Brookings	Oregon.
Home Valley Bank	Cave Junction	Oregon.
Citizens Bank	Corvallis	Oregon.
Oregon State Bank	Corvallis	Oregon.
U Lane O Credit Union	Eugene	Oregon.
Oregon Pacific Banking Company	Florence	Oregon.
Community Bank of Grants Pass	Grants Pass	Oregon.
Southern Oregon Federal Credit Union	Grants Pass	Oregon.
Oregon Dental Service	Portland	Oregon.
Portland Teachers Credit Union	Portland	Oregon.
Town Center Bank	Portland	Oregon.
Valley Business Bank	Salem	Oregon.
Silver Falls Bank	Silverton	Oregon.
St. Helens Community Federal Credit Union	St. Helens	Oregon.
State Bank of Southern Utah	Cedar City	Utah.
Central Bank	Provo	Utah.
Far West Bank	Provo	Utah.
Liberty Bank	Salt Lake City	Utah.
Foundation Bank	Bellevue	Washington.
First Mutual Bank	Bellevue	Washington.
North Coast Credit Union	Bellingham	Washington.
Westsound Bank	Bremerton	Washington.
Coastal Community Bank	Everett	Washington.
Educational Community Credit Union	Everett	Washington.
Frontier Bank	Everett	Washington.
State National Bank of Garfield	Garfield	Washington.
Harbor Bank, NA	Gig Harbor	Washington.
ShoreBank Pacific	Iiwaco	Washington.
Twin City Bank	Longview	Washington.
City Bank	Lynnwood	Washington.
Golf Savings Bank	Mountlake Terrace	Washington.
Columbia State Bank	Olympia	Washington.
Redmond National Bank	Redmond	Washington.
Group Health Credit Union	Seattle	Washington.
Washington School Employees Credit Union	Seattle	Washington.
Silverdale State Bank	Silverdale	Washington.
AmericanWest Bank	Spokane	Washington.
Global Credit Union	Spokane	Washington.
Numerica Credit Union	Spokane	Washington.
Washington Trust Bank	Spokane	Washington.
Harborstone Credit Union	Tacoma	Washington.
Pierce Commercial Bank	Tacoma	Washington.
Boeing Employee's Credit Union	Tukwila	Washington.
Westside Community Bank	University Place	Washington.
Baker Boyer National Bank	Walla Walla	Washington.
Mid State Bank	Waterville	Washington.
First National Bank of Buffalo	Buffalo	Wyoming.
Wyoming Bank & Trust	Cheyenne	Wyoming.
The Jackson State Bank	Jackson	Wyoming.

II. Public Comments

To encourage the submission of public comments on the community support performance of Bank members, on or before January 26, 2004, each Bank will notify its Advisory Council and nonprofit housing developers, community groups, and other interested parties in its district of the members selected for community support review in the 2002–03 eighth quarter review cycle. 12 CFR 944.2(b)(2)(ii). In reviewing a member for community support compliance, the Finance Board will consider any public comments it has received concerning the member. 12 CFR 944.2(d). To ensure consideration by the Finance Board, comments concerning the community support performance of members selected for the 2002–03 eighth quarter review cycle must be delivered to the Finance Board on or before the February 27, 2004 deadline for submission of Community Support Statements.

Dated: December 29, 2003.

Arnold Intrater,

General Counsel.

[FR Doc. 04–18 Filed 1–2–04; 8:45 am]

BILLING CODE 6725–01–P

FEDERAL MARITIME COMMISSION

Sunshine Act Meeting

AGENCY HOLDING THE MEETING: Federal Maritime Commission

TIME AND DATE: 10:00 A.M.–January 21, 2004

PLACE: 800 North Capitol Street, NW, First Floor Hearing Room, Washington, DC.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Petition No. P3–99—Petition of China Ocean Shipping (Group) Company for a Partial Exemption from the Controlled Carrier Act.
2. Petition No. P4–03—Petition of China Shipping Container Lines Co., Ltd. for Permanent Full Exemption From the First Sentence of Section 8(C) of the Shipping Act of 1984.
3. Petition No. P6–03—Petition of SINOTRANS Container Lines Co., Ltd. (SINOLINES) for a Full Exemption From the First Sentence of Section 8(c) of the Shipping Act of 1984, as amended.
4. Docket No. 98–14—Shipping Restrictions, Requirements and Practices of the People's Republic of China

FOR FURTHER INFORMATION CONTACT: Bryant L. VanBrakle, Secretary, (202) 523–5725.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 03–32340 Filed 12–31–03; 3:56 am]

BILLING CODE 6730–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than January 20, 2004.

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. *John C. Simpson*, New Orleans, Louisiana; to retain voting shares of Red River Bancshares, Inc., and thereby indirectly retain voting shares of Red River Bank, both of Alexandria, Louisiana.

Board of Governors of the Federal Reserve System, December 30, 2003.

Margaret McCloskey Shanks,

Assistant Secretary of the Board.

[FR Doc. 04–104 Filed 1–2–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 27, 2004.

A. Federal Reserve Bank of Chicago (Patrick Wilder, Managing Examiner) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. *Will County Bancorp, Inc.*, Shorewood, Illinois; to become a bank holding company by acquiring 100 percent of the voting shares of Bank of Shorewood, Shorewood, Illinois.

B. Federal Reserve Bank of Kansas City (James Hunter, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. *First Southwest Bancorporation, Inc.*, Alamosa, Colorado; to become a bank holding company by acquiring 100 percent of the voting shares of First Southwest Bank, Alamosa, Colorado.

Board of Governors of the Federal Reserve System, December 29, 2003.

Margaret McCloskey Shanks,

Assistant Secretary of the Board.

[FR Doc. 04–57 Filed 1–2–04; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 29, 2004.

A. Federal Reserve Bank of Atlanta (Sue Costello, Vice President) 1000 Peachtree Street, N.E., Atlanta, Georgia 30303:

1. Hometown Bancshares, Inc., Hamilton, Alabama; to become a bank holding company by acquiring 100 percent of the voting shares of PeoplesTrust Bank (in organization) Hamilton, Alabama.

Board of Governors of the Federal Reserve System, December 30, 2003.

Margaret McCloskey Shanks,

Assistant Secretary of the Board.

[FR Doc. 04–103 Filed 1–2–04; 8:45 am]

BILLING CODE 6210–01–S

GENERAL SERVICES ADMINISTRATION

Federal Travel Regulation; Publication of Electronic Copy

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Notice.

SUMMARY: GSA announces publication of an improved electronic Federal Travel Regulation (FTR), and the discontinuance of the hard copy FTR looseleaf edition.

FOR FURTHER INFORMATION CONTACT: Jane Groat, Travel Management Policy Division, Office of Transportation and Personal Property, General Services Administration, Washington, DC 20405, (202) 501–4318, *jane.groat@gsa.gov*.

SUPPLEMENTARY INFORMATION: The FTR is the regulation contained in 41 Code of Federal Regulations (CFR), Chapters 300 through 304, which implements statutory requirements and Executive branch policies for travel by Federal civilian employees and others authorized to travel at Government expense.

GSA's goal is to publish the improved electronic FTR within the next 30 days. This edition contains a new look in appearance only and does not include new policy changes. Discontinuance of the hard copy FTR looseleaf edition is expected to follow in the near future after coordination with the Government Printing Office and Federal printing and publication officials.

Dated: December 24, 2003.

Peggy DeProspero,

Director, Travel Management Policy Division.

[FR Doc. 04–63 Filed 1–2–04; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–04–21]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 498–1210.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–E11, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

Proposed Project: Child Stress and Toxics—New—The Agency for Toxic Substances and Disease Registry (ATSDR). ATSDR is mandated pursuant to the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and its 1986 amendments, the Superfund Amendments and Reauthorization Act (SARA), to serve the public by using the best science, taking responsive public health actions, and providing trusted health information to prevent harmful exposures and disease related to toxic substances.

For the past 6 years, ATSDR has worked with the U.S. Environmental Protection Agency (EPA), the Substance Abuse and Mental Health Services Administration (SAMSHA), state health departments, and local communities on the issue of psychosocial stress due to the presence of toxic hazards. A significant amount of research has focused on adult psychosocial stress in communities affected by hazardous substances. Comparatively little is known about levels of psychosocial stress among children or other susceptible populations in these settings. There is a critical need to develop a research instrument to screen children who live in communities at or near hazardous waste sites for elevated stress levels. The instrument will facilitate the establishment of group norms for levels of stress in children and is not intended to provide clinical or diagnostic information on individual children.

The purposes of this project are to: (1) Develop and pilot-test a scale to assess levels and sources of psychosocial stress in children who live in communities at or near hazardous waste sites; (2) modify the scale based on pilot-test results; (3) validate the scale on children living in communities near hazardous waste sites; and 4) provide an evidence base for planning and conducting interventions in affected communities.

CDC will pilot test the scale in at least 100 children in two age groups (5th and 9th grade levels) at one or more test sites. Semi-structured interviews or focus groups will be conducted to determine whether additional variables need to be included in the scale. During the second and third years of the project, a scale will be used to screen up to 4,700 children in communities at or near hazardous waste sites. CDC plans to then use this data to create effective interventions methods to predict and explain levels of stress in children living around hazardous waste sites. There are no costs to respondents.

Respondents	Number of respondents	Number of responses/ respondent	Average burden/response (in hours)	Total burden (in hours)
Children 10–17 years old	5,000	1	30/60	2,500
Total				2,500

Dated: December 29, 2003.

Ron Ergle,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–40 Filed 1–2–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–04–20]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 498–1210.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments to Seleda Perryman, CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–E11, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

Proposed Project: National Hospital Ambulatory Medical Care Survey (NHAMCS) 2005–2006 (OMB No. 0920–0278)—Extension—National Center for Health Statistics (NCHS), Centers for Disease Control and Prevention (CDC).

The National Hospital Ambulatory Medical Care Survey (NHAMCS) is managed by CDC, NCHS, Division of Health Care Statistics. This survey has been conducted annually since 1992. The purpose of NHAMCS is to meet the needs and demands for statistical information about the provision of ambulatory medical care services in the United States. Ambulatory services are rendered in a wide variety of settings, including physicians' offices and hospital outpatient and emergency departments. The targeted population for NHAMCS will consist of in-person visits made to outpatient departments and emergency departments that are non-Federal, short-stay hospitals (hospitals with an average length of stay of less than 30 days) or those whose specialty is general (medical or surgical) or children's general. NHAMCS was initiated to complement the National Ambulatory Medical Care Survey (NAMCS, OMB No. 0920–0234) which provides similar data concerning patient visits to physicians' offices.

NHAMCS provides a range of baseline data on the characteristics of the users and providers of ambulatory medical care. Data collected include patients' demographic characteristics and reason(s) for visit, and the physicians' diagnosis, diagnostic services, medications, and disposition. In addition to the annual statistics normally collected, a key focus of the 2005/06 survey will be on the prevention and treatment of selected chronic conditions. These data, together with trend data, may be used to monitor the effects of change in the health care system, for the planning of health services, improving medical education, and assessing the health status of the population.

Users of NHAMCS data include, but are not limited to, congressional offices, Federal agencies, state and local governments, schools of public health, researchers, administrators, and health planners. Data collection will continue through 2005 to 2006. The number of respondents for the NHAMCS is based on an annual sample of approximately 500 hospitals with an 88 percent participation rate. There are no costs to respondents.

Respondents	Number of respondents	Number of responses/ respondent	Avg. burden/ response (in hrs)	Total burden hours
Induction forms:.				
Hospital (Ineligible)	50	1	15/60	13
Hospital (Eligible)	440	1	1	440
Emergency Departments	400	1	1	400
Outpatient Departments	240	4	1	960
Patient record forms:.				
Emergency Departments	400	100	5/60	3,333
Outpatient Departments	240	150	5/60	3,000
Total				8,146

Dated: December 29, 2003.

Ron Ergle,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–41 Filed 1–2–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Committee on Childhood Lead Poisoning Prevention

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the National Center for Environmental Health (NCEH) of the Centers for Disease Control and Prevention (CDC) announces the following committee meeting.

Name: Advisory Committee on Childhood Lead Poisoning Prevention (ACCLPP).

Times and Dates: 8:30 a.m.–5 p.m., March 9, 2004. 8:30 a.m.–12:30 p.m., March 10, 2004.

Place: Admiral Fell Inn, 888 South Broadway, Baltimore, Maryland 21231. Telephone: 410/522–7377 or toll free 866/583–4162.

Status: Open to the public, limited only by the space available. The meeting room accommodates approximately 75 people.

Purpose: The Committee shall provide advice and guidance to the Secretary; the Assistant Secretary for Health; and the Director, CDC, regarding new scientific knowledge and technological developments and their practical implications for childhood lead poisoning prevention efforts. The Committee shall also review and report regularly on childhood lead poisoning prevention practices and recommend improvements in national childhood lead poisoning prevention efforts.

Matters To Be Discussed: Agenda items include: Update on the Adverse Health Effects of Blood Lead Levels <10mg/dl workgroup report, presentation and discussion of lead exposure during pregnancy, update of strategic planning process by state and local childhood lead poisoning prevention programs, High Intensity Screening as a component of a local plan to eliminate lead poisoning and an update on research and program evaluation activities ongoing in the Lead Poisoning Prevention Branch. Agenda items are subject to change as priorities dictate. Opportunities will be provided during the meeting for oral comments. Depending on the time available and the number of requests, it may be necessary to limit the time of each presenter.

Contact Person for More Information: Crystal M. Gresham, Program Analyst, Lead Poisoning Prevention Branch, Division of Emergency and Environmental Health Services, NCEH, CDC, 4770 Buford Hwy, NE., M/S F–40, Atlanta, Georgia 30341, telephone 770/488–7490, fax 770/488–3635.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Dated: December 24, 2003.

Ronald Argle,

Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 04–42 Filed 1–2–04; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Board on Radiation and Worker Health, National Institute for Occupational Safety and Health

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention (CDC) announces the following committee meeting:

Name: Advisory Board on Radiation and Worker Health (ABRWH), National Institute for Occupational Safety and Health (NIOSH).

Time and date: 11 a.m.–5 p.m., January 15, 2004.

Place: The Cincinnati Airport Marriott, 2395 Progress Drive, Hebron, Kentucky 41048, telephone (859) 586–0166, fax (859) 586–0266.

Status: Closed 9 a.m.–5 p.m., January 15, 2004.

Background: The Advisory Board on Radiation and Worker Health ("the Board") was established under the Energy Employees Occupational Illness Compensation Program Act (EEOICPA) of 2000 to advise the President, through the Secretary of Health and Human Services (HHS), on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Board include providing advice on the development of probability of causation guidelines which have been promulgated by HHS as a final rule, advice on methods of dose reconstruction which have also been promulgated by HHS as a final rule, evaluation of the scientific validity and quality of dose reconstructions conducted by NIOSH for qualified cancer claimants, and advice on the addition of classes of workers to the Special Exposure Cohort. In December 2000 the President delegated responsibility for funding, staffing, and operating the Board to HHS, which subsequently delegated this authority to CDC. NIOSH implements this responsibility for CDC. The charter was renewed on August 3, 2003, and the President has completed the appointment of members to the Board to ensure a balanced representation on the Board.

Purpose: This board is charged with (a) Providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) Providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this Program; and (c) Upon request by the Secretary, HHS, advise the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class.

Matters to be Discussed: The meeting will involve a review and discussion of the Independent Government Cost Estimate (IGCE) for task order contracts and proposals of work for the performance of these task order contracts. The Board may revise or accept the IGCE, the task orders, and/or some or all of the ABRWH independent dose reconstruction review contractor's bids. These contracts will serve to provide technical support consultation to assist the ABRWH in fulfilling its statutory duty to advise the Secretary, HHS, on the scientific validity and quality of dose estimation and reconstruction efforts under the EEOICPA. These discussions will include reviews of the technical proposals to determine adequacy of the proposed approach and associated contract cost estimates. The information being discussed will include information of a confidential nature. The IGCEs will include contract cost estimates, the disclosure of which would adversely impact the Governments negotiating position and strategy in regards to these contracts by giving the ABRWH independent dose reconstruction review contractor undue advantage in determining the price associated with its bids. The meeting will be closed to the public in accordance with provisions set forth regarding subject matter considered confidential under the terms of 5 U.S.C. 552b(c)(9)(B), 48 CFR 5.401(b)(1) and (4), and 48 CFR 7.304(d), and the Determination of the Director of the Management Analysis and Services Office, Centers for Disease Control and Prevention, pursuant to Pub. L. 92–463. A summary of this meeting will be prepared and submitted within 14 days of the close of the meeting.

The agenda is subject to change as priorities dictate.

FOR FURTHER INFORMATION CONTACT: Larry Elliott, Executive Secretary, ABRWH, NIOSH, CDC, 4676 Columbia Parkway, Cincinnati, Ohio 45226, telephone (513) 533–6825, fax (513) 533–6826.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities for both CDC and the Agency for Toxic Substances and Disease Registry.

Ronald Ergle,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 03–32247 Filed 12–31–03; 8:45 am]

BILLING CODE 4163–19–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Referral of Morphine Sulfate for the Conduct of Pediatric Studies

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the referral of morphine sulfate to the Foundation for the National Institutes of Health (the Foundation) for the conduct of pediatric studies. FDA referred the drug to the Foundation on September 29, 2003, and is publishing this notice of the referral in accordance with the Best Pharmaceuticals for Children Act (BPCA).

FOR FURTHER INFORMATION CONTACT: Terrie Crescenzi, Office of Pediatric Therapeutics (HFG–2), Food and Drug Administration, 5600 Fishers Lane, rm. 4B–44, Rockville, MD 20857, 301–827–9218.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with section 4 of the BPCA (Public Law 107–109), FDA is announcing the referral to the Foundation of the written request for the conduct of pediatric studies for the use of intravenous (IV) morphine sulfate. Enacted on January 4, 2002, the BPCA reauthorizes, with certain important changes, the exclusivity incentive program described in section 505A of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355a). Section 505A of the act permits certain applications to obtain 6 months of exclusivity if, in accordance with the requirements of the statute, the sponsor submits requested information relating to the use of the drug in the pediatric population.

The BPCA established additional mechanisms for obtaining information on the safe and effective use of drugs in pediatric patients. Specifically, section 4 of the BPCA amends section 505A(d) of the act to create a referral process to obtain studies for drugs that have patent or exclusivity protection, but for which the sponsor has declined to conduct the pediatric studies in response to a written request by FDA. Under section 4 of the BPCA, if the Secretary of Health and Human Services (the Secretary) determines that there is a continuing need for the pediatric studies described in the written request and the sponsors of the products with patent or exclusivity protection have declined to conduct the studies, the Secretary shall refer the drug to the Foundation, established under section 499 of the Public Health Service Act (42 U.S.C. 290(b)), for the conduct of the pediatric studies described in the written request (21 U.S.C. 355a(d)(4)(B)(i)). In addition, the BPCA requires public notice of the name of the drug, name of the manufacturer, and indications to be studied pursuant to the referrals (21 U.S.C. 355a(d)(4)(B)(ii)).

In accordance with section 4 of the BPCA, FDA is announcing that it has referred the written request for pediatric studies for the IV use of morphine sulfate to the Foundation. On March 28, 2003, FDA issued a written request for pediatric studies to Faulding Pharmaceutical Co. and Ligand Pharmaceuticals, the holders of approved applications for morphine sulfate that have market exclusivity. The studies described in the written request were for the indication of moderate-to-severe pain in the pediatric population. Not later than 180 days after receiving the written request, Faulding Pharmaceutical Co. and Ligand Pharmaceuticals declined to conduct the requested studies. FDA has determined that there is a continuing need for information relating to the IV use of morphine sulfate in the pediatric population. Consistent with the provisions of the BPCA, on September 30, 2003, FDA referred to the Foundation the written request for the conduct of the pediatric studies for IV morphine sulfate.

Dated: December 24, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

[FR Doc. 04–17 Filed 1–2–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[FDA 225–04–8005]

Memorandum of Understanding Between the Food and Drug Administration and the Central Science Laboratory, Department of Environment, Food and Rural Affairs of the United Kingdom Concerning Analytical Methods In Support of Food Safety

AGENCY: Food and Drug Administration, HHS

ACTION: Notice.

SUMMARY: Food and Drug Administration (FDA) is providing notice of a memorandum of understanding (MOU) between FDA and the Central Science Laboratory, Department of Environment, Food and Rural Affairs of the United Kingdom. The purpose of this MOU is to provide a framework for developing a common approach to analytical methods in support of food safety in relation to the protection of public health and international trade.

DATES: The agreement became effective October 28, 2003.

FOR FURTHER INFORMATION CONTACT: Elizabeth Calvey, Center for Food Safety and Applied Nutrition (HFS–006), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 301–436–1981.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 20.108(c), which states that all written agreements and MOU's between FDA and others shall be published in the **Federal Register**, the agency is publishing notice of this MOU.

Dated: December 23, 2003.

Jeffrey Shuren,

Assistant Commissioner for Policy.

MEMORANDUM OF UNDERSTANDING

BETWEEN

THE FOOD AND DRUG ADMINISTRATION
DEPARTMENT OF HEALTH AND HUMAN SERVICES
OF THE UNITED STATES OF AMERICA

AND

CENTRAL SCIENCE LABORATORY
DEPARTMENT OF ENVIRONMENT, FOOD AND RURAL AFFAIRS
OF THE UNITED KINGDOM

The United States Food and Drug Administration (USFDA), Department of Health and Human Services (DHHS) and the United Kingdom Central Science Laboratory (CSL), Department of Environment, Food and Rural Affairs (DEFRA) (collectively "the Participants") recognizing that

The scientific laboratories underpinning the USFDA/DHHS and the CSL/DEFRA are faced with common technical challenges in providing surge capacity and speed-of-response for analytical services;

New challenges are likely to arise in the areas of molecular diagnostics, veterinary drugs, and food supplements;

USFDA is charged with the enforcement of the Food, Drug, and Cosmetic Act, as amended (21 U.S.C. 301), and is the lead United States regulatory agency responsible for assuring, among other things, the safety of the nation's food supply and the safety and effectiveness of animal drugs, animal food additives, and animal feed ingredients;

CSL plays a major role in food safety in the UK for Government customers by undertaking analyses and monitoring (supported by research and development) to ensure the safety and quality of foods and animal feeds;

Through the joint efforts of USFDA and CSL, new approaches can be identified and developed in the areas of analytical quality assurance and food safety thus working to the mutual benefit of both organizations and towards the achievement of their objectives; and

A more formal relationship between the Participants that permits regular exchange of scientists, training, technology transfer and exchange of scientific literature would greatly enhance the capabilities of the Participants to carry out their responsibilities in consumer protection with regard to issues of food safety and quality and animal health

Have reached the following understanding.

ARTICLE 1
Purpose

This Memorandum of Understanding (MOU) is intended to provide a framework for developing a common approach to analytical methods in support of food safety in relation to the protection of public health and international trade.

Specifically, the MOU has the following objectives:

a) Information exchange on priorities for future methods development;
b) Exchange of technical staff for training;
c) Intellectual property framework for exchange of analytical protocols; and
d) Annual review of analytical methods at the senior staff level.

ARTICLE 11
Activities

A. In order to achieve fully the objectives of this MOU, USFDA and CSL intend to take the following actions:

1) Initiate and maintain a dialogue on matters of food safety and quality, and
2) Participate in the execution of on-going programs, projects, and related activities that are satisfactory to the Participants, whenever financial and other arrangements can be made.

B. In case of joint projects discussed in point A.2 of the present Article, the Participants intend to develop prior to starting the work, on a case-by-case basis and in accordance with the existing regulations, a specific written agreement setting up the arrangements related to the planned activity. These individual project agreements should, as necessary, address technical, security, and financial aspects, including intellectual property rights and identifying the responsibilities of the Participants.

ARTICLE 111
Responsibilities of the Participants

A. USFDA and CSL each intend to designate professional technical staff in their respective agencies as coordinators with responsibility for facilitating and coordinating the various areas of collaboration identified by the Participants.

B. Each Participant is to be responsible for its own personnel in activities undertaken pursuant to this MOU

C. When staff members from USFDA or CSL participate for brief periods in programs, projects or activities implemented by the other Participant, the Participants intend to develop prior to starting the work, on a case-by-case basis and in accordance with the existing regulations, a specific written agreement similar to the agreement described in paragraph B of Article 2. These agreements should include the conditions of co-operation to be provided by the staff-member and the terms under which USFDA and CSL are authorizing its staff member to participate. The host organization should assist as much as possible in meeting the personal and professional needs of the visitor, including providing or helping to provide access to institutional facilities.

E. When required, meetings between USFDA and CSL coordinators or their authorized

representatives are expected to take place to permit evaluation of progress in collaborative projects and ensure co-ordination in the development of future programs and policies.

ARTICLE IV
Protection of Data, Information and Intellectual Property

A. The Participants expect that most of the information exchanged under this MOU may be provided in a form appropriate for public dissemination under the laws of both Participants. Information that is not appropriate for public dissemination should be shared according to the procedures and policies of the Participants only as permitted by the laws of the participants.

B. Under this MOU, the Participants should consult with one another and mutually agree regarding the following communications:

1) the publication of any information transmitted by the other Participant;
2) the transmission of any results to other government agencies or to persons, bodies and undertakings not engaged, in the UK or US, in research or production justifying access to such results; or
3) the dissemination of the information in public fora.

The collaboration of the other Participant should be mentioned in publications or in public presentations.

C. The applicable right to inventions, whether or not patentable, made or conceived when carrying out any activity under this MOU belongs to the employer of the inventor. In case of inventions made or conceived by more than one inventor having different employers, the invention is owned in common by the employers. If a co-owner of an invention elects not to pursue patent protection for that invention, it should promptly inform the other co-owner of such election, so as not to prejudice the other's ability to pursue patent protection for the invention on its own behalf.

D. Unless there is a specific written agreement established under Article 111.C, the co-owners may exploit, or have the inventions and patents referred to in paragraph C of the present Article exploited, based upon mutual agreement or, if the Participants cannot agree, each co-owner may independently exploit the invention. The Participants may agree to consolidate ownership of any invention with one Participant to exploit the invention through a license agreement. In addition, any Participant seeking patent protection for such an invention should grant a Power of Attorney and the right to review any patent office communications to the co-owning Participant for any patent applications directed to an invention made or conceived under this MOU.

E. The provisions of paragraphs C and D of the present Article shall remain valid after the expiry of this MOU as long as the inventions are protected by a patent or by secrecy.

ARTICLE V
Source of Funding

Each Participant to this MOU intends to fund its own activities subject to the availability of appropriated funds, personnel and other resources. Any exchange of information or any other activity under this MOU is to be performed in accordance with applicable laws and regulations, policies and programs of the Participants.

ARTICLE V1
Settlement of Disputes

The Participants should strive to resolve by mutual decision any disputes that arise from the interpretation or application of this MOU.

ARTICLE V11
Liaison Officers

Liaison officers will be as follows:

A. For CSL

Professor John Gilbert
Research Director (Food)
Central Science Laboratory
Department of Environment, Food, and Rural Affairs
Sand Hutton, York Y041 1LZ
United Kingdom
Telephone: +44 (0) 1904 4624 24

B. For FDA

Office of Science
Center for Food Safety and Applied Nutrition
Food and Drug Administration
5100 Paint Branch Parkway (HFS-006)
College Park, MD 20740
Telephone: 301-436-1981

Director, Division of Residue Chemistry
Center for Veterinary Medicine
Food and Drug Administration
8401 Muirkirk Road (HFV-510)
Laurel, MD 20708
Telephone: 301-827-8167

Deputy Director, Division of Field Science
Office of Regulatory Affairs
Food and Drug Administration
5600 Fishers Lane (HFC-140)
Rockville, MD 20857
Telephone: 301-827-1026

ARTICLEV11
Duration

Activities under this MOU commence upon signatures of both Participants and continue in effect for a period of five years. The Participants agree to evaluate the agreement during the five-year period. It may be extended or modified by written consent of the Participants. Either Participant, upon 30-days written notice to the other Participant, may terminate this MOU.

Signed at Washington, D.C., in duplicate, this twenty-ninth day of October 2003.

FOR THE FOOD AND DRUG ADMINISTRATION
DEPARTMENT OF HEALTH AND HUMAN SERVICES
OF THE UNITED STATES OF AMERICA

Mark B. McClellan, M.D., Ph.D.
Commissioner of Food and Drugs

FOR THE CENTRAL SCIENCE LABORATORY
DEPARTMENT OF ENVIRONMENT, FOOD AND RURAL AFFAIRS
OF THE UNITED KINGDOM

Professor M. Roberts
Chief Executive

[FR Doc. 04–15 Filed 1–2–04; 8:45 am]
BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 1990D–0194]

Radioimmunoassay Analysis of Hair to Detect the Presence of Drugs of Abuse; Revocation of Compliance Policy Guide 7124.06

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the revocation of the compliance policy guide (CPG) entitled "Sec. 370.200 RIA Analysis of Hair to Detect the Presence of Drugs of Abuse (CPG 7124.06)." This CPG no longer reflects current agency policy.

DATES: The revocation is effective January 5, 2004.

ADDRESSES: Submit written requests for single copies of CPG 7124.06 to the Division of Compliance Policy (HFC–230), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, FAX 301–827–0482.

A copy of the CPG may be seen in the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD, between 9 a.m. and 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Jeffrey B. Governale, Division of Compliance Policy (HFC–230), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–827–0411.

SUPPLEMENTARY INFORMATION:

I. Background

FDA issued the CPG entitled "Sec. 370.200 RIA Analysis of Hair to Detect the Presence of Drugs of Abuse (CPG 7124.06)" on May 31, 1990. The CPG stated that the use of radioimmunoassay (RIA) to analyze hair for the presence of drugs of abuse lacked scientific evidence of its safety and effectiveness, as defined in 21 CFR 860.7. Accordingly, the CPG indicated that approved premarket approval applications (PMAs) were necessary before commercially distributing these types of devices.

Since publication of this CPG, more than 88 scientific articles on drugs of abuse testing in hair have been published in the peer-reviewed scientific literature. There has been extensive discussion about the analytical performance, the clinical parameters, and sources of error and testing differences for this technology compared to other technologies. FDA has reviewed a number of hair tests and found these to be substantially equivalent to predicate devices measuring drugs of abuse in other matrices. Given these scientific developments and product clearances,

FDA is revoking CPG 7124.06, in its entirety, to eliminate obsolete compliance policy.

Any person who proposes to introduce into commercial distribution an in vitro diagnostic device that is intended to test human hair for drugs of abuse is required to submit a premarket notification (510(k)) to FDA. However, in accordance with § 864.3260 (21 CFR 864.3260), over-the-counter test sample collection systems for drugs of abuse testing (systems sold for use in nonmedical settings such as insurance, workplace, and home) are exempt from the 510(k) submission requirement as long as the laboratory test (whether for urine, hair, or other matrices) has been cleared or approved by FDA, the laboratory is recognized as capable of performing the testing, and the system is properly labeled. (See 21 CFR 809.40 and § 864.3260.)

Dated: December 23, 2003.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 04–16 Filed 1–2–04; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Government-Owned Inventions; Availability for Licensing

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: The inventions listed below are owned by an agency of the U.S. Government and are available for licensing in the U.S. in accordance with 35 U.S.C. 207 to achieve expeditious commercialization of results of federally-funded research and development. Foreign patent applications are filed on selected inventions to extend market coverage for companies and may also be available for licensing.

ADDRESSES: Licensing information and copies of the U.S. patent applications listed below may be obtained by writing to the indicated licensing contact at the Office of Technology Transfer, National Institutes of Health, 6011 Executive Boulevard, Suite 325, Rockville, Maryland 20852–3804; telephone: 301/496–7057; fax: 301/402–0220. A signed Confidential Disclosure Agreement will be required to receive copies of the patent applications.

Combinatorial Therapy for Protein Signaling Diseases

Arpita Mehta (NCI), Lance Liotta (NCI), Emmanuel Petricoin (FDA)

U.S. Provisional Application No. 60/453,629 filed 10 Mar 2003 (DHHS Reference No. E–039–2003/0–US–01)

Licensing Contact: Michael Shmilovich; 301/435–5019; *shmilovm@mail.nih.gov.*

Available for licensing are methods for individualizing therapy based on information obtained concerning deranged signaling pathways that cause disease. The invention includes the use of protein microarrays to detect the deranged signaling pathways that are specific for the subject's disease. The invention covers the use of combination therapy targeting multiple points in the protein network. The invention is based, in part, on the unexpected discovery that treatment of interconnected nodes in a protein signaling pathway can provide a synergistic improvement in therapeutic efficacy at reduced toxicity. For example, a protein signaling network of a diseased cell (*e.g.*, colon cancer) is analyzed and the information obtained from the analysis is used to select at least two drugs whose targets are interconnected within the protein signaling network.

Fluorescent Pteridine Nucleoside Analogs

Mary Hawkins, Wolfgang Pfleiderer, Frank Balis, Michael Davis (NCI)

U.S. Patent 5,525,711 issued 11 Jun 1996 (DHHS Reference No. E–181–1993/0–US–01);

U.S. Patent 5,612,468 issued 18 Mar 1997 (DHHS Reference No. E–181–1993/0–US–23);

U.S. Patent 6,451, 530 issued 17 Sep 2002 (DHHS Reference No. E–155–1996/0–US–03);

U.S. Patent Application No. 09/786,666 filed 07 Mar 2001, allowed (DHHS Reference No. E–035–1998/0–US–0).

Worldwide IP coverage.

Licensing Contact: Susan Carson; 301/435–5020; *carsonsu@mail.nih.gov.*

Pteridines are naturally occurring, highly fluorescent compounds (Quantum yields 0.88–0.40) that are structurally similar to purines and that were first isolated from butterfly wings in 1889. The pteridine nucleoside analogs developed by NCI scientist Hawkins and co-workers are structurally similar to guanosine (3–MI and 6–MI) or adenosine (6–MAP). These analogs are stable, can be formulated as phosphoramidites and are incorporated into oligonucleotides as a direct substitute for a purine base using automated DNA synthesis. The fluorescence properties of these probes are directly impacted by the chemistry of neighboring bases and reflect changes in tertiary structure due to interactions with proteins, RNA or DNA. Even subtle changes in base stacking or base pairing can be observed through changes in fluorescence intensity, lifetimes, energy transfer or anisotropy, making these pteridines ideally suited for the study of DNA/DNA and DNA/protein interactions.

Several applications have been further developed using this technology and one such application causes the pteridine probe to "bulge" out of the base stacking environment as it anneals to a target sequence which does not contain a base pairing partner for the pteridine. Prior to binding to the bulge-forming target strand the fluorescence of the probe is very quiet, only "lighting up" when bound to a specific sequence. This highly specific technique results in a dramatic increase in fluorescence intensity of up to 27 fold, is very rapid, does not require separation of oligonucleotides in a mixture and has been used in the development of a PCR product detection system. The specific nature of the "bulge hybridization" technique may be used to overcome some of the issues caused by non-specific probe binding in standard chip technology. (For a review see: Hawkins, M. (2003) Fluorescent Nucleoside Analogues as DNA Probes, in DNA Technology. J. R. Lakowicz. New York, Kluwer Academic/Plenum Publishers Vol 7 151–175.) More recent applications have shown that the stability and brightness of the guanosine analogy 3–MI are suitable for studies requiring probe detection at the single molecule level and studies using 6–MAP and 2-photon counting excitation demonstrate the adenosine analog's usefulness as a UV probe.

The pteridine nucleoside analogs provide a unique opportunity to use native-like, stable and highly fluorescent probes in the development of further refined, quantitative approaches to the study of DNA/DNA and DNA/protein interactions. The pteridine nucleoside patent portfolio is available for licensing and provides composition and methods of use claims for these versatile fluorophores.

Dated: December 22, 2003.

Steven M. Ferguson,

Director, Division of Technology Development and Transfer, Office of Technology Transfer, National Institutes of Health.

[FR Doc. 04–99 Filed 1–2–04; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

National Toxicology Program (NTP) Board of Scientific Counselors Technical Reports Review Subcommittee Meeting; Review of Draft NTP Technical Reports; Correction

The table included in the **Federal Register** notice (68 FR, No. 232 pp. 67696–67697) published December 3, 2003, had errors in the information provided in the column headed Route & Exposure Levels for 2,3,7,8-Tetrachlorodibenzo-p-dioxin (TCDD), 3,3',4,4',5-Pentachlorobiphenyl (PCB 126), 2,3,4,7,8-Pentachlorodibenzo-furan (PeCDF) and the Mixture of PCB 126, TCDD, and PeCDF. The corrected information is provided below.

Chemical/CAS No.	Report No.	Route & exposure levels
2,3,7,8-Tetrachlorodibenzo-p-dioxin (TCDD)/1746–01–6.	TR 521	Two-year study; administered by gavage at 3–100 ng/kg to female Sprague-Dawley rats.
3,3',4,4',5-Pentachlorobiphenyl (PCB 126)/57465–28–8.	TR 520	Two-year study; administered by gavage at 30–1000 ng/kg to female Sprague-Dawley rats.
2,3,4,7,8-Pentachlorodibenzo-furan (PeCDF)/57117–31–4.	TR 525	Two-year study; administered by gavage at 6–200 ng/kg to female Sprague-Dawley rats.
Mixture of PCB 126, TCDD, and PeCDF	TR 526	Two-year study; administered by gavage at 10–100 ng TCDD "equivalents"/kg to female Sprague-Dawley.

Dated: December 19, 2003.

Samuel Wilson,

Deputy Director, National Toxicology Program.

[FR Doc. 04–100 Filed 1–2–04; 8:45 am]

BILLING CODE 4140–01–U

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–930–1430–ET; NVN–77821; 4–08807]

Notice of Proposed Withdrawal and Opportunity for Public Meeting; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management has received a request from the United States Air Force to withdraw 1,979 acres of public land from surface entry and mining to protect support facilities for the safe and secure operation of national defense activities on the Nevada Test and Training Range. This notice segregates the land from surface entry and mining for up to 2 years while various studies and analyses are made to support a final decision on the withdrawal application.

DATES: Comments and requests for a meeting should be received on or before April 5, 2004.

ADDRESSES: Comments and meeting requests should be sent to the Nevada State Director, BLM, 1340 Financial Blvd., P.O. Box 12000, Reno, Nevada 89520–0006.

FOR FURTHER INFORMATION CONTACT: Dennis J. Samuelson, BLM Nevada State Office, 775–861–6532.

SUPPLEMENTARY INFORMATION: The United States Air Force has filed an application to withdraw the following described public land from settlement, sale, location, or entry under the general land laws, including the mining laws, but not the mineral leasing laws, subject to valid existing rights:

Mount Diablo Meridian

From the northwest corner of section 12, T. 5 N., R. 50 E., Proceed southeast 1,874.10 feet on a bearing of 155°48′00″ to starting point;

Thence southeast 5,551.20 feet on a bearing of 122°54′00″;

Thence northeast 15,530.30 feet on a bearing of 33°18′00″;

Thence northwest 5,551.20 feet on a bearing of 302°54′00″;

Thence southwest 15,530.30 feet on a bearing of 213°18′00″ to the starting point, excepting Tybo Road.

The area described contains 1,979 acres in Nye County.

The land would be withdrawn from settlement, sale, location, or entry under the general land laws, including the mining laws, but not the mineral leasing laws, to protect facilities that support the safe and secure operation of national defense activities on the Nevada Test and Training Range. Approximately 400 acres of the area are currently withdrawn by Public Land Order No. 6591, Parcel A (50 FR 10965–10966, FR Doc. 85–6479, March 19, 1985). Public Land Order No. 6591 will be allowed to expire as to Parcel A and will be replaced by this proposed withdrawal.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal may present their views in writing to the Nevada State Director of the Bureau of Land Management.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the Nevada State Director within 90 days from the date of publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** at least 30 days before the scheduled date of the meeting.

Comments, including the names and street addresses of those who submitted them, will be available for public review at the Tonopah Field Station, 1553 South Main Street, Tonopah, Nevada, during regular business hours 7:30 a.m. to 4:30 p.m., Monday through Friday, except holidays. Individual respondents may request anonymity. If you wish to hold your name or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your comments. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, will be made available for public inspection in their entirety.

The application will be processed in accordance with the regulations set forth in 43 CFR part 2300.

For a period of 2 years from January 5, 2004, in accordance with 43 CFR 2310.2(a), the land will be segregated from surface entry and mining, unless the application is denied or canceled, or the withdrawal is approved prior to that date. Other uses which will be permitted during this segregative period are rights-of-way, leases, and permits.

Dated: December 4, 2003.

Jim Stobaugh,

Lands Team Lead.

[FR Doc. 04–96 Filed 1–2–04; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[NV–930–1430–ET; NVN–35951, 4–08807]

Notice of Proposed Extension of Withdrawal and Opportunity for Public Meeting; Nevada

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of withdrawal.

SUMMARY: The United States Air Force proposes to extend a withdrawal 200 acres of public land withdrawn to protect an administrative/communication site in Nye County. The withdrawal being extended is Public Land Order No. 6591. This withdrawal will expire on April 11, 2005, unless extended. The land is currently withdrawn from surface entry and mining, but not the mineral leasing laws, by Public Land Order No. 6591.

DATES: Comments and requests for a meeting should be received on or before April 5, 2004.

ADDRESSES: Comments and meeting requests should be sent to the Nevada State Director, BLM, 1340 Financial Blvd., PO Box 12000, Reno, Nevada 89520.

FOR FURTHER INFORMATION CONTACT: Dennis J. Samuelson, BLM Nevada State Office, 702–861–6532.

SUPPLEMENTARY INFORMATION: The United States Air Force has filed an application to extend Public Land Order No. 6591 200 acres of public land withdrawn to protect an administrative/communication site (Public Land Order No. 6591, 50 FR 10965–10966, FR Doc. 85–6479, March 19, 1985). An extension, if approved, would continue the withdrawal from all forms of appropriation, including the mining laws, but not the mineral leasing laws, for the following described pubic land known as Parcel B:

Mount Diablo Meridian

T. 7 N., R. 52 E., sec. 5, (within). sec. 8, (within) sec. 17, (within)
T. 8 N., R. 52 E., sec. 32, (within).

The area described contains 200 acres in Nye County. See Public Land Order No. 6591 for a detailed metes and bounds description for Parcel B (Note: The withdrawal for Parcel A is not included in this notice).

The Air Force proposes to extend the withdrawal an additional 20 years through April 11, 2025. The extension of the withdrawal would protect a facility used for the safe and secure operation of national defense activities on the Nevada Test and Training Range.

This withdrawal extension will be processed in accordance with the regulations set forth in 43 CFR 2300.

For a period of 90 days from the date of publication of this notice, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal extension may present their views in writing to the Nevada State Director of the Bureau of Land Management.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal extension. All interested persons who desire a public meeting for the purpose of being heard on the proposed extension must submit a written request to the Nevada State Director within 90 days from the date of publication of this notice. Upon determination by the authorized officer that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** and at least one local newspaper 30 days before the scheduled date of the meeting.

Comments, including names and street addresses of commenters, will be available for public review at the Tonopah Field Station, 1553 South Main Street, Tonopah, Nevada, during regular business hours 7:30 a.m. to 4:30 p.m., Monday through Friday, except holidays. Individual respondents may request anonymity. If you wish to hold your name or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your comments. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, will be made available for public inspection in their entirety.

Dated: November 26, 2003.

Jim Stobaugh,

Lands Team Lead.

[FR Doc. 04–97 Filed 1–2–04; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Portland Cement Association

Notice is hereby given that, on December 2, 2003, pursuant to section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Portland Cement Association ("PCA") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing a change in its membership status. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Suwannee American Cement, Branford, FL has been added as a Member; and Solios Environment Inc., Montreal, Quebec, CANADA has been added as an Associate Member. Also, Southeast Cement Promotion Association, Snellville, GA has changed its name to Southeast Cement Association.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and PCA intends to file additional written notification disclosing all changes in membership.

On January 7, 1985, PCA filed its original notification pursuant to section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to section 6(b) of the Act on February 5, 1985 (50 FR 5015).

The last notification was filed with the Department on September 26, 2003. A notice was published in the **Federal Register** pursuant to section 6(b) of the Act on October 22, 2003 (68 FR 60416).

Dorothy B. Fountain,

Deputy Director of Operations, Antitrust Division.

[FR Doc. 04–38 Filed 1–2–04; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Agency Information Collection Activities: Proposed Collection; Comments Requested

ACTION: 30-day notice of information collection under review: National Clandestine Laboratory Seizure Report.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA) 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 190, page 56650 on October 1, 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 4, 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) 395–5806. 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 Collection

(1) *Type of Information Collection:* New Collection.

(2) *Title of the Form/Collection:* National Clandestine Laboratory Seizure Report.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form Number: EPIC Form 143, Drug Enforcement Administration, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: State and Local Law Enforcement Agencies. Other: None. Records in this system are used to provide clandestine laboratory seizure information for the El Paso Intelligence Center, Drug Enforcement Administration, and other law enforcement agencies, in the discharge of their law enforcement duties and responsibilities. It is a criminal offense under title 21, United States Code, to illegally manufacture controlled substances and their counterfeits. 21 U.S.C. 873(a) authorizes the Attorney General to, among other things, arrange for the exchange of information between governmental officials concerning the use and abuse of controlled substances. This form provides a consistent method by which state and local authorities can report incidents relating to the seizure of clandestine laboratories for illegal drug manufacturing or of materials evidencing clandestine laboratory operations.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 10,000 respondents will complete the information within 1 hour.

(6) *An estimate of the total public burden (in hours) associated with the collection:* There are an estimated 10,000 total annual burden hours associated with this collection.

If additional information is required contact: Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Patrick Henry Building, Suite 1600, 601 D Street, NW., Washington, DC 20530.

Dated: December 29, 2003.

Brenda E. Dyer,

Deputy Clearance Officer, Department of Justice.

[FR Doc. 04–37 Filed 1–2–04; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

[Prohibited Transaction Exemption 2003–40; Exemption Application No. D–11191]

United States Steel and Carnegie Pension Fund (UCF or the Applicant), Located in Atlanta, GA

AGENCY: Employee Benefits Security Administration, U.S. Department of Labor.

ACTION: Grant of individual exemption.

SUMMARY: This document contains a final exemption issued by the Department of Labor (the Department) from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and from certain taxes imposed by the Internal Revenue Code of 1986 (the Code).

The exemption permits the in kind contribution of certain timber rights (the Timber Rights) under two timber purchase and cutting agreements (the Timber Rights 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 (the Property) on which the Timber Rights are based. The exemption affects participants and beneficiaries of, and fiduciaries with respect to the Plan.

EFFECTIVE DATE: This exemption is effective as of December 24, 2003.

FOR FURTHER INFORMATION CONTACT: Ms. Silvia M. Quezada of the Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, telephone (202) 693–8553. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On November 14, 2003, the Department published a notice of proposed individual exemption (the Notice) in the **Federal Register** at 68 FR 64650. The Notice was requested in an application filed on behalf of the Plan pursuant to section 408(a) of the Act and section

4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 1995) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Accordingly, this final exemption is being issued solely by the Department.

The Notice set forth a summary of the facts and representations (the Summary) contained in the Applicant's June 2, 2003 application for exemptive relief and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC.

The Notice also invited interested persons to submit written or faxed comments with respect to the Notice and/or requests for a public hearing on or before December 18, 2003. All comments were made a part of the record. In response to the solicitation of comments from interested persons, the Department received 54 written comments, including 2 comment letters submitted by the Applicant. Among these, a number of interested persons requested a public hearing. Of the comments received, 3 commenters supported the merits of the proposed transactions, while 51 commenters opposed the transactions for a variety of reasons. The Department also received 39 general telephone inquiries concerning the proposed transactions.

The Department forwarded copies of all of the comment letters to the Applicant and requested that the concerns raised by the commenters be addressed in writing by either the Applicant or The Campbell Group (TCG) of Portland, Oregon, which will serve on behalf of the Plan as the independent fiduciary (the Independent Fiduciary) with respect to the proposed transactions.

Following is a discussion of the comments and responses provided by the Applicant, the Independent Fiduciary, or the Department.

The Applicant's Comments

The Department received comment letters from the Applicant dated December 2, and December 23, 2003. In these letters, the Applicant requested certain changes and clarifications to the conditions of the exemption as proposed in the Notice. The Applicant's comments on the conditions of the Notice and the Summary are discussed below in the order of appearance in the Notice.

1. *Section I(B) and Section I(B)(1) of the Notice.* The Applicant notes that Section I(B) of the proposal provides relief for ancillary transactions arising from certain rights retained by US Steel, but limits that relief to four specified types of ancillary transactions (See Section I(B)(1) through (4)). By contrast, the Applicant points out that on page 64655 of the Summary, in the first full non-bulleted paragraph appearing in column 1, Representation 14, in describing these transactions, precedes the same list of the four types of transactions by stating that the subsequent dealings with US Steel "include the following." The Applicant explains that while the list in Section I(B) covers the principal examples of ancillary transactions that may arise from the Timber Rights contribution, there may be other matters that arise during the course of the operation of the Timber Rights Agreements that involve dealings between the Plan and US Steel. Therefore, the Applicant believes there should be no need to limit these types of transactions, which may benefit the Plan, so long as all the protections of the exemption apply to them. In the exemption request under consideration, all such transactions would be subject to the oversight of the Independent Fiduciary, who would represent the interests of the Plan. Accordingly, the Applicant requests that Section I(B) be amended by adding the phrase "including the following" at the end of the initial paragraph, before the list of the four types of transactions to conform with the Summary.

The Department does not concur with the Applicant's comment. The Department does not believe that it would be appropriate to provide broad exemptive relief for "other transactions" that have not been identified in the Applicant's submission. Therefore, the Department did not make the revision as requested by the Applicant. Instead, the Department requested that the Applicant provide a listing of additional ancillary transactions that could arise between the Plan and US Steel following the Timber Rights contribution. The Applicant and the Independent Fiduciary identified additional ancillary transactions which are referenced in new Sections I(b)(5) and Section III(e) of the Notice.

Section I(b)(5) refers to: "(5) Any additional ancillary transactions defined in Section III(e)." Section III(e) provides that the term "additional ancillary transactions" means:

(1) The allocation and contesting of property taxes, fees, licenses, fines and other charges or assessments imposed on the Plan, the Timber Rights or (as relevant) the Property; (2) the allocation of payments in connection with the granting of easements or use permits; (3) the use of timberlands in connection with government-mandated environmental cleanup or other construction or maintenance activities occurring on US Steel owned adjacent properties; (4) the negotiation by the Independent Fiduciary with US Steel of a premium price to be paid to the Plan to permit US Steel to buy out the Timber Rights on a parcel in order to sell the parcel to a third party; (5) the coordination between the Independent Fiduciary and US Steel of access to the Property on a continuing basis, such as where to place a gate or to whom to permit access; (6) the allocation of costs and responsibilities related to participation in cooperatives for fire protection, research on land use, or other matters relating to the Property and the Timber Rights; (7) the representation of the Plan in regulatory matters, such as changes in laws or regulations affecting the Property, that also would impact US Steel; (8) the allocation of insurance coverage for the Property and Timber Rights between the Plan and US Steel; (9) the joint hiring by, or the allocation of costs between, the Plan and US Steel of contractors to cut or maintain roads for fire protection or other joint uses; (10) the joint action by, or allocation of costs between, the Plan and US Steel to maintain Property boundaries, monitor for violations, and determine damages if any from third party trespass or other intrusion onto the Property; (11) the joint representation of the Plan and US Steel to an agency or other governmental body in the event of any regulatory dispute or other regulatory issue involving the Timber Rights and the Property; (12) working with government agencies on environmental projects, enhancements, conservation easements, or similar matters that may affect the value of the Timber Rights and the Property; (13) the negotiation of a joint sale of the Timber Rights owned by the Plan and the underlying Property owned by US Steel to a third party; (14) the enforcement and settlement arising from US Steel's obligations under the Timber Rights Agreements; and (15) the joint defense and prosecution of lawsuits involving the Timber Rights and/or the Property.

The Department notes that the exemption requires that the Independent Fiduciary represent the Plan's interest with respect to the ancillary transactions and approve of the terms prior to entering into any of the transactions.

The Applicant also notes that, with regard to Section I(B)(1) of the Notice, an early termination may not apply to a Timber Rights Agreement as a whole, but rather to a portion of the Property covered by that Agreement, as described in Representation 7 of the Summary. Therefore, the Applicants suggests that the initial clause of subparagraph (a) be revised to read as follows:

US Steel exercises its right to early termination of an Agreement or with respect to a portion of the Property covered by an Agreement, * * *

The Department concurs with the Applicant and has modified the initial clause of subparagraph (a) of Section I(B)(1) accordingly.

2. *Section II(j) of the Notice.* In response to the Department's concern over the authority of the Independent Fiduciary with respect to the disposition of Timber Rights to third parties, the Applicant agreed to amend Section II(j) of the Notice. Section II(j) pertains to the disposition of the Timber Rights under the Timber Rights Agreements and related instruments. The Applicant proposes that its oversight role in approving or directing sales to third parties under the Management Agreement with TCG be turned over to a Second Independent Fiduciary appointed for that purpose. Section II(j) of the final exemption reads as follows:

The Independent Fiduciary, acting on behalf of the Plan, retains the right to sell or assign, in whole or in part, any of the Plan's Timber Rights interests to any third party purchaser. Notwithstanding the above, UCF retains the authority to appoint a second independent fiduciary (the Second Independent Fiduciary) to determine whether to approve a proposed disposition, or to determine whether to direct the Independent Fiduciary to make a disposition.

The Department concurs with the Applicant's amendment to Section II(j) and has revised the Notice, accordingly.

3. *Section III(a) of the Notice.* Under Section III(a) of the Notice, the Applicant states that one of the circumstances under which a fiduciary will not be deemed independent of and unrelated to US Steel is where "the annual gross revenue received by such fiduciary, during any year of its engagement, from US Steel and its affiliates exceeds 5% of the Independent Fiduciary's annual gross revenue from all sources for its prior tax year."

The Applicant interprets this to mean that if, during the course of a particular year, the gross revenue received by TCG from US Steel and its affiliates were to exceed 5% of its total annual gross revenue for the prior year, TCG would, at that point in time, cease to be "independent" for purposes of the exemption. This means that the relief provided by the exemption for any transaction entered into under TCG's authority as Independent Fiduciary prior to the date on which its revenue exceeds the 5% threshold would not be affected. Violation of the 5% condition would therefore have only a prospective effect, requiring UCF to hire another Independent Fiduciary in order to continue using the exemption going forward, and would not retroactively invalidate all past transactions that have been entered into pursuant to the exemption. The Applicant requests that the Department confirm this interpretation.

In response to this comment, the Department concurs with the Applicant's interpretation of the Independent Fiduciary's 5% earnings cap and the unavailability of the exemption in the event this limitation is exceeded.

4. *Representation 7 of the Summary.* The Applicant wishes to clarify certain matters relating to a "temporary" termination of the Timber Rights with respect to Property under the Timber Rights Agreements discussed in Representation 7 of the Summary. First, in the second sentence of the second full paragraph on page 64653 of the Notice, pertaining to the terms of the Timber Rights Agreement for the 135,000 acre parcel, the phrase which states "the fair market rental value of the affected timberland surface plus" should be deleted. For purposes of clarification, the Applicant requests that the following sentence be added at the end of the paragraph: "In the event of surface or strip mining, US Steel must also pay the fair market rental value of the affected timberland surface."

Second, in Footnote 8 on the same page, the Applicant requests that in the 5th line, the phrase stating "in less than 15 years" should be deleted. The Applicant explains that the reason for these changes is that certain mining activities (namely, those described in clauses (i) through (xvi) of Section 12.2 of the Timber Rights Agreements, which also are listed in Footnote 8 of the Notice) are deemed to be "temporary" even if the use is for longer than 15 years. In accordance with prevailing practice in Alabama, the Applicant further explains that these mining activities give rise to a requirement to reimburse the timber owner only for the value of the standing timber, but not for the fair market rental value of the Property, itself. The only "temporary" mining activity for which the Plan will receive fair market rental value during mining use, in addition to timber value, is surface or strip mining, because surface or strip mining could involve a large amount of land being out of use for an indeterminate period. According to the Applicant, activities other than those enumerated in Footnote 8 would be characterized as "temporary" if (a) they are for less than 15 years, (b) they do not pose a material risk of contamination or nuisance, and (c) the surface will be substantially restored to its prior condition upon cessation of activities.

Third, the Applicant states that the same comments and changes apply to the 4th full paragraph on page 64653 of the Notice, which describes the parallel provisions in the Timber Rights Agreement covering the 35,000 acre parcel of the Property.

In response to the foregoing comments, the Department notes these clarifications to the Summary and, particularly, the Timber Rights Agreements.

5. *Representation 11 of the Summary.* The Applicant notes that Representation 11 of the Summary describes negotiations that were taking place at the time the exemption application was filed to sell the mineral rights held by US Steel and its affiliate, US Steel Mining Co., with respect to the underlying land. Since that time, the Applicant states that US Steel has agreed to sell its mineral rights to a third party (the USS Mineral Sale). The Applicant further states that the mineral purchaser's interest will be subject to the terms of the Timber Rights Agreements with regard to compensation due to the Plan for damaged or destroyed timber.

On June 30, 2003, the Applicant indicates that the Oak Grove Mine, owned by US Steel Mining Co., was separately sold. The area affected by the sale involved approximately 12,000 acres and related only to certain identified coal seams that are expected to be fully mined in approximately 10 years (which may be extended if options for any of five different option parcels totaling 22,000 acres are exercised). Rights to any other minerals on those acres were retained by US Steel and are included in the USS Mineral Sale.

Because the Oak Grove Mine was sold prior to the date on which the Timber Rights Agreements were finalized, the Applicant explains that the documents associated with its conveyance are to be treated as "Current Leases" that pre-date the Timber Rights Agreements, so that their compensation terms will technically supersede the mining use provisions of the Timber Rights Agreements. The Applicant further explains that these compensation terms, like those in the Timber Rights Agreements, provide for compensation at fair market value for any timber that might be damaged or destroyed for mining purposes. According to the Applicant, the negotiation of those terms was overseen by TCG as Independent Fiduciary, and those terms are viewed by TCG as fair and reasonable to the Plan. Furthermore, the

Applicant indicates that the terms of the Oak Grove Mine sale were taken into account by the independent appraiser and Independent Fiduciary in valuing the Timber Rights.

The Department takes note of the Applicant's clarifications regarding the USS Mineral Sale in Representation 11 of the Summary.

6. *Representation 14 of the Summary.* The Applicant wishes to clarify that the last paragraph of Representation 14 of the Summary reflects the Applicant's original statement that TCG's representations regarding its independence from U.S. Steel are contained in the "Management Agreement." Because the Management Agreement had not been finalized by the time TCG was required to begin its work, the Applicant notes that these representations are contained in a letter agreement between UCF and TCG dated August 25, 2003.

The Department acknowledges the Applicant's clarification of the written instrument wherein TCG memorializes its independence from either the Applicant and US Steel.

7. *Representation 17 of the Summary.* The Applicant wishes to clarify that with regard to TCG's incentive fee (the Incentive Fee), the Management Agreement provision regarding such fee is being amended. As described in the last sentence of Representation 17 of the Summary, 50% of the Incentive Fee was originally payable every third year for the duration of the Management Agreement. The Applicant explains that the amendment will permit UCF and TCG, by mutual agreement, to defer payment of all or a portion of the Incentive Fee due in a particular year to any subsequent year. The Applicant further explains that this action may be taken to spread out the Incentive Fee payments more evenly from period to period.

In response to this comment, the Department notes the proposed amendment regarding the payment of TCG's Incentive Fee. The Department further notes that no exemptive relief is provided herein for the payment of incentive compensation to TCG.

The Applicant's Response to Issues Raised by the Commenters

In a letter dated, December 10, 2003, the Applicant provided the Department with a written response to the issues raised by interested persons who responded in writing to the Department concerning the Notice. Discussed below are the issues raised by the commenters and the responses to these comments made by the Applicant and the Independent Fiduciary.

1. *Effect of Contribution on Benefits Provided under the Plan.* Several commenters questioned whether the proposed contribution would affect benefits under the Plan. In response, the Applicant states that the proposed transaction would not, in itself, have any effect on the benefits provided under the Plan. If anything, the Applicant states that the proposed transaction would offer greater assurance that the benefits will ultimately be paid, by providing the Plan with a larger and more diverse asset base.

In addition, the Applicant points out that several comment letters raised questions about increasing benefit levels. Because the Applicant considers this matter outside the scope of the proposed transactions and the exemption request, it has not chosen to comment.

2. *Plan Merger Questions.* Some of the commenters raised questions regarding the merger of the US Steel pension plans. Because this merger is occurring separately from, and unrelated to, the Timber Rights contribution, the Applicant states that US Steel will respond directly to the Plan participants on those issues, outside of the exemption proceeding.

3. *Persons to Whom Independent Fiduciary Is Responsible.* A commenter questioned to whom in UCF would TCG be responsible. The Applicant states that the Independent Fiduciary would report to the officers of Plan LLC, the limited liability company that is created to hold the Timber Rights on behalf of the Plan. They would be M. Sharon Cassidy, the General Counsel of UCF; William Donovan, the Vice President—Investments of UCF; and Katherine Stults, the Staff Analyst—Forest Products Industry of UCF.

The Independent Fiduciary's Response to the Commenters

In a letter to the Department dated December 9, 2003, the Independent Fiduciary responded to the following issues raised by a number of commenters:

1. *Risk of Short-Term Loss on the Investment, No Returns to the Plan, and Transaction Costs Outweighing Benefits.* A commenter thought the proposed transaction would subject the Plan to a risk of short-term loss on the investment and generate no investment return at all to the Plan.

In response to this comment, the Independent Fiduciary states that based on the cruise (*i.e.*, inspection with reference to possible timber yield) and inventory work and cash flow projections by Larson & McGowin, the independent appraiser, it anticipates that there will be sufficient timber available for harvest in 2004 and subsequent years so as to provide a positive cash flow from the outset of the proposed transaction. Consequently, the Independent Fiduciary does not expect a loss to the Plan, and in fact, believes there will be a positive return, from the first year of the investment forward over the course of the first five years. Also, as demonstrated by the appraisal report, the Independent Fiduciary anticipates positive cash flows and a positive investment return for the Plan over the long term from this investment, net of any related costs. Therefore, in its considered judgment, and as expressed in its report, the Independent Fiduciary believes the proposed transaction would be a prudent investment for the Plan.

The Independent Fiduciary notes that another commenter cited the specific risk of adverse affects to the Plan from lawsuits related to environmental issues, given the nature of the assets involved. The Independent Fiduciary states that the parties have taken several precautions to limit any environmental risk, including an indemnification obligation in favor of the Plan from US Steel as owner of the underlying land. Therefore, the Independent Fiduciary believes this risk to be limited and that it will not outweigh the potential benefits of the proposed transaction.

2. *Preferability of Selling the Property to a Third Party and Donating the Sale Proceeds to the Plan.* A commenter suggested the preferability of selling the Property outright to an unrelated party and then donating the proceeds to the Plan.

In response to this comment, the Independent Fiduciary states that if US Steel were to attempt to sell the Timber Rights, the proceeds would be relatively low compared to the their long-term expected cash flow, because of the young age of the timber. The Independent Fiduciary represents that it would be difficult to invest the proceeds in a manner that would achieve the same expected investment return with a commensurate level of risk compared to the Timber Rights. In addition, the Independent Fiduciary states that the contribution provides an opportunity for the Plan to receive Timber Rights without incurring transaction costs. For these reasons, and because of the diversification benefits of expanding the Plan's investments to include timber rights, the Independent Fiduciary believes that it is prudent and in the interests of the Plan to receive the Timber Rights as a contribution rather than the proceeds of the sale of the Timber Rights.

3. *Risk of Loss from Floods, Fires, Vandalism and Other Causes, Natural and Otherwise.* A commenter questioned the risk of loss to the Plan from the Timber Rights investment caused by floods, fire, vandalism and other causes.

In response to this comment, the Independent Fiduciary states that based on its past experience in managing timber property, there would be only a small risk of loss from fire or other natural disasters. The Independent Fiduciary explains that it would take steps to minimize fire and disease risk through active timber management aimed at maintaining healthy and vigorous stands. Further, the Independent Fiduciary asserts that the nature of the Property, being interspersed with other land uses and close to an urban center (Birmingham), would lead to quick detection of fire and quick response. The Independent Fiduciary notes that although tornado damage to timberlands is generally confined to small areas, and hurricane damage tends to occur closer to near-coastal areas, flooding and drought are generally not significant risks in the area where the Property is located.

The Independent Fiduciary further explains that consistent with every other property it manages, it will have a "fire plan" to serve as the basis for how it will manage the risk of fire and how it will respond to any incidence of fire. It notes that the capacity of the state of Alabama to support fire fighting efforts is only one consideration that will be accounted for in the fire plan for the Property. The Independent Fiduciary states that in its experience one of the most effective means to manage the risk of fire is through active management that maintains a healthy and vigorous forest, including the practice of periodically thinning in overly dense forest types. Therefore, the Independent Fiduciary represents that it will increase the intensity of its management practices on the Property, which will improve the health and vigor of the forest and help mitigate the inherent risk of fire, insects, and disease.

4. *Using the Proposed Transaction to Benefit US Steel.* Some commenters raised the possibility that US Steel would be using the proposed in kind contribution transaction to benefit itself in various ways.

In response to the commenters, the Independent Fiduciary states that the form of the transaction is a "contribution," and not a "sale." The Independent Fiduciary explains that US Steel is receiving no cash or other consideration from the Plan in exchange for the Timber Rights, other than the possibility of decreasing future cash contributions. Therefore, it believes the Plan's current assets and investments are not being affected or diminished in any way.

The Independent Fiduciary explains that the exemption does not provide any relief from the requirement that the assets accepted through the in kind contribution constitute a prudent investment for the Plan. In this regard, the Independent Fiduciary explains that its role has been to assure that the terms of the transaction are fair and reasonable to the Plan. In its view, the Independent Fiduciary believes that the terms of the transaction are at least as favorable, if not more favorable, to the Plan than the terms it could obtain in an arm's length transaction with an unrelated party. The Independent Fiduciary states that it will continue to perform that role in connection with any future dealings between the Plan and US Steel relating to the Timber Rights. Therefore, the Independent Fiduciary concludes that US Steel is not obtaining any benefit at the Plan's expense.

The Independent Fiduciary further states that the Timber Rights, once contributed to the Plan, must be used for the exclusive benefit of the Plan. Any appreciation in value would belong to the Plan and would increase the security of future pension payments. Any benefit to US Steel, such as through a tax deduction or decreasing future contributions, would be incidental to the principal benefit of increasing the Plan's funding level, according to the Independent Fiduciary.

The Independent Fiduciary notes that a commenter suggested that US Steel would be using this opportunity to seek an "exemption" from or otherwise postpone its obligatory annual cash contribution to the Plan. In response to this commenter's concern, the Independent Fiduciary states that US Steel would not receive any exemption from its contribution obligations, which apply regardless of the form of contribution. The Independent Fiduciary also states that as noted in the exemption application, US Steel anticipates that it will be making a cash contribution in 2005.

5. *Risks to the Plan from Becoming a "Business" as a Result of Owning the Timber Rights.* Two commenters suggested that there are risks to the Plan from becoming engaged in a "business," with one comment describing these risks by comparison to the "unscrupulous executives" at companies such as Enron.

In response to these comments, the Independent Fiduciary explains that managing approximately 170,000 acres of timberland in Alabama is not comparable to those well-publicized problems, where the principal issue at the root of the problems at those companies was a lack of independent oversight and control. The Independent Fiduciary asserts that it will manage the Timber Rights, subject to the oversight of UCF as Plan Trustee, so that independent oversight and controls will be in place.

6. *Risk to the Plan of Limiting the Make-Whole Contribution Period and Its Scope.* The Independent Fiduciary notes that US Steel's "make-whole" contribution obligation was limited to five years because there is a risk of loss to any prudent investment, and it did not seem appropriate to require US Steel to guarantee the long-term prudence of the Timber Rights investment to any greater extent than any other Plan investment, other than to cover any initial risk relating to the in-kind contribution. The Independent Fiduciary further explains that the make-whole contribution is therefore limited to five years to protect the Plan from risks related to the initial contribution transaction.

A commenter asked if the make-whole contribution would be designed to bring the Plan to its "proper funding level." In response to the commenter's concern, the Independent Fiduciary states that the contribution would be triggered only by changes in the value of the Timber Rights, and would not be affected by the Plan's then-current funding level. The Independent Fiduciary indicates that the make-whole payment would be required even if the Plan were overfunded, although the payment would be postponed to the extent that it would not be deductible for tax purposes or would result in an excise tax. If the Plan were underfunded, the Independent Fiduciary represents that the make-whole payment would be limited by the loss in value of the Timber Rights and would not necessarily restore the Plan to full funding, a matter addressed by the pension funding rules.

Furthermore, the Independent Fiduciary explains that the make-whole contribution obligation would take into account any loss from forest fires or other causes for damage to the timber, to the extent that loss reduces the appraised value or net cash flow from the Timber Rights over the first five years.

7. *Exclusion of Due Diligence Costs from the Make-Whole Obligation.* Another commenter argued that the make-whole contribution formula should be changed to allow the Plan to

recover its due diligence costs, "unless the Plan initiated the Timber Rights contribution activity."

In response to this comment, the Independent Fiduciary states that the due diligence process undertaken here is necessary for it and for UCF to fulfill the prudence obligations in connection with the acceptance of the Timber Rights as a Plan investment. If a cash contribution were received in place of the in kind contribution, and if it were similarly used to acquire private real estate assets, the Independent Fiduciary states that the Plan would incur similar costs in determining a prudent investment for the cash. Even if the Plan did not invest in real estate, the Independent Fiduciary explains that the Plan would likely incur costs in determining how to invest the cash through researching and performing due diligence on other investment opportunities. Therefore, the Independent Fiduciary concludes that it is in the interests of the Plan to incur these due diligence fees, which are reasonable since similar costs would be incurred even if the contribution were made in cash.

8. *Limiting Expenses for Operating the Timber Rights to Earnings from the Timber Rights.* A commenter suggested limiting expenses for operating the Timber Rights to earnings from the Timber Rights because the commenter argued that to do otherwise would violate the exclusive benefit provision of the Plan.

In response to this comment, the Independent Fiduciary states that the Timber Rights would be considered a Plan asset just like any other asset owned by the Plan, so that there is no reason to limit related expenses to related earnings. Using other Plan assets to cover Timber Rights expenses would be a use of Plan assets for the benefit of the Plan, consistent with the exclusive benefit requirement, according to the Independent Fiduciary. In any event, the Independent Fiduciary states that it anticipates positive cash flow net of expenses throughout the term of the Timber Rights, so it does not consider this matter to be an issue.

9. *Administrability and Feasibility of the Timber Rights.* A commenter questioned how the administrability and feasibility of the Timber Rights would be determined.

In response to this comment, the Independent Fiduciary indicated that it would make such determinations on behalf of the Plan.

10. *Disposal of the Timber Rights and Distribution of the Proceeds.* A commenter questioned who would determine whether to dispose of the Timber Rights and distribute the sale proceeds.

In response to this comment, the Independent Fiduciary states that it will manage the disposition of the Timber Rights. The Department notes that the Independent Fiduciary will manage the disposition of the Timber Rights. However, UCF will retain the authority to appoint a Second Independent Fiduciary to determine whether to approve a proposed disposition disclosed to UCF by the Independent Fiduciary, or to determine whether to direct the Independent Fiduciary to make such disposition. As for the proceeds of any sale of the Timber Rights, the Independent Fiduciary states that they would go into the general assets of the Plan.

11. *Alternative Transactions and More "Stable" Products.*

A commenter asked whether alternative transactions and more stable investment products had been considered for potential investment by the Plan.

In response to this comment, the Independent Fiduciary states that the proposed contribution of Timber Rights represents a prudent opportunity for the Plan to expand and diversify its investments into an established asset class in which it does not currently invest. The Independent Fiduciary explains that these assets are available to the Plan only as a contribution in the form of Timber Rights, and under circumstances that permit the Plan to expend less in transaction costs than it otherwise would do in connection with a timber investment. The Independent Fiduciary also believes that the Timber Rights are a prudent and stable investment.

12. *Ownership of the Underlying Property.* A commenter asked whether US Steel owns the underlying Property.

In response to this comment, the Independent Fiduciary notes that US Steel owns the underlying Property in fee simple absolute.

13. *Environmental Due Diligence.* A commenter queried whether appropriate environmental due diligence had been performed on the Property underlying the Timber Rights.

In response to this comment, the Independent Fiduciary wishes to clarify that under the proposed transaction, the Plan is acquiring title only to the timber and is acquiring a contractual right to grow and harvest timber for a 99 year period under two Timber Cutting Agreements. In addition, the Independent Fiduciary states that the Plan will never be the owner of the surface or subsurface Property. Therefore, its practical exposure from the perspective of potential environmental liability will be for any releases by the Plan or its agents.

The Independent Fiduciary explains that it engaged an environmental consultant, GeoSource, Inc., to perform a Phase I Environmental Site Assessment (ESA) of the Property in accordance with ASTM Standard E 1527–00 (Standard Practice for Environmental Assessments) and E 2247–02 (Standard Practice for Phase I Environmental Assessments for Forestland and Rural Property). In addition, the Independent Fiduciary indicates that outside environmental counsel to UCF reviewed the consultant's work and directed additional work to further expand the amount of information, as a result of which certain areas of environmental concern were excluded entirely from the proposed transaction. Based on the ESA, the Independent Fiduciary states that it advised the Plan to acquire Timber Rights only rather than to own the underlying Property or its surface or subsurface. In addition, the Independent Fiduciary notes that US Steel will indemnify the Plan against any liability arising out of any existing environmental conditions.

Moreover, the Independent Fiduciary states that it will take steps to address any potential exposure to the Plan to environmental liability from its timber operations. Based on the Phase I ESA and follow up investigation, the Independent Fiduciary indicates that areas of historical mining activities have been identified where timber harvesting will also take place. Together with environmental counsel, the Independent Fiduciary explains that it plans to develop a pollution prevention protocol for operations within these areas so that environmental concerns will be built into Plan-sponsored timber operations. The protocol will also address wetland and endangered species concerns, which protocols are customary for timber operators. Finally, the Independent Fiduciary notes that Larson & McGowin, the independent appraiser, has considered the impact of these requirements in valuing the Timber Rights.

14. *Compensation to the Plan for Loss in Timber Value Due to Mineral/Mining Activities.* A commenter questioned how the Plan would be compensated for the loss in timber value due to mineral or mining activities.

In response to this comment, the Independent Fiduciary points out that the Timber Agreements provide for compensation to the Plan for the loss of any timber to the extent mining operations require the removal of the

timber. In certain instances where the use is for a long term, where there is a risk of environmental contamination or where the Property will not be restored after the mining use, the Independent Fiduciary notes that US Steel or the mineral owner will be required to compensate the Plan for the permanent loss of the use of such Property, with the exception of surface ponds related to existing mineral operations which have been excluded.

15. *Replanting Costs.* A commenter asked who would pay the cost of replanting the acreage in a pine forest following a harvest anticipated in the next 10 years.

In response to this comment, the Independent Fiduciary states that the Plan will pay the cost of replanting, as it will continue to derive the economic benefit of such plantings under the 99 year term of the Timber Agreements. The Independent Fiduciary asserts that this cost was taken into account when Larson & McGowin completed the appraisal of the Timber Rights.

16. *Capacity of the Independent Fiduciary to Manage Timberland in Alabama.* A commenter expressed concern that while the Independent Fiduciary was qualified to manage timberland in the western United States and Canada, it had little or no experience with forest and land types present in Alabama.

In response to this comment, the Independent Fiduciary states that it has considerable experience relevant to the management of Alabama timberland. The Independent Fiduciary explains that it has been involved in the management of diverse timber types for over twenty years as a professional timber investment management organization, and that it is very experienced in providing a full range of management and fiduciary services. During that time, the Independent Fiduciary states that it was engaged by one of the largest industrial timberland owners in the Southeast to provide advice and counsel regarding timberland investment management strategies in the Southeast. Furthermore, one of the principal officers of the Independent Fiduciary assigned to the proposed Timber Rights contribution began his career as a forester trained in the southeastern United States nearly 25 years ago, receiving training specific to the predominant forest type associated with the US Steel Property.

The Independent Fiduciary explains that consistent with a proven strategy applied numerous times in the past, it sought out demonstrated forestry expertise in the local area for the purposes of assembling a team of highly qualified foresters to provide UCF with state of the art forestry investment services on the Property. Furthermore, the Independent Fiduciary asserts that it has assembled a team of foresters that it believes are the most qualified individuals available to be part of its management team in Birmingham. For example, two of the three foresters on that team have over 20 years of experience managing timberland in the Birmingham/Tuscaloosa area.

17. *Litigation Risk.* One commenter expressed concern over the liability risk of lawsuits stemming from the Timber Rights, in particular, suits related to hunting activity associated with the Property.

In response to this comment, the Independent Fiduciary explains that according to the information provided by US Steel, there have only been two personal liability suits filed against US Steel involving the Property over the last ten years. The Independent Fiduciary explains that this is not unusual for a ten year period. It also notes that only one of those lawsuits was related to hunting.

The Independent Fiduciary states that the predominant strategy implemented by numerous industrial timberland managers and timber investment management organizations across the South to deal with hunting liability risk has been to lease hunting rights to private hunting clubs. The hunting clubs have an interest in utilizing the resource in a responsible manner, including assisting the land manager in controlling access to the property, responsible utilization of forest roads, managing the hunting activity of their members, and reporting any incidence of fire, arson, theft, etc. Furthermore, the Independent Fiduciary explains that liability insurance is typically required on the part of the hunting clubs to help manage the risks associated with these leases. As property manager, the Independent Fiduciary states that its goal will be to develop a prudent strategy for managing these liability risks. It states that it intends to examine the options and select the one that best balances the benefits to the Plan, such as income from hunting leases with the potential risks.

Determination of the Department

Accordingly, based upon the entire record, including the written comments received in response to the Notice, and the responses to the comments made by the Applicant and the Independent Fiduciary, the Department has determined to grant the exemption. The Department has also determined not to hold a public hearing. In the Department's view, the comments did not raise any factual issues that were not adequately addressed by the Applicant or the Independent Fiduciary. Accordingly, the Department believes that no issues were identified by the commenters that would need to be further explored by a hearing. The Department notes that, in transactions of this nature, it has placed emphasis on the need for an Independent Fiduciary and on such Independent Fiduciary's considered and objective evaluation of the transactions. In its deliberations, which included its analysis of all aspects of the transactions, the Independent Fiduciary has consistently represented for the record that no contribution of Timber Rights will be accepted on behalf of the Plan unless such transactions are found by the Independent Fiduciary to be in the interests of the Plan. Finally, the Department notes that the Independent Fiduciary's satisfaction of its obligations is a critical factor in the Department's decision to grant a final exemption.

The exemption application pertaining to the final exemption, the Notice, the comments submitted to the Department and the responses to the comments, and all other documents submitted to the Department concerning this exemption have been included as part of the public record of the application. The complete application file (Exemption Application No. D–11191), including all supplemental submissions received by the Department, is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue, NW., Washington, DC 20210.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which require, among other things, a fiduciary to discharge his or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirements of section 401(a) of the Code that the plan operate for the exclusive benefit of the employees of

the employer maintaining the plan and their beneficiaries;

(2) The exemption does not extend to transactions prohibited under section 406(b)(3) of the Act and section 4975(c)(1)(F) of the Code;

(3) In accordance with section 408(a) of the Act, section 4975(c)(2) of the Code, and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990), the Department finds that the exemption is administratively feasible, in the interest of the Plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the Plan;

(4) The exemption is supplemental to, and not in derogation of, any other provisions of the Act and the Code, including administrative exemptions. Furthermore, the fact that a transaction is subject to an administrative exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(5) The availability of this exemption is subject to the express condition that the facts and representations contained in the application are true and complete and accurately describe all material terms of the transactions, which are the subjects of the exemption.

Exemption

In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, August 10, 1990), and based upon the entire record, the Department finds that the exemption is:

(a) Administratively feasible;

(b) In the interests of the Plan and its participants and beneficiaries; and

(c) Protective of the rights of the participants and beneficiaries of the Plan.

Section I. Covered Transactions

(A) The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply, effective December 24, 2003, to the in kind contribution of certain timber rights (the Timber Rights), under two timber purchase and cutting agreements (the Timber Rights Agreements) to The United States Steel Corporation Plan for Employee Pension Benefits (the Plan) by the United Steel Corporation (US Steel), the Plan sponsor and a party in interest with respect to the Plan.

(B) The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply, effective December 24, 2003, to the following ancillary transactions between the Plan and US Steel arising from certain rights retained by US Steel related to the timberland (the Property) on which the Timber Rights are based:

(1) The receipt of compensation by the Plan from US Steel under the Timber Rights Agreements in the event that either (a) US Steel exercises its right to early termination of an Agreement, or with respect to a portion of the Property covered by an Agreement, which requires a termination payment to the Plan at a premium over the fair market value of the Timber Rights as determined by a qualified, independent appraiser, which has been selected by the independent fiduciary (the Independent Fiduciary); or (b) US Steel owes compensation to the Plan for mineral activities that interfere with the Plan's use of the land for timber purposes;

(2) The guarantee by US Steel to make the Plan whole in the event of a decline in value of the Timber Rights after five years;

(3) Any ongoing obligation incurred by US Steel to maintain the Property in a fashion that does not unreasonably interfere with the Plan's use thereof;

(4) The indemnity given by US Steel to the Plan for any environmental claims arising out of activities engaged in prior to the execution and closing of the proposed Timber Rights contribution; and

(5) Any additional ancillary transactions defined in Section III(e).

Section II. General Conditions

This exemption is conditioned upon adherence to the material facts and representations described herein and upon satisfaction of the following general conditions:

(a) A qualified, Independent Fiduciary acting on behalf of the Plan, represents the Plan's interests for all purposes with respect to the Timber Rights contribution, and determines prior to entering into any of the transactions described herein, that each such transaction, including the Timber Rights contribution, is in the interest of the Plan;

(b) The Independent Fiduciary negotiates and approves the terms of any of the transactions between the Plan and US Steel that relate to the Timber Rights;

(c) The Independent Fiduciary manages the holding, disposition, and assignment of the Timber Rights and takes whatever actions it deems necessary to protect the rights of the Plans with respect to the Timber Rights;

(d) The terms of any transactions between the Plan and US Steel are no less favorable to the Plan than terms negotiated at arm's length under similar circumstances between unrelated third parties;

(e) The Independent Fiduciary determines the fair market value of the Timber Rights contributed to the Plan on the date of such contribution. In determining the fair market value of the Timber Rights contribution, the Independent Fiduciary obtains an updated appraisal from a qualified, independent appraiser selected by the Independent Fiduciary, and ensures that the appraisal is consistent with sound principles of valuation;

(f) The fair market value of the Timber Rights does not exceed 5% of the Plan's total assets at the time of such contribution.

(g) The Plan pays no fees or commissions in connection with the Timber Rights contribution. (This condition does not preclude the Plan from paying the Independent Fiduciary's ongoing management fees once the contribution has been approved and accepted. It also does not restrict the Plan from paying the due diligence costs connected with the acquisition of the Property, such as the expenses for a title search, appraisal and environmental review.)

(h) Five years from the date of the Timber Rights contribution, US Steel contributes, to the Plan, an amount in cash calculated as follows:

(1) The fair market value of the Timber Rights as of the date of the contribution, less

(2) The sum of (i) the fair market value of the Timber Rights held by the Plan as of the date five years from the date of the contribution, as determined by a qualified, independent appraiser, which is selected by the Independent Fiduciary, plus (ii) the net cash distributed to the Plan LLC or the Plan relating to all or any part of the Timber Rights (and/or the related timber) prior to such date; provided, that if a contribution is due and if, for the taxable year of US Steel in which the contribution is to be made, such contribution (i) is not deductible under section 404(a)(1) of the Code or (ii) results in the imposition of an excise tax under section 4972 of the Code, such contribution is not made until the next taxable year of US Steel for which the contribution is deductible under section 404(a)(1) of the Code and does not result in an excise tax under section 4972 of the Code.

(i) US Steel indemnifies the Plan with respect to all liability for hazardous substances released on the Property prior to the execution and closing of the Timber Rights contribution.

(j) The Independent Fiduciary, acting on behalf of the Plan, retains the right to sell or assign, in whole or in part, any of the Plan's Timber Rights interests to any third party purchaser. Notwithstanding the above, UCF retains the authority to appoint a second independent fiduciary (the Second Independent Fiduciary) to determine whether to approve a proposed disposition, or to determine whether to direct the Independent Fiduciary to make a disposition.

Section III. Definitions

(a) The term "Independent Fiduciary" means a fiduciary who is: (1) Independent of an unrelated to US Steel or its affiliates, and (2) appointed to act on behalf of the Plan for purposes related to (i) the in kind contribution of the Timber Rights by US Steel to the Plan and (ii) other transactions between the Plan and US Steel related to the Property on which the Timber Rights are based. For purposes of this exemption, a fiduciary will not be deemed to be independent of and unrelated to US Steel if: (1) Such fiduciary directly or indirectly controls, is controlled by or is under common control with US Steel, (2) such fiduciary directly or indirectly receives any compensation or other consideration in connection with any transaction described in this exemption; except that an Independent Fiduciary may receive compensation for acting as an Independent Fiduciary from US Steel in connection with the transactions contemplated herein if the amount or payment of such compensation is not contingent upon or in any way affected by the Independent Fiduciary's ultimate decision, and (3) the annual gross revenue received by such fiduciary, during any year of its engagement, from US Steel and its affiliates exceeds 5% of the Independent Fiduciary's annual gross revenue from all sources for its prior tax year.

(b) The term "affiliate" means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative, or partner of any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner, or employee.

(c) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The term "Second Independent Fiduciary" means a fiduciary who meets the definition of an "Independent Fiduciary" in Section III(a) above, except that such fiduciary is appointed solely to oversee a disposition transaction as described in Section II(j) hereof.

(e) The term "additional ancillary transactions" refers to other transactions which may be entered into by the Plan and US Steel arising from rights retained by US Steel related to the Property on which the Timber Rights are based. These transactions include the following: (1) The allocation and contesting of property taxes, fees, licenses, fines and other charges or assessments imposed on the Plan, the Timber Rights or (as relevant) the Property; (2) the allocation of payments in connection with the granting of easements or use permits; (3) the use of timberlands in connection with government-mandated environmental cleanup or other construction or maintenance activities occurring on US Steel owned adjacent properties; (4) the negotiation by the Independent Fiduciary with US Steel of a premium price to be paid to the Plan to permit US Steel to buy out the Timber Rights on a parcel in order to sell the parcel to a third party; (5) the coordination between the Independent Fiduciary and US Steel of access to the Property on a continuing basis, such as where to place a gate or to whom to permit access; (6) the allocation of costs and responsibilities related to participation in cooperatives for fire protection, research on land use, or other matters relating to the Property and the Timber Rights; (7) the representation of the Plan in regulatory matters, such as changes in laws or regulations affecting the Property, that also would impact US Steel; (8) the allocation of insurance coverage for the Property and Timber Rights between the Plan and US Steel; (9) the joint hiring by, or the allocation of costs between, the Plan and US Steel of contractors to cut or maintain roads for fire protection or other joint uses; (10) the joint action by, or allocation of costs between, the Plan and US Steel to maintain Property boundaries, monitor for violations, and determine damages if any from third party trespass or other intrusion onto the Property; (11) the joint representation of the Plan and US Steel to an agency or other governmental body in the event of any regulatory dispute or other regulatory issue involving the Timber Rights and the Property; (12) working with government agencies on environmental projects, enhancements, conservation easements, or similar matters that may affect the value of the Timber Rights and the Property; (13) the negotiation of a joint sale of the Timber Rights owned by the Plan and the underlying Property owned by US Steel to a third party; (14) the enforcement and settlement arising from US Steel's obligations under the Timber Rights Agreements; and (15) the joint defense and prosecution of lawsuits involving the Timber Rights and/or the Property.

Effective Date: This exemption is effective as of December 24, 2003.

For a more complete statement of the facts and representations supporting the Department's decision to grant this final exemption, refer to the proposed exemption which is cited above.

Signed at Washington, DC, this 30th day of September, 2003.

Ivan L. Strasfeld,

Director of Exemption Determinations, Employee Benefits Security Administration, Department of Labor.

[FR Doc. 04–52 Filed 1–2–04; 8:45 am]

BILLING CODE 4510–29–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 03–164]

Notice of Prospective Patent License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of prospective patent license.

SUMMARY: NASA hereby gives notice that JFC Technologies has applied for an exclusive license to practice the inventions described and claimed in U.S. Patent No. 6,359,107, entitled "Composition Of And Method For Making High Performance Resins For Infusion And Transfer Molding Processes"; which is assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. Written objections to the prospective grant of a license should be sent to NASA Langley Research Center. NASA has not yet made a determination to grant the requested license and may deny the requested license even if no objections are submitted within the comment period.

DATES: Responses to this notice must be received by January 20, 2004.

FOR FURTHER INFORMATION CONTACT: Robin W. Edwards, Patent Attorney, Mail Stop 212, NASA Langley Research Center, Hampton, VA 23681–2199.

Telephone (757) 864–3230; Fax (757) 864–9190.

Dated: December 29, 2003.

Robert M. Stephens,

Deputy General Counsel.

[FR Doc. 04–69 Filed 1–2–04; 8:45 am]

BILLING CODE 7510–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 70–7001, 70–7002]

Notice of Renewal of Certificates of Compliance, GDP–1 and GDP–2 for the U.S. Enrichment Corporation, Paducah and Portsmouth Gaseous Diffusion Plants, Paducah, KY, and Portsmouth, OH

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of a Director's Decision renewing the Certificates of Compliance for the United States Enrichment Corporation (USEC) which allows continued operation of the two Gaseous Diffusion Plants (GDPs), at Paducah, Kentucky, and Portsmouth, Ohio.

FOR FURTHER INFORMATION CONTACT: Michael Raddatz, Fuel Cycle Facilities Branch, Division of Fuel Cycle Safety and Safeguards, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Telephone: (301) 415–6334; Fax: (301) 415–5955; and/or by e-mail: *mgr@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The U.S. Nuclear Regulatory Commission (NRC) is issuing a Director's Decision (Decision) renewing the Certificates of Compliance for the two GDPs located near Paducah, Kentucky, and Portsmouth, Ohio, for the USEC, which allows continued operation of these plants. The renewal of these certificates for the GDPs covers a five-year period. Pursuant to 10 CFR 76.31, USEC submitted its renewal request on April 11, 2003.

Pursuant to 10 CFR 76.53, the NRC consulted with and requested written comments on the renewal application from the U.S. Environmental Protection Agency (EPA). EPA responded on June 27, 2003, indicating that they did not have comments. The NRC staff has reviewed the certificate renewal applications for the GDPs located near Paducah, Kentucky, and Portsmouth, Ohio. USEC's applications for certificate renewal did not propose any changes to the current safety basis or requirements. However, updates to USEC's Depleted Uranium Management Plan and Decommissioning Funding Plan were provided, to reflect a revised 5-year projection of accumulated depleted uranium and new cost estimates for disposition of depleted uranium and radioactive waste. Previous applications, statements, and reports are incorporated by reference into the renewal application as provided for in 10 CFR 76.36. These include the Technical Safety Requirements, Safety Analysis Report, Compliance Plan, Quality Assurance Program, Emergency Plan, Security and Safeguards Plans, Waste Management Program, and Decommissioning Funding Program, changes made pursuant to 10 CFR 76.68.

Based on its review of the certificate renewal applications, the staff has concluded that in combination with existing certificate conditions, they provide reasonable assurance of adequate safety, safeguards, and security, and compliance with NRC requirements. The NRC staff has prepared Compliance Evaluation Reports which provide details of the staff's evaluations. The NRC staff has determined that the renewals satisfy the criteria for a categorical exclusion in accordance with 10 CFR 51.22 (c) (19). Therefore, pursuant to 10 CFR 51.22 (b), no environmental impact statement or environmental assessment needs to be prepared for this action.

As a result of the staff reviews, the Director, Office of Nuclear Material Safety and Safeguards (NMSS), has found that the requirements in 10 CFR 76.60 for certification for operation of the GDPs have continued to be met. Accordingly, the Director has renewed Certificates of Compliance GDP–1 and GDP–2. The renewal of Certificates of Compliance GDP–1 and GDP–2 becomes effective immediately after being signed by the Director, NMSS.

II. Opportunity to File a Petition

Pursuant to 10 CFR 76.62(c), USEC, or any person whose interest may be affected may file a petition requesting the Commission's review of this renewal decision. A petition requesting the Commission's review may not exceed 30 pages and must be filed within 30 days after the publication of this notice in the **Federal Register**. Within 15 days of filing a petition requesting the Commission's review, pursuant to 10 CFR 76.62(c), any other person whose interest may be affected may file a response, not to exceed 30 pages, to the petition for review. Petitions requesting the Commission's review or responses thereto are to be served by either:

(1) Delivery to the Rulemaking and Adjudications Staff of the Office of the Secretary at One White Flint North, 11555 Rockville Pike, Rockville, MD 20852, between 7:45 a.m. and 4:15 p.m., Federal workdays; or

(2) Mail or telegram addressed to the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Rulemaking and Adjudications Staff. Because of continuing disruptions in the delivery of mail to United States Government offices, it is requested that requests for hearing also be transmitted to the Secretary of the Commission either by means of facsimile transmission to 301–415–1101, or by e-mail to *hearingsdocket@nrc.gov.*

A petition for review of the Decision and responses thereto shall set forth with particularity the interest of the person and how that interest may be affected by the results of the decision. The petition or responses thereto shall specifically explain the reasons why review of the Decision should or should not be permitted with particular reference to the following factors:

(1) The interest of the petitioner;

(2) How that interest may be affected by the Decision, including the reasons why the petitioner should be permitted a review of the Decision; and

(3) The petitioner's areas of concern about the activity that is the subject matter of the Decision.

The filing of any petition for review or any responses thereto are governed by the procedural requirements set forth in 10 CFR 76.72.

III. Further Information

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," details with respect to this action, including the application for renewal (Portsmouth-ML031050318, Paducah-ML031050324) and the Commission's Compliance Evaluation Reports (Portsmouth-ML033440617, Paducah-ML033440612), are available electronically for public inspection and copying from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html.* These documents (except for classified and proprietary portions which are withheld in accordance with 10 CFR 2.790, "Availability of Public Records") are also available for public inspection at the Commission's Public Document Room, at One White Flint North, 11555 Rockville Pike Rockville, MD 20852.

Dated at Rockville, Maryland, this 29th day of December, 2003.

For the Nuclear Regulatory Commission.

Martin J. Virgilio,

Director, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 04–55 Filed 1–2–04; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NUREG–1600]

Revision of NRC Enforcement Policy; Packaging and Transportation of Radioactive Material

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement: revision.

SUMMARY: The Nuclear Regulatory Commission (NRC) is publishing a revision to its Enforcement Policy (NUREG–1600, "General Statement of Policy and Procedure for NRC Enforcement Actions") to clarify that enforcement action may be taken against non-licensees for violations of the Commission's regulations governing the packaging and transportation of radioactive material.

EFFECTIVE DATE: October 1, 2004.

ADDRESSES: You may submit comments by any of the following methods. Comments submitted in writing or in electronic format will be made available to the public in their entirety on the NRC rulemaking web site. Personal information will not be removed from your comments. Mail comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemaking and Adjudications Staff.

E-mail comments to: *SECY@nrc.gov.* If you do not receive a reply e-mail confirming that we have received your comments, contact us directly (301) 415–1966. You may also submit comments via the NRC's interactive rulemaking Web site at *http://ruleforum.llnl.gov.* Address questions about our rulemaking Web site to Carol Gallagher at (301) 415–5905 (e-mail: *CAG@nrc.gov*).

Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays. (Telephone (301) 415–1966).

Fax comments to: Secretary, U.S. Nuclear Regulatory Commission at (301) 415–1101.

Publicly available documents related to this action may be viewed electronically on the public computers located at the NRC's Public Document Room (PDR), O1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The PDR reproduction contractor will copy documents for a fee. Selected documents, including comments, may be viewed and downloaded electronically via the NRC's interactive rulemaking Web site at *http://ruleforum.llnl.gov.*

Publicly available documents created or received at the NRC after November 1, 1999, are available electronically at the NRC's Electronic Reading Room at *http://www.nrc.gov/reading-rm/adams.html.* From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. If you do not have access to ADAMS or if there are problems in accessing the document located in ADAMS, contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737, or e-mail to *pdr@nrc.gov.*

The NRC maintains the current Enforcement Policy on its Web site at *http://www.nrc.gov,* select What We Do, Enforcement, then Enforcement Policy.

FOR FURTHER INFORMATION CONTACT: Frank J. Congel, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, (301) 415–2741, e-mail *fjc@nrc.gov.*

SUPPLEMENTARY INFORMATION: The Commission's Enforcement Policy primarily addresses violations by licensees and certain non-licensed persons, including certificate holders, as discussed further in footnote 3 to Section I, Introduction and Purpose, and in Section X, Enforcement Action Against Non-licensees. In 10 CFR Part 71, the NRC's regulations address licensing requirements for packaging and transport of radioactive material. For several years, the Commission has observed problems with the performance of some certificate holders and their contractors and subcontractors in the packaging and transport of radioactive material. The Commission has concluded that additional enforcement sanctions (*e.g.*, issuance of Notices of Violations (NOVs) and Orders), are required to address the performance problems which have occurred in the packaging and transportation of radioactive material. Therefore, concurrent with publication of this change to the Enforcement Policy, the Commission is amending 10 CFR Part 71 to expand its applicability to holders of, and applicants for, Certificates of Compliance (CoCs). While CoCs are legally binding documents, certificate holders or applicants for a CoC had not clearly been brought within the scope of certain Part 71 requirements, and the NRC has not had a clear basis to cite these persons for violations of Part 71 requirements in the same way it treats licensees. When the NRC has identified a failure to comply with Part 71 requirements by these persons, it has taken administrative action by issuing a Notice of Nonconformance (NON) or a Demand for Information rather than an NOV. With these changes to Part 71, the Commission will be in a position to issue NOVs and Orders to certificate holders and applicants.

An NOV is a written notice that sets forth one or more violations of a legally binding requirement. The NOV effectively conveys to both the person violating the requirement and the public that a violation of a legally binding requirement has occurred and permits use of graduated severity levels to convey more clearly the safety significance of the violation. Therefore, in addition to the changes to 10 CFR Part 71, the Commission is amending Part X of the Enforcement Policy, Enforcement Action Against Non-Licensees, to make clear that non-licensees who are subject to specific regulatory requirements (*e.g.*, Part 71), will be subject to enforcement action, including NOVs and Orders. The final Part 71 rule does not provide authority for issuing civil penalties to non-licensees other than that already provided under the Deliberate Misconduct Rule (January 13, 1998; 63 FR 1890) in § 71.8.

Paperwork Reduction Act

This policy statement does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget (OMB), approval number 3150–0136. The approved information collection requirements contained in this policy statement appear in Section VII.C.

Public Protection Notification

The NRC 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.

Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this

detennination with the Office of Information and Regulatory Affairs of OMB.

Accordingly, the NRC Enforcement Policy amended by revising the last paragraph of section X to read as follows:

General Statement of Policy and Procedure for NRC Enforcement Actions

* * * * *

X. Enforcement Action Against Non-Licensees

* * * * *

When inspections determine that violations of NRC requirements have occurred, or that contractors have failed to fulfill contractual commitments (*e.g.*, 10 CFR Part 50, appendix B) that could adversely affect the quality of a safety significant product or service, enforcement action will be taken. Notices of Violation and civil penalties will be used, as appropriate, for licensee failures to ensure that their contractors have programs that meet applicable requirements. Notices of Violation will be issued for contractors who violate 10 CFR Part 21. Civil penalties will be imposed against individual directors or responsible officers of a contractor organization who knowingly and consciously fail to provide the notice required by 10 CFR 21.21(b)(1). Notices of Violation or Orders will be used against non-licensees who are subject to the specific requirements of Parts 71 and 72. Notices of Nonconformance will be used for contractors who fail to meet commitments related to NRC activities but are not in violation of specific requirements.

Dated at Rockville, Maryland, this 29th day of December, 2003.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary for the Commission.

[FR Doc. 04–54 Filed 1–2–04; 8:45 am]

BILLING CODE 7590–01–P

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Railroad Retirement Board (RRB) has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

Summary of Proposal(s)

(1) *Collection title:* Evidence for Application of Overall Minimum.

(2) *Form(s) submitted:* G–319, G–320.

(3) *OMB Number:* 3220–0083.

(4) *Expiration date of current OMB clearance:* 2/29/2004.

(5) *Type of request:* Extension of a currently approved collection.

(6) *Respondents:* Individuals or households.

(7) *Estimated annual number of respondents:* 290.

(8) *Total annual responses:* 290.

(9) *Total annual reporting hours:* 121.

(10) *Collection description:* Under section 3(f)(3) of the Railroad Retirement Act, the total monthly benefits payable to a railroad employee and his family are guaranteed to be no less than the amount which would be payable if the employee's railroad service had been covered by the Social Security Act.

Additional Information or Comments: Copies of the forms and supporting documents can be obtained from Charles Mierzwa, the agency clearance officer (312–751–3363 or *Charles.Mierza@RRB.GOV*).

Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirment Board, 844 North Rush Street, Chicago, Illinois, 60611–2092, or *Ronald.Hodapp@RRB.GOV* and to the OMB Desk Officer for the RRB, at the Office of Management and Budget, Room 10230, New Executive Office Building, Washington, DC 20503.

Charles Mierzwa,

Clearance Officer.

[FR Doc. 04–75 Filed 1–2–04; 8:45 am]

BILLING CODE 7905–01–M

RAILROAD RETIREMENT BOARD

Agency Forms Submitted for OMB Review

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35), the Railroad Retirement Board (RRB) has submitted the following proposal(s) for the collection of information to the Office of Management and Budget for review and approval.

Summary of Proposal(s)

(1) *Collection title:* Student Beneficiary Monitoring.

(2) *Form(s) submitted:* G–315, G–315a, G–315a.1.

(3) *OMB Number:* 3220–0123.

(4) *Expiration date of current OMB clearance:* 02/29/2004.

(5) *Type of request:* Extension of a currently approved collection.

(6) *Respondents:* Individuals or households.

(7) *Estimated annual number of respondents:* 1,230.

(8) *Total annual responses:* 1,230.

(9) *Total annual reporting hours:* 121.

(10) *Collection description:* Under the Railroad Retirement Act (RRA), a student benefit is not payable if the student ceases full-time school attendance, marries, works in the railroad industry, has excessive earnings or attains the upper age limit under the RRA. The report obtains information to be used in determining if benefits should cease or be reduced.

Additional Information or Comments: Copies of the forms and supporting documents can be obtained from Charles Mierzwa, the agency clearance officer (312–751–3363 or *Charles.Mierzwa@RRB.GOV*).

Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 North Rush Street, Chicago, Illinois, 60611–2092 or *Ronald.Hodapp@RRB.GOV* and to the OMB Desk Officer for the RRB, at the Office of Management and Budget, Room 10230, New Executive Office Building, Washington, DC 20503.

Charles Mierzwa,

Clearance Officer.

[FR Doc. 04–76 Filed 1–2–04; 8:45 am]

BILLING CODE 7905–01–M

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meeting during the week of January 5, 2004:

A Closed Meeting will be held on Thursday, January 8, 2004 at 2:00 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matter may also be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (9B), and (10) and 17 CFR 200.402(a)(3), (5), (6), (7), (9ii), and (10), permit consideration of the scheduled matter at the Closed Meeting.

Commissioner Glassman, as duty officer, voted to consider the items listed for the closed meeting in closed session.

The subject matter of the Closed Meeting scheduled for Thursday, January 8, 2004 will be:

Formal orders of investigation;

Institution and settlement of administrative proceedings of an enforcement nature;

Institution and settlement of injunctive actions;

Litigation matters; and

Opinion.

At times, changes in Commission priorities require alternations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 942–7070.

Dated: December 30, 2003.

Jonathan G. Katz,

Secretary.

[FR Doc. 03–32334 Filed 12–31–03; 12:38 pm]

BILLING CODE 8010–01–M

SOCIAL SECURITY ADMINISTRATION

Rate for Attorney Fee Assessment Beginning in 2004

AGENCY: Social Security Administration (SSA).

ACTION: Notice.

SUMMARY: The Social Security Administration is announcing that the attorney-fee assessment rate under section 206(d) of the Act, 42 U.S.C. 406(d), is 6.3 percent for 2004.

FOR FURTHER INFORMATION CONTACT: Jim Winn, Social Security Administration, Office of the General Counsel, Phone: (410) 965–3137, email *jim.winn@ssa.gov.*

SUPPLEMENTARY INFORMATION: Section 406 of Public Law No. 106–170, the Ticket to Work and Work Incentives Improvement Act of 1999, established an assessment for the services required to determine and certify payments to attorneys from the benefits due claimants under Title II of the Act. This provision is codified in section 206 of the Act (42 U.S.C. 406). The legislation set the assessment for the calendar year 2000 at 6.3 percent of the amount that would be required to be certified for direct payment to the attorney under section 206(a)(4) or 206(b)(1) before the application of the assessment. For subsequent years, the legislation requires the Commissioner of Social Security to determine the percentage rate necessary to achieve full recovery of the costs of determining and certifying fees to attorneys, but not in excess of 6.3 percent. The Commissioner of Social Security has determined, based on the best available data, that the current rate of 6.3 percent will continue for 2004. We will continue to review our costs on a yearly basis.

Dated: December 29, 2003.

Dale W. Sopper,

Deputy Commissioner for Finance, Assessment and Management.

[FR Doc. 04–59 Filed 1–2–04; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 4579]

Culturally Significant Objects Imported for Exhibition Determinations: "Art Deco 1910–1939"

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236 of October 19, 1999, as amended, and Delegation of Authority No. 257 of April 15, 2003 [68 FR 19875], I hereby determine that the objects to be included in the exhibition "Art Deco 1910–1939," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners. I also determine that the exhibition or display of the exhibit objects at the Fine Arts Museum of San Francisco, from on or about March 6, 2004 until on or about July 5, 2004, at the Museum of Fine Arts Boston from on or about August 22, 2004 until on or about January 9, 2005, and at possible additional venues yet to be determined, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact the Office of the Legal Adviser, U.S. Department of State, telephone: (202) 619–6982. The address is U.S. Department of State, SA–44, 301 4th Street, SW., Room 700, Washington, DC 20547–0001.

Dated: December 23, 2003.

C. Miller Crouch,

Principal Deputy Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 04–65 Filed 1–2–04; 8:45 am]

BILLING CODE 4710–08–P

DEPARTMENT OF STATE

[Public Notice 4535]

United States International Telecommunication Advisory Committee Meeting-Radiocommunication Sector (ITAC–R)

The Department of State announces meetings of the ITAC–R. The purpose of the Committee is to advise the Department on matters related to telecommunication and information policy matters in preparation for international meetings pertaining to telecommunication and information issues.

The ITAC–R will meet to discuss the matters related to the meeting of the ITU Council's Ad Hoc Group on Cost Recovery for Satellite Network Filings that will take place 24–26 February 2004 in Geneva, Switzerland. ITAC–R meetings will be convened on 15 January, 28 January, and 12 February 2004 from 1:30 to 4 p.m. in Room 7 South (7B516) at the Federal Communications Commission (FCC). The FCC is located at 445 12th Street, SW., Washington, DC.

Members of the public will be admitted to the extent that seating is available and may join in the discussions subject to the instructions of the Chair. Entrance to the FCC is controlled. Persons planning to attend the meeting should arrive early enough to complete the entry procedure. One of the following current photo identifications must be presented to gain entrance to the FCC: U.S. driver's license with your photo on it, U.S. passport, or U.S. Government identification. Directions to the FCC may be obtained by calling the ITAC Secretariat at 202–647–2592 or e-mailing to *worsleydm@state.gov.*

Dated: December 30, 2003.

Douglas R. Spalt,

Electronics Engineer, Department of State.

[FR Doc. 04–64 Filed 1–2–04; 8:45 am]

BILLING CODE 4710–45–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Privacy Act of 1974: System of Records

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice to establish a system of records.

SUMMARY: DOT proposes to establish a new system of records under the Privacy Act of 1974.

EFFECTIVE DATE: February 17, 2004. If no comments are received, the proposal will become effective on the above date. If comments are received, the comments will be considered and, where adopted, the documents will be republished with changes.

ADDRESSES: Address all comments concerning this notice to Yvonne L. Coates, Department of Transportation, Office of the Secretary, 400 7th Street, SW., Washington, DC 20590, (202) 366–6964 (telephone), (202) 366–7373 (fax) *Yvonne.Coates@ost.dot.gov* (Internet address).

FOR FURTHER INFORMATION CONTACT: Department of Transportation, Federal Railroad Administration, Melissa Porter, Trial Attorney, Safety Law Division, Office of the Chief Counsel, 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590–0001, (202) 493–6034, (202) 493–6068 (fax).

SUPPLEMENTARY INFORMATION: The Department of Transportation system of records notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the above mentioned address.

System of Records

SYSTEM NUMBER:

DOT/FTA 131.

SYSTEM NAME:

Engineer Certification Appeals Docket.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Department of Transportation (DOT), Federal Railroad Administration (FRA), Office of the Chief Counsel, Safety Law Division, RCC–10, 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590–0001. Department of Transportation, Docket Management System, Room PL–401, 400 7th Street, SW., Washington, DC 20590, and on the Internet at *http://www.dms.dot.gov* and at *http://www.fra.dot.gov*.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals requesting FRA review, with or without administrative hearings, of employing railroad decisions to revoke or deny the individual's engineer certification (collectively referred to as engineer certification appeals).

CATEGORIES OF RECORDS IN THE SYSTEM:

Submissions from individuals, railroads and the FRA relating to engineer certification appeals (petitions, hearing transcripts, correspondence between parties, and other filings, etc.) and decisions by the Locomotive Engineer Review Board (LERB), FRA Administrative Hearing Officer, and the FRA Administrator regarding these appeals.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Rail Safety Improvement Act of 1988 (Pub. L. 100–342).

PURPOSE(S):

To maintain a public docket so that the LERB, FRA Administrative Hearing Officer, and the FRA Administrator can issue decisions pursuant to the dispute resolution procedures set forth in 49 CFR Part 240. Once issued, the decisions will be part of the public docket as well. Even though these decisions do not constitute precedent, how the LERB, FRA Administrative Hearing Officer, and FRA Administrator have resolved certain issues in past cases may add some predictability to the outcome of a potential case. Furthermore, greater public awareness of actions that can lead to loss of an engineer certification may help reduce such actions in the first place.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Posting of LERB, presiding officer, and Administrator final decisions on governmental Web sites, including FRA's public Web site (*http://www.fra.dot.gov*) to inform the public of how safety laws are being enforced, and to inform those individuals or entities who may potentially become parties to these proceedings, or who are already parties to proceedings how FRA is implementing the dispute resolution procedures set forth in 49 CFR Part 240. Posting of documents submitted by the parties in a given case on governmental Web sites to make them more easily accessible.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

Policies and Practices for Storing, Retrieving, Accessing, Retaining, and Disposing of Records in the System

STORAGE:

File folders, file cabinets, and the Department of Transportation's Docket Management System.

RETRIEVABILITY:

Records are retrievable by name of individual and/or his or her employer, keywords in the text, or by docket numbers assigned sequentially as the docket clerk receives them.

SAFEGUARDS:

None are necessary because all documents are a matter of public record.

RETENTION AND DISPOSAL:

Appropriate records retention schedules will be applied. Certain automated records will be retained indefinitely to provide a complete compliance history.

SYSTEM MANAGER(S) AND ADDRESS:

Docket Clerk, Department of Transportation, Federal Railroad Administration, Office of the Chief Counsel, Safety Law Division, RCC–10, 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590–0001. Docket Clerk, Department of Transportation, Docket Management System, Room PL–401, 400 7th Street, SW., Washington, DC 20590.

NOTIFICATION PROCEDURE:

Inquiries should be directed to: Federal Railroad Administration, Safety Law Division, Office of the Chief Counsel, 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590–0001.

RECORD ACCESS PROCEDURES:

Contact (202) 493–6053 or write to the System Manager for information on procedures for gaining access to records.

CONTESTING RECORD PROCEDURES:

Same as "record access procedure."

RECORD SOURCE CATEGORIES:

Information is obtained directly from the individual or from other persons with personal knowledge of the facts and circumstances involved.

EXEMPTIONS:

None.

OMB CONTROL NUMBER:

Not Applicable.

Dated: December 29, 2003.

Yvonne L. Coates,

Privacy Act Coordinator.

[FR Doc. 04–70 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of random drug and alcohol testing rates.

SUMMARY: This notice announces the random testing rates for employers subject to the Federal Transit Administration's (FTA) drug and alcohol rules.

EFFECTIVE DATE: January 1, 2004.

FOR FURTHER INFORMATION CONTACT: Jerry Fisher, Drug and Alcohol Program Manager for the Office of Safety and Security, (202) 366–2896 (telephone) and (202) 366–7951 (fax). Electronic access to this and other documents concerning FTA's drug and alcohol testing rules may be obtained through the FTA World Wide Web home page at *http://www.fta.dot.gov*, click on "Safety and Security."

SUPPLEMENTARY INFORMATION: The FTA required large transit employers to begin drug and alcohol testing employees performing safety-sensitive functions on January 1, 1995, and to report, annually by March 15 of each year beginning in 1996, the number of such employees who had a verified positive for the use of prohibited drugs, and the number of such employees who tested positive for the misuse of alcohol. Small employers commenced their FTA-required testing on January 1, 1996, and began reporting the same information as the large employers beginning March 15, 1997. The 1994 rules, which were updated on August 1, 2001, established a random testing rate for prohibited drugs and the misuse of alcohol.

The rules require that employers conduct random drug tests at a rate equivalent to at least 50 percent of their total number of safety-sensitive employees for prohibited drug use and at least 25 percent of the misuse of alcohol. The rules provide that the drug random testing rate may be lowered to 25 percent if the "positive rate" for the entire transit industry is less than one percent for two preceding consecutive years. Once lowered, it may be raised to 50 percent if the positive rate equals or exceeds one percent for any one year ("positive rate" means the number of positive results for random drug tests conducted under part 655.45 plus the number of refusals of random tests required by part 655.49, divided by the total number of random drug tests, plus the number of refusals of random tests required by part 655.)

The alcohol provisions provide that the random rate may be lowered to 10 percent if the "violation rate" for the entire transit industry is less than .5 percent for two consecutive years. It will remain at 25 percent if the "violation rate" is equal to or greater than .5 percent but less than one percent, and it will be raised to 50 percent if the "violation rate" is one percent or greater for any one year. ("violation rate" means the number of covered employees found during random tests given under part 655.45 to have an alcohol concentration of .04 or greater, plus the number of employees who refuse a random test required by part 655.49, divided by the total reported number of random alcohol tests plus the total number of refusals of random tests required by part 655.)

In 2003, the FTA required a random drug testing rate of 50 percent of the total number of their "safety-sensitive" employees for prohibited drugs based on the "positive rate" for random drug test data from 2000 and 2001. FTA has received and analyzed the 2002 data from a representative sample of transit employers. Because the random drug rate was not lower than 1.0 percent for the two preceding consecutive years (0.89 percent for 2001 and 1.05 percent for 2002), the random drug testing rate will remain at 50 percent for 2004.

In 2003, the FTA retained the random alcohol testing rate of 10 percent (reduced previously from 25 percent) based on the "positive rate" for random alcohol test data from 2000 and 2001. Because the random alcohol violation rate was again lower than .5 percent for the two preceding consecutive years (0.19 percent for 2001 and 0.22 for 2002), the random alcohol testing rate will remain at 10 percent for 2004.

FTA detailed reports on the drug and alcohol testing data collected from transit employers may be obtained from the Office of Safety and Security, Federal Transit Administration, 400 Seventh Street, SW., Room 9301, Washington, DC 20590, (202) 366–2896 or at *http://transit-safety.volpe.dot.gov/Publications.*

Issued on: December 30, 2003.

Jennifer L. Dorn,

Administrator.

[FR Doc. 04–95 Filed 1–2–04; 8:45 am]

BILLING CODE 4910–57–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

Release of Waybill Data

The Surface Transportation Board has received a request from Sidley Austin Brown & Wood LLP on behalf of Canadian Pacific Railway Company (WB471–8–December 19, 2003) for permission to use certain data from the Board's Carload Waybill Samples. A copy of the requests may be obtained from the Office of Economics, Environmental Analysis, and Administration.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics, Environmental Analysis, and Administration within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

FOR FURTHER INFORMATION CONTACT: Mac Frampton, (202) 565–1541.

Vernon A. Williams,

Secretary.

[FR Doc. 04–61 Filed 1–2–04; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–167 (Sub–No. 1184X)]

Consolidated Rail Corporation—Abandonment Exemption—In Middlesex County, NJ

Consolidated Rail Corporation (Conrail) has filed a notice of exemption [1] under 49 CFR 1152 Subpart

[1] By decision served in this proceeding on December 5, 2003, the Board rejected Conrail's notice of exemption filed on November 21, 2003, for Conrail's failure to comply with the environmental requirements of 49 CFR 1105.7(b) and 49 CFR 1105.8(c). On December 16, 2003, Conrail requested the Board to reinstate the notice of exemption. Conrail submitted, as Exhibit A, a copy of its letter indicating that copies of the environmental and historic report (report) were sent to the specified agencies on October 16, 2003, in compliance with 49 CFR 1105.7 and 1105.8. Conrail stated that it updated its report based on responses it received between October 16, 2003, and November 20, 2003, but erred by not stating in the notice that it had sent the report to the required agencies on October 16, 2003, and on November 20, 2003. Conrail acknowledged that it inadvertently failed to serve a copy of the report on the National Geodetic Survey (NGS). It attached, as Exhibit B, a copy of its letter dated December 15, 2003, to NGS. Based on the information received from Conrail, the notice of exemption is now accepted.

F—*Exempt Abandonments* to abandon a portion of a line of railroad known as the Sayreville Running Track, between milepost 10.85± and milepost 11.31± in the Township of North Brunswick, Middlesex County, NJ, a distance of 0.46± miles. The line traverses United States Postal Service Zip Code 08903.

Conrail has certified that: (1) No local traffic has moved over the line for at least 2 years; (2) no overhead traffic has moved over the line for at least 2 years; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Board or with any U.S. District Court or has been decided in favor of complainant within the 2-year period; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on February 4, 2004,[2] unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[3] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[4] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by January 15, 2004. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by January 26, 2004, with: Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to Conrail's representative: John K. Enright, Associate General Counsel, Consolidated Rail Corporation, 2001 Market Street, 16th Floor, Philadelphia, PA 19103.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

Conrail has filed an environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. SEA will issue an EA by January 9, 2004. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1539. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.] Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), Conrail shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by Conrail's filing of a notice of consummation by January 5, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at "*http://www.stb.dot.gov.*"

Decided: December 23, 2003.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 04–181 Filed 1–2–04; 8:45 am]

BILLING CODE 4915–00–P

[2] In its notice, Conrail indicated January 20, 2004, as the proposed consummation date of the abandonment. Conrail now states that it understands that the effective date of its notice will have to be adjusted to allow NGS an opportunity to comment on the proposed abandonment and to allow the Board's Section of Environmental Analysis (SEA) to issue its environmental assessment (EA).

[3] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by SEA in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[4] Each OFA must be accompanied by the filing fee, which currently is set at $1,100. *See* 49 CFR 1002.2(f)(25).

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Proposed Extension of Information Collection; Comment Request

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

ACTION: Notice and request for comment.

SUMMARY: The OCC, 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 a continuing information collection, as required by the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The OCC is soliciting comment concerning its information collection titled, "Disclosure of Financial and Other Information by National Banks—12 CFR 18."

DATES: You should submit written comments by March 5, 2004.

ADDRESSES: You should direct comments to the Communications Division, Office of the Comptroller of the Currency, Public Information Room, Mailstop 1–5, Attention: 1557–0182, 250 E Street SW., Washington, DC 20219. Due to delays in paper mail in the Washington area, commenters are encouraged to submit comments by fax or e-mail. Comments may be sent by fax to (202) 874–4448, or by e-mail to *regs.comments@occ.treas.gov.* You can inspect and photocopy the comments at the OCC's Public Information Room, 250 E Street SW., Washington, DC 20219. You can make an appointment to inspect the comments by calling (202) 874–5043.

A copy of the comments should also be sent to the OMB Desk Officer for the OCC: Joseph F. Lackey, Jr., Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503, or by e-mail to *jlackeyj@omb.eop.gov.*

FOR FURTHER INFORMATION CONTACT: You can request additional information from John Ference, Acting OCC Clearance Officer, or Camille Dixon, (202) 874–5090, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 250 E Street, SW., Washington, DC 20219.

SUPPLEMENTARY INFORMATION: The OCC is proposing to extend OMB approval of the following information collection:

Title: Disclosure of Financial and Other Information by National Banks—12 CFR 18.

OMB Number: 1557–0182.

Description: This submission covers an existing regulation and involves no change to the regulation or to the information collection requirements. The OCC requests only that OMB extend its approval of the information collection.

This disclosure of information is needed to facilitate informed decision making by existing and potential customers and investors by improving public understanding of , and confidence in, the financial condition of an individual national bank. The disclosed information is used by depositors, security holders, and the general public in evaluating the condition of, and deciding whether to do business with, a particular national bank. Disclosure and increased public knowledge complements OCC's efforts to promote the safety and soundness of national banks and the national banking system.

The information collections contained in part 18 are found in 12 CFR 18.4(c) and 18.8. Section 18.4(c) permits a national bank to prepare an optional narrative for inclusion in its annual disclosure statement. Section 18.8 requires that a national bank promptly furnish materials in response to a request.

Type of Review: Extension, without change, of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 2,450.

Estimated Total Annual Responses: 2,450.

Frequency of Response: Annual.

Estimated Total Annual Burden: 1,225 hours.

Comments submitted in response to this notice will be summarized and 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 has 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 on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: December 29, 2003.

Mark J. Tenhundfeld,

Assistant Director, Legislative and Regulatory Activities Division.

[FR Doc. 04–68 Filed 1–2–04; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds: United Fire & Indemnity Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 6 to the Treasury Department Circular 570; 2003 Revision, published July 1, 2003 at 68 FR 39186.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874–6696.

SUPPLEMENTARY INFORMATION: A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued to the following Company under 31 U.S.C. 9304 to 9308. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 2003 Revision, on page 39223 to reflect this addition:

United Fire & Indemnity Company. Business Address: P.O. Box 73909, Cedar Rapids, Iowa 52407–3909. Phone: (409) 766–4600.

Underwriting Limitation b/: $706,000. Surety Licenses c/: AL, CO, IN, KY, LA, MS, MO, NM, TX. Incorporated in: Texas.

Certificates of Authority expire on June 30 each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (31 CFR Part 223). A list of qualified companies is published annually as of July 1 in Treasury Department Circular 570, with details as to underwriting limitations, areas in which licensed to transact surety business and other information.

The Circular may be viewed and downloaded through the Internet at *http://www.fms.treas.gov/c570*. A hard copy may be purchased from the Government Printing Office (GPO) Subscription Service, Washington, DC, Telephone (202) 512–1800. When ordering the Circular from GPO, use the following stock number: 769–004–04643–2.

Questions concerning this Notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6F07, Hyattsville, MD 20782.

Dated: December 23, 2003

Wanda J. Rogers,

Director, Financial Accounting and Services Division, Financial Management Service.

[FR Doc. 04–102 Filed 1–2–04; 8:45 am]

BILLING CODE 4810–35–M

Corrections

Federal Register
Vol. 69, No. 2
Monday, January 5, 2004

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–808]

Stainless Steel Wire Rods from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review

Correction

In notice document 03–31354 beginning on page 70765 in the issue of Friday, December 19, 2003, make the following correction:

On page 70765, in the second column, the **EFFECTIVE DATE** should read December 19, 2003.

[FR Doc. C3–31354 Filed 1–2–04; 8:45 am]

BILLING CODE 1505–01–D

Monday,
January 5, 2004

Part II

Environmental Protection Agency

40 CFR Part 63

National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[Docket ID No. OAR–2002–0052; FRL–7551–7]

RIN 2060–AG72

National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action promulgates national emission standards for hazardous air pollutants (NESHAP) for the lime manufacturing source category. The lime manufacturing emission units regulated will include lime kilns, lime coolers, and various types of processed stone handling (PSH) operations. The EPA has identified the lime manufacturing industry as a major source of hazardous air pollutant (HAP) emissions including, but not limited to, hydrogen chloride (HCl), antimony, arsenic, beryllium, cadmium, chromium, lead, manganese, mercury, nickel, and selenium. Exposure to these substances has been demonstrated to cause adverse health effects such as cancer; irritation of the lung, skin, and mucus membranes; effects on the central nervous system; and kidney damage. The final NESHAP will require all major sources subject to the rule to meet HAP emission standards reflecting the application of maximum achievable control technology (MACT). Implementation of the final NESHAP will reduce non-volatile and semi-volatile metal HAP emissions from the lime manufacturing industry source category by approximately 6.5 tons per year (tpy) and will reduce emissions of particulate matter (PM) by 5,900 tpy.

EFFECTIVE DATE: January 5, 2004.

ADDRESSES: *Docket.* The EPA has established an official public docket for this action including both Docket ID No. OAR–2002–0052 and Docket ID No. A–95–41. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. All items may not be listed under both docket numbers, so interested parties should inspect both docket numbers to ensure that they have received all materials relevant to the final rule. The official public docket is available for public viewing at the EPA Docket Center (Air Docket), EPA West, Room B–102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For further information concerning applicability and rule determinations, contact the appropriate State or local agency representative. For information concerning analyses performed in developing the final NESHAP, contact Keith Barnett, U.S. EPA, Emission Standards Division, Minerals and Inorganic Chemicals Group, C504–05, Research Triangle Park, North Carolina 27711, (919) 541–5605, *barnett.keith@epa.gov.*

SUPPLEMENTARY INFORMATION: *Docket.* The EPA has established an official public docket for this action including both Docket ID No. OAR–2002–0052 and Docket ID No. A–95–41. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. All items may not be listed under both docket numbers, so interested parties should inspect both docket numbers to ensure that they have received all materials relevant to the final rule. Although a part of the official public docket, the public docket does not include Confidential Business Information or other information whose disclosure is restricted by statute. The docket is a dynamic file because information is added throughout the rulemaking process. The docketing system is intended to allow members of the public and industries involved to easily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the proposed and promulgated standards and their preambles, the contents of the docket, excluding interagency review materials, will serve as the record in the case of judicial review. (See section 307(d)(7)(A) of the Clean Air Act (CAA).) The regulatory text and other materials related to this rulemaking are available for review in the docket, or copies may be mailed from the Air Docket on request by calling (202) 566–1742. A reasonable fee may be charged for copying docket materials. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "**Federal Register**" listings at *http://www.epa.gov/fedrgstr/.* 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 access the index of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA dockets. Information claimed as confidential business information (CBI) and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. The 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 in this document.

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

Regulated Entities. Categories and entities potentially regulated by this action include:

Category	NAICS	Examples of regulated entities
	32741	Commercial lime manufacturing plants.
	33111	Captive lime manufacturing plants at iron and steel mills.
	3314	Captive lime manufacturing plants at nonferrous metal production facilities.

Category	NAICS	Examples of regulated entities
	327125	Producers of dead-burned dolomite (Non-clay refractory manufacturing).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your facility is regulated by this action, you should examine the applicability criteria in § 63.7081 of the final NESHAP. If you have any questions regarding the applicability of this action to a particular entity, consult the technical contact person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

Judicial Review. The NESHAP for Lime Manufacturing were proposed in December 20, 2002 (67 FR 78046). This action announces EPA's final decisions on the NESHAP. Under section 307(b)(1) of the CAA, judicial review of the final NESHAP is available only by filing a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by March 5, 2004. Under section 307(d)(7)(B) of the CAA, only an objection to a rule or procedure raised with reasonable specificity during the period for public comment can be raised during judicial review. Moreover, under section 307(b)(2) of the CAA, the requirements established by the final NESHAP may not be challenged separately in any civil or criminal proceeding brought to enforce these requirements.

Outline. The information presented in this preamble is organized as follows:

I. Introduction
A. What Is the Purpose of the Final NESHAP?
B. What Is the Source of Authority for Development of NESHAP?
C. What Criteria Are Used in the Development of NESHAP?
D. How Was the Final NESHAP Developed?
E. What Are the Health Effects of the HAP Emitted From the Lime Manufacturing Industry?
F. What Are Some Lime Manufacturing Industry Characteristics?
G. What Are the Processes and Their Emissions at a Lime Manufacturing Plant?
II. Summary of the Final NESHAP
A. What Lime Manufacturing Plants Are Subject to the Final NESHAP?
B. How Do We Define the Affected Source and What Emissions Units Are Included?
C. What Pollutants Are Regulated by the Final NESHAP?
D. What Are the Emission Limits and Operating Limits?
E. When Must I Comply With the Final NESHAP?
F. How Do I Demonstrate Initial Compliance With the Final NESHAP?
G. How Do I Continuously or Periodically Demonstrate Compliance With the Final NESHAP?
H. How Do I Determine if My Lime Manufacturing Plant Is a Major Source and Thus Subject to the Final NESHAP?
III. Summary of Changes Since Proposal
IV. Summary of Environmental, Energy and Economic Impacts
A. How Many Facilities Are Subject to the Final NESHAP?
B. What Are the Air Quality Impacts?
C. What Are the Water Impacts?
D. What Are the Solid Waste Impacts?
E. What Are the Energy Impacts?
F. What Are the Cost Impacts?
G. What Are the Economic Impacts?
V. Responses To Major Comments
VI. Statutory and Executive Order Reviews
A. Executive Order 12866, Regulatory Planning and Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Analysis
D. Unfunded Mandates Reform Act
E. Executive Order 13132, Federalism
F. Executive Order 13175, Consultation and Coordination with Indian Tribal Governments
G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks
H. Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use
I. National Technology Transfer and Advancement Act
J. Congressional Review Act

I. Introduction

A. What Is the Purpose of the Final NESHAP?

The purpose of the final NESHAP is to protect the public health by reducing emissions of HAP from lime manufacturing plants.

B. What Is the Source of Authority for Development of NESHAP?

Section 112(c) of the CAA requires us to list categories and subcategories of major sources and area sources of HAP and to establish NESHAP for the listed source categories and subcategories. We listed Lime Manufacturing in the category of major sources on July 16, 1992 (57 FR 31576). Major sources of HAP are those that have the potential to emit, considering controls, 10 tpy or more of any one HAP or 25 tpy or more of any combination of HAP.

C. What Criteria Are Used in the Development of NESHAP?

Section 112(d) of the CAA requires that we establish NESHAP for the control of HAP from both new and existing major sources. The CAA requires NESHAP to reflect the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator of EPA determines has been adequately demonstrated. This level of control is commonly referred to as MACT.

The CAA further provides that MACT standards must attain at least a minimum level of stringency, known as the MACT floor. The MACT floor is the minimum control level allowed for NESHAP and is defined under section 112(d)(3) of the CAA. In essence, the MACT floor ensures that the standard is set at a level that assures that all major sources achieve the level of control at least as stringent as that already achieved by the better-controlled and lower-emitting sources in each source category or subcategory. For new sources, the MACT floor cannot be less stringent than the emission control that is achieved in practice by the best-controlled similar source. The MACT standards for existing sources can be less stringent than standards for new sources, but they cannot be less stringent than the average emission limitation achieved by the best-performing 12 percent of existing sources in the category or subcategory (or the best-performing 5 sources for categories or subcategories with fewer than 30 sources) for which the Agency has emissions information.

In developing MACT, we also consider control options that are more stringent than the floor. We may establish standards more stringent than the floor based on the consideration of cost of achieving the emissions reductions, any health and environmental impacts, and energy requirements.

D. How Was the Final NESHAP Developed?

We used several resources to develop the final NESHAP, including questionnaire responses from industry, emissions test data, site surveys of lime manufacturing facilities, operating and new source review permits, permit applications, and comments on the proposed rule. We researched the relevant technical literature and existing State and Federal regulations and

consulted and met with representatives of the lime manufacturing industry, State and local representatives of air pollution agencies, Federal agency representatives (*e.g.*, United States Geological Survey) and emission control and emissions measurement device vendors in developing the final NESHAP. We also conducted an extensive emissions test program. Industry representatives provided emissions test data, arranged site surveys of lime manufacturing plants, participated in the emissions test program, reviewed draft questionnaires, provided information about their manufacturing processes and air pollution control technologies, and identified technical and regulatory issues. State representatives provided existing emissions test data, copies of permits and other information.

E. What Are the Health Effects of the HAP Emitted From the Lime Manufacturing Industry?

The HAP emitted by lime manufacturing facilities include, but are not limited to, HCl, antimony, arsenic, beryllium, cadmium, chromium, lead, manganese, mercury, nickel, and selenium. Exposure to these compounds has been demonstrated to cause adverse health effects when present in concentrations higher than those typically found in ambient air.

We have detailed data on each of the currently operating facilities for emissions of HCl. Human exposures to ambient levels of HCl resulting from lime manufacturing facilities' emissions were estimated by industry as part of the risk assessment they conducted for purposes of demonstrating, pursuant to section 112(d)(4) of the CAA, that HCl emissions from lime kilns are below the threshold level of adverse effects, within an ample margin of safety.

We do not have the type of current detailed data on each of the facilities that will be covered by the final NESHAP, and the people living around the facilities, that will be necessary to conduct an analysis to determine the actual population exposures to the metals HAP emitted from these facilities and the potential for resultant health effects. Therefore, we do not know the extent to which the adverse health effects described below occur in the populations surrounding these facilities. However, to the extent the adverse effects do occur, the final NESHAP will reduce emissions and subsequent exposures.

The HAP that will be controlled with the final NESHAP are associated with a variety of adverse health effects, including chronic health disorders (*e.g.*, irritation of the lung, skin, and mucus membranes; effects on the central nervous system; cancer; and damage to the kidneys), and acute health disorders (*e.g.*, lung irritation and congestion, alimentary effects such as nausea and vomiting, and effects on the kidney and central nervous system). We have classified three of the HAP—arsenic, chromium, and nickel—as human carcinogens and three others—beryllium, cadmium, and lead—as probable human carcinogens.

F. What Are Some Lime Manufacturing Industry Characteristics?

There are approximately 70 commercial and 40 captive lime manufacturing plants in the U.S., not including captive lime manufacturing operations at pulp and paper production facilities. About 30 of the captive plants in the U.S. produce lime that is used in the beet sugar manufacturing process, but captive lime manufacturing plants are also found at steel, other metals, and magnesia production facilities. Lime is produced in about 35 States and Puerto Rico by about 47 companies, which include commercial and captive producers (except for lime manufacturing plants at pulp and paper production facilities), and those plants which produce lime hydrate only.

G. What Are the Processes and Their Emissions at a Lime Manufacturing Plant?

There are many synonyms for lime, the main ones being quicklime and its chemical name, calcium oxide. High calcium lime consists primarily of calcium oxide, and dolomitic lime consists of both calcium and magnesium oxides. Lime is produced via the calcination of high calcium limestone (calcium carbonate) or other highly calcareous materials such as aragonite, chalk, coral, marble, and shell; or via the calcination of dolomitic limestone. Calcination occurs in a high temperature furnace called a kiln, where lime is produced by heating the limestone to about 2000° F, driving off carbon dioxide in the process. Dead-burned dolomite is a type of dolomitic lime produced to obtain refractory characteristics in the lime.

The kiln is the heart of the lime manufacturing plant, where various fossil fuels (such as coal, petroleum coke, natural gas, and fuel oil) are combusted to produce the heat needed for calcination. There are five different types of kilns: rotary, vertical, double-shaft vertical, rotary hearth, and fluidized bed. The most popular is the rotary kiln, but the double-shaft vertical kiln is an emerging new kiln technology gaining in acceptance because of its energy efficiency. Rotary kilns may also have preheaters associated with them to improve energy efficiency. As discussed further in this preamble, additional energy efficiency is obtained by routing exhaust from the lime cooler to the kiln, a common practice. Emissions from lime kilns include, but are not limited to, metallic HAP, HCl, PM, sulfur dioxide, nitrogen oxides, and carbon dioxide. These emissions predominately originate from compounds in the limestone feed material and fuels (*e.g.*, metals, sulfur, chlorine) and are formed from the combustion of fuels and the heating of feed material in the kiln.

All types of kilns use external equipment to cool the lime product, except vertical (including double-shaft) kilns, where the cooling zone is part of the kiln. Ambient air is most often used to cool the lime (although a few use water as the heat transfer medium), and typically all of the heated air stream exiting the cooler goes to the kiln to be used as combustion air for the kiln. The exception to this is the grate cooler, where more airflow is generated than is needed for kiln combustion, and consequently a portion (about 40 percent) of the grate cooler exhaust is vented to the atmosphere. We estimate that there are about five to ten kilns in the U.S. that use grate coolers. The emissions from grate coolers include the lime dust (PM) and the trace metallic HAP found in the lime dust.

Lime manufacturing plants may also produce hydrated lime (also called calcium hydroxide) from some of the calcium oxide (or dolomitic lime) produced. Hydrated lime is produced in a hydrator via the chemical reaction of calcium oxide (or magnesium oxide) and water. The hydration process is exothermic, and part of the water in the reaction chamber is converted to steam. A wet scrubber is integrated with the hydrator to capture the lime (calcium oxide and calcium hydroxide) particles carried in the gas steam, with the scrubber water recycled back to the hydration chamber. The emissions from the hydrator are the PM comprised of lime and hydrated lime.

Operations that prepare the feed materials and fuels for the kiln and process the lime product for shipment or further on-site use are found throughout a lime manufacturing plant. The equipment includes grinding mills, crushers, storage bins, conveying systems (such as bucket elevator, belt conveyors), bagging systems, bulk loading or unloading systems, and screening operations. The emissions from these operations include limestone

and lime dust (PM) and the trace metallic HAP found in the dust.

II. Summary of the Final NESHAP

A. What Lime Manufacturing Plants Are Subject to the Final NESHAP?

The final NESHAP will regulate HAP emissions from all new and existing lime manufacturing plants that are major sources, co-located with major sources, or are part of major sources. However, lime manufacturing plants located at pulp and paper mills or at beet sugar factories are not subject to the final NESHAP. Other captive lime manufacturing plants, such as (but not limited to) those at steel mills and magnesia production facilities, will be subject to the final NESHAP. See 67 FR 78053 explaining the basis for these determinations. We define a lime manufacturing plant as any plant which uses a lime kiln to produce lime product from limestone or other calcareous material by calcination. However, we specifically exclude lime kilns that use only calcium carbonate waste sludge from water softening processes as the feedstock. Lime product means the product of the lime kiln calcination process including calcitic lime, dolomitic lime, and dead-burned dolomite.

B. How Do We Define the Affected Source and What Emissions Units Are Included?

The final NESHAP defines the affected source as follows: each lime kiln and its associated cooler, each individual PSH system. The individual types of emission units in a PSH system are conveying system transfer points, bulk loading or unloading systems, screening operations, bucket elevators, and belt conveyors—if they follow the processed stone storage bin or storage pile in the sequence of PSH operations. The materials processing operations (MPO) associated with lime products (such as quicklime and hydrated lime), lime kiln dust handling, quarry or mining operations, limestone sizing operations, and fuels are not subject to today's final NESHAP. Processed stone handling operations are further distinguished in the final NESHAP as follows: (1) Whether their emissions are vented through a stack, (2) whether their emissions are fugitive emissions, (3) whether their emissions are vented through a stack with some fugitive emissions from the partial enclosure, and/or (4) whether the source is enclosed in a building. Finally, lime hydrators and cooler nuisance dust collectors are not included under the definition of affected source under the final NESHAP.

C. What Pollutants Are Regulated by the Final NESHAP?

The final NESHAP establishes PM emission limits for lime kilns, coolers, and PSH operations with stacks. Particulate matter will be measured solely as a surrogate for the non-volatile and semi-volatile metal HAP. (Particulate matter of course is not itself a HAP, but is a typical and permissible surrogate for HAP metals. See *National Lime Ass'n* v. *EPA,* 233 F. 3d 625, 637–40 (D.C. Cir., 2000). The final NESHAP also regulate opacity or visible emissions from most of the PSH operations, with opacity also serving as a surrogate for non-volatile and semi-volatile HAP metals.

D. What Are the Emission Limits and Operating Limits?

Emission Limits

The PM emission limit for the existing kilns and coolers is 0.12 pounds PM per ton of stone feed (lb/tsf) for kilns using dry air pollution control systems prior to January 5, 2004. Existing kilns that have installed and operating wet scrubbers prior to January 5, 2004 must meet an emission limit of 0.60 lb/tsf. Kilns which meet the criteria for the 0.60 lb/tsf emission limit must continue to use a wet scrubber for PM emission control in order to be eligible to meet the 0.60 lb/tsf limit. If at any time such a kiln switches to a dry control, they would become subject to the 0.12 lb/tsf PM emission limit, regardless of the type of control device used in the future. The PM emission limit for all new kilns and lime coolers is 0.10 lb/tsf. As a compliance option, these emission limits (except for the 0.60 lb/tsf limit) may be applied to the combined emissions of all the kilns and coolers (assuming the cooler(s) has a separate exhaust vent to the atmosphere) at the lime manufacturing plant. In other words, the sum of the PM emissions from all of the kilns and coolers at the lime manufacturing plant, divided by the sum of the production rates of the kilns at the existing lime manufacturing plant, will be used to determine compliance with the appropriate emission limit for kilns and coolers. If the lime manufacturing plant has both new and existing kilns and coolers, then the emission limit will be an average of the existing and new kiln PM emissions limits, weighted by the annual actual production rates of the individual kilns, except that no new kiln may exceed the PM emission level of 0.10 lb/tsf. Kilns that are required to meet a 0.60 lb/tsf PM emission limit must meet that limit individually, and may not be included in any averaging calculations.

Emissions from PSH operations that are vented through a stack will be subject to a limit of 0.05 grams PM per dry standard cubic meter (g/dscm) PM and 7 percent opacity. Stack emissions from PSH operations that are controlled by wet scrubbers are subject to the 0.05 g/dscm but not subject to the opacity limit. Fugitive emissions from PSH operations are subject to a 10 percent opacity limit.

For each building enclosing any PSH operation, each of the affected PSH operations in the building must comply individually with the applicable PM and opacity emission limitations discussed above. Otherwise, there must be no visible emissions from the building, except from a vent, and the building's vent emissions must not exceed 0.05 g/dscm and 7 percent opacity. For each fabric filter (FF) that controls emissions from only an individual, enclosed processed stone storage bin, the opacity must not exceed 7 percent. For each set of multiple processed stone storage bins with combined stack emissions, emissions must not exceed 0.05 g/dscm and 7 percent opacity. Because the opacity requirement for PSH operations is used as an indicator that a control device is functioning properly, it is not appropriate, or meaningful, to average the opacity readings from multiple PSH operations. The final rule does not allow averaging of PSH operations.

We are not regulating HCl emissions from lime kilns in the final NESHAP. Under the authority of section 112(d)(4) of the CAA, we have determined that no further control is necessary because HCl is a "health threshold pollutant," and HCl levels emitted from lime kilns are below the threshold value within an ample margin of safety. See generally, 67 FR 78054–057. As explained there, the risk analysis sought to assure that emissions from every source in the category result in exposures less than the threshold level even for an individual exposed at the upper end of the exposure distribution. The upper end of the exposure distribution is calculated using the "high end exposure estimate," defined as a plausible estimate of individual exposure for those persons at the upper end of the exposure distribution, conceptually above the 90th percentile, but not higher than the individual in the population who has the highest exposure. We believe that assuring protection to persons at the upper end of the exposure distribution is consistent with

the "ample margin of safety" requirement in section 112(d)(4).

In the proposed rule, we published the results of the risk analysis on which we based this decision. More information on the risk analysis may be found in the published proposed rule (67 FR 78054–78057) and in the docket. We received only one comment on our risk analysis.

We also are not establishing a limit for mercury emissions from lime kilns. The only control technique would reflect control of the raw materials and/or fossil fuels. This control is not duplicable or replicable. We also determined that an emission limit for mercury based on a beyond-the-MACT-floor option is not justified after consideration of the cost, energy, and non-air environmental impacts. See 67 FR 78057 for additional discussion. We received no adverse comments on this aspect of the rule as proposed.

Operating Limits

For lime kilns that use a wet scrubber PM control device, you are required to maintain the 3-hour block average gas stream pressure drop across the scrubber and the 3-hour block average scrubber liquid flow rate equal to or above the levels for the parameters that were established during the PM performance test.

For kilns using a FF or electrostatic precipitator (ESP) PM control device, you must monitor opacity (as an operating limit) with a continuous opacity monitoring system (COMS). You are required to install and operate the COMS in accordance with Performance Specification 1 (PS–1), 40 CFR part 60, Appendix B, and maintain the opacity level of the lime kiln exhaust at or below 15 percent for each 6-minute block period. Facilities that installed COMS on or before February 6, 2001, should continue to meet the requirements in effect in 40 CFR part 60, Appendix B, at the time of COMS installation unless specifically required to re-certify the COMS by their permitting authority.

As an alternative to a COMS, lime kilns that use ESP or FF PM controls can elect to monitor PM levels with a PM detector that meets the requirements in § 63.7113(e) of the final rule. You must maintain and operate the ESP or FF such that the PM detector alarm is not activated, and the alarm condition does not exist for more than 5 percent of the operating time in each 6-month period.

For lime kilns that use a FF PM control device, you may install, maintain and operate a bag leak detection system (BLDS) as an alternative to a COMS or PM detector. The FF must be operated and maintained so that the BLDS alarm is not activated, and an alarm condition does not exist for more than 5 percent of the operating time in each 6-month period. The BLDS must be certified by the manufacturer to be capable of detecting PM emissions at concentrations of 10 milligrams per actual cubic meter (0.0044 grains per actual cubic foot) or less.

For PSH operation emission points subject to a PM emission limit and controlled by a wet scrubber, you are required to collect and record the exhaust gas stream pressure drop across the scrubber and the scrubber liquid flow rate during the PM performance test. You are required to continuously maintain the 3-hour average gas stream pressure drop across the scrubber and the 3-hour average scrubber liquid flow rate equal to or above the levels for the parameters that were established during the PM performance test.

You are required to prepare a written operations, maintenance, and monitoring (OM&M) plan to cover all affected emission units. The plan must include procedures for proper operation and maintenance of each emission unit and its air pollution control device(s); procedures for monitoring and proper operation of monitoring systems in order to meet the emission limits and operating limits; standard procedures for the use of a BLDS and PM detector; and corrective actions to be taken when there is either a deviation from operating limits, or when PM detector or BLDS alarms indicate corrective action is necessary.

E. When Must I Comply With the Final NESHAP?

The compliance date for existing affected sources is January 5, 2004. (Three years may be needed to install new, or retrofit existing, air pollution control equipment.) A new affected source (*i.e.*, a kiln or PSH system for which construction or reconstruction commenced after December 20, 2002) must be in compliance upon initial startup or January 5, 2007, whichever is later.

F. How Do I Demonstrate Initial Compliance With the Final NESHAP?

Kiln and Coolers

For the kiln and cooler PM emission limit, you must conduct a PM emissions test on the exhaust of each kiln at the lime manufacturing plant and measure the stone feed rate to each kiln during the test. Each individual kiln must meet their applicable PM emission limit (0.10, 0.12, or 0.60 lb/tsf). Alternately, kilns subject to the 0.10 (new kilns) or 0.12 (existing kilns) lb/tsf PM emission limits are in compliance if the sum of the emissions from these kilns at the lime manufacturing plant, divided by the sum of the stone feed rates entering each of these kilns, do not exceed the applicable PM emission limit, or if the facility has both new and existing kilns, it must not exceed an average of the 0.12 and 0.10 lb/tsf PM emission limits weighted by individual kiln throughput. Kilns subject to the 0.60 lb/tsf PM emission limit can not be included in any averaging scheme. If you have a lime cooler(s) that has a separate exhaust to the atmosphere, you must conduct a PM test on the cooler's exhaust concurrently with the kiln PM test, and add the cooler emissions to the appropriate kiln emissions. For kilns with a wet scrubber, you must collect and record the applicable operating parameters during the PM performance test and then establish the operating limits based on those data.

Processed Stone Handling Operations

For PSH operations with stacks that are subject to PM emission limits, you are required to conduct a PM emissions test on each stack exhaust, and the stack emissions must not exceed the emission limit of 0.05 g/dscm. For PSH operations with stack opacity limits, you are required to conduct a 3-hour test on the exhaust in accordance with Method 9 in Appendix B of 40 CFR part 60, and each of the 30 consecutive, 6-minute opacity averages must not exceed 7 percent. The PSH operations controlled using wet scrubbers do not have an opacity limit, but you are required to collect and record the wet scrubber operating parameters during the PM performance test and then establish the applicable operating limits based on those data.

For PSH operations with fugitive emissions, you are required to conduct a Method 9 test, and each of the consecutive 6-minute opacity averages must not exceed the applicable opacity limit. These Method 9 tests are for 3 hours, but the test duration may be reduced to 1 hour if certain criteria are met. Lastly, Method 9 tests or visible emissions checks may be performed on PSH operations inside of buildings, but additional lighting, improved access to equipment, and temporary installation of contrasting backgrounds may be needed. For additional guidance, see page 116 of the "Regulatory and Inspection Manual for Nonmetallic Minerals Processing Plants," EPA report 305–B–97–008, November 1997.

G. How Do I Continuously or Periodically Demonstrate Compliance With the Final NESHAP?

General

You are required to install, operate, and maintain each required continuous parameter monitoring system (CPMS) such that the CPMS completes a minimum of one cycle of operation for each successive 15-minute period. The CPMS will be required to have valid data from at least three equally spaced data values for that hour during periods that it is not out of control according to your OM&M plan. To calculate the block average for each 3-hour averaging period, you must have at least two of three of the hourly averages for that period using only hourly average values that are based on valid data (*i.e.*, not from out-of-control periods). When required, the 3-hour block average value for each operating parameter must be calculated as the average of each set of three successive 1-hour average values.

You are required to develop and implement a written startup, shutdown, and malfunction plan (SSMP) according to the general provisions in 40 CFR 63.6(e)(3).

Kilns and Coolers

For kilns controlled by a wet scrubber, you are required to maintain the 3-hour block average of the exhaust gas stream pressure drop across the wet scrubber greater than, or equal to, the pressure drop operating limit established during the most recent PM performance test. You are also required to maintain the 3-hour block average of the scrubbing liquid flow rate greater than or equal to the flow rate operating limit established during the most recent performance test.

Sources opting to monitor PM emissions from an ESP with a PM detector in lieu of monitoring opacity are required to maintain and operate the ESP such that the PM detector alarm is not activated, and alarm condition does not exist for more than 5 percent of the operating time in a 6-month period. Each time the alarm sounds and the owner or operator initiates corrective actions (per the OM&M plan) within 1 hour of the alarm, 1 hour of alarm time will be counted. If inspection of the ESP demonstrates that no corrective actions are necessary, no alarm time will be counted. The sensor on the PM detection system must provide an output of relative PM emissions. The PM detection system must have an alarm that will sound automatically when it detects an increase in relative PM emissions greater than a preset level. The PM detection systems are required to be installed, operated, adjusted, and maintained according to the manufacturer's written specifications and recommendations.

Sources opting to monitor PM emissions from a FF with a BLDS or PM detector in lieu of monitoring opacity are required to maintain and operate the FF such that the BLDS or PM detector alarm is not activated, and alarm condition does not exist for more than 5 percent of the operating time in a 6-month period. Each time the alarm sounds and the owner or operator initiates corrective actions (per the OM&M plan) within 1 hour of the alarm, 1 hour of alarm time will be counted. If inspection of the FF demonstrates that no corrective actions are necessary, no alarm time will be counted. The sensor on the BLDS is required to provide an output of relative PM emissions. The BLDS is required to have an alarm that will sound automatically when it detects an increase in relative PM emissions greater than a preset level. The BLDS is required to be installed, operated, adjusted, and maintained in accordance with the manufacturer's written specifications and recommendations.

Standard operating procedures for the BLDS and PM detection systems must be incorporated into the OM&M plan. We recommend that for electrodynamic (or other similar technology) BLDS, the standard operating procedures include concepts from EPA's "Fabric Filter Bag Leak Detection Guidance" (EPA–454/R–98–015, September 1997). This document may be found on the world wide web at *www.epa.gov/ttn/emc.*

For kilns and lime coolers monitored with a COMS, you are required to maintain each 6-minute block average opacity level at or below 15 percent opacity. For COMS installed after February 6, 2001, the COMS must be installed and operated in accordance with PS–1, 40 CFR part 60, Appendix B. Facilities that installed COMS on or before February 6, 2001, should continue to meet the requirements in effect in 40 CFR part 60, Appendix B, at the time of COMS installation unless specifically required to re-certify the COMS by their permitting authority.

Processed Stone Handling Operations

For stack emissions from PSH operations which are controlled by a wet scrubber, you are required to maintain the 3-hour average exhaust gas stream pressure drop across the wet scrubber greater than, or equal to, the pressure drop operating limit established during the most recent PM performance test. You are required to also maintain the 3-hour average scrubbing liquid flow rate greater than, or equal to, the flow rate operating limit established during the most recent PM performance test.

For PSH operations subject to opacity limitations that do not use a wet scrubber control device, you are required to periodically demonstrate compliance as follows. You must conduct a monthly 1-minute visible emissions check of each emissions unit in the affected source. If no visible emissions are observed in six consecutive monthly tests for any emission unit, you may decrease the frequency of testing from monthly to semiannually for that emissions unit. If visible emissions are observed during any semiannual test, you must resume testing of that emissions unit on a monthly basis and maintain that schedule until no visible emissions are observed in six consecutive monthly tests. If no visible emissions are observed during the semiannual test for any emissions unit, you may decrease the frequency of testing from semiannually to annually for that emissions unit. If visible emissions are observed during any annual test, you must resume visible emissions testing of that emissions unit on a monthly basis and maintain that schedule until no visible emissions are observed in six consecutive monthly tests.

If visible emissions are observed during any visible emissions check, you must conduct a 6-minute test of opacity in accordance with Method 9 of appendix A to part 60 of this chapter. The Method 9 test is required to begin within 1 hour of any observation of visible emissions, and the 6-minute opacity reading must not exceed the applicable opacity limit.

H. How Do I Determine if My Lime Manufacturing Plant Is a Major Source and Thus Subject to the Final NESHAP?

The final NESHAP apply to lime manufacturing plants that are major sources, co-located with major sources, or are part of major sources. Each lime facility owner/operator must determine whether their plant is a major or area source since this determines whether the lime manufacturing plant is an affected source under the final NESHAP. Section 112 of the CAA defines a major source as a "stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons/yr or more of any HAP or 25 tons/yr or more of any combination of HAP." This definition requires evaluation of the facility's potential to emit all HAP from

all emission sources in making a determination of whether the source is major or area. However, based on our data analysis, HCl is most likely the HAP that will account for the largest quantity of HAP emissions from a lime manufacturing plant. Although lime manufacturing plants emit HAP metals from most of the emission units at the plant site and organic HAP from the kiln, our analysis indicates that most likely the metal and organic HAP emissions will each be well below the 10 tpy criteria.

We are requiring that all lime manufacturing facilities potentially subject to the final NESHAP demonstrate, with an emissions test, that they emit less than 10 tpy of HCl if they wish to claim area source status. We are allowing three HCl test methods to be used. These are EPA Method 320 or 321 in Appendix A to 40 CFR part 63, or ASTM Method D 6735–01. If ASTM Method D 6735–01 is used, we require that the paired-train option in section 11.2.6 and the post-test analyte spike option in section 11.2.7 be used.

III. Summary of Changes Since Proposal

We proposed a PM standard (as a surrogate for non-mercury HAP metals) of 0.12 lb/tsf reflecting the performance of dry pollution control systems (baghouses). We also solicited comment on having a separate PM standard of 0.60 lb/tsf for kilns controlled with wet scrubbers. In the final rule, we have decided to adopt these two different standards for PM emissions from existing lime kilns. We are also indicating that existing kilns subject to the 0.60 lb/tsf PM emission limit are not to be included in any averaging scheme for demonstrating compliance with a PM standard.

In the proposed NESHAP, we required facilities using wet scrubbers to monitor scrubber pressure drop and liquid flow rate. We have written the final NESHAP to explicitly state that alternative monitoring procedures are allowed under the procedures described in 40 CFR 63.8(f). However, we do not delegate that authority.

The proposed NESHAP stated that you must install, operate, and maintain COMS as required by 40 CFR part 63, subpart A, General Provisions, and according to PS–1 in Appendix B to 40 CFR part 60. We have stated in the rule that COMS installed, relocated, or substantially refurbished after February 6, 2001, must meet the requirements of PS–1 as revised on August 10, 2000. Any COMS installed on or before February 6, 2001, should continue to meet the requirements in effect at the time of installation unless specifically required by the local regulatory agency to re-certify the COMS in question.

In the proposed NESHAP, we required you to monitor the performance of FF with either a COMS or a PM detector. In the final NESHAP, we are allowing existing facilities to monitor FF performance using daily EPA Method 9, in Appendix A to 40 CFR part 60, visible emission readings if the facility has a positive pressure FF with multiple stacks, or if it is infeasible to install a COMS in accordance with PS–1 in Appendix B to 40 CFR part 60.

In the proposed NESHAP, we allowed three alternatives for monitoring ESP performance. These were a COMS, a PM detector, or monitoring ESP voltage and current. In the final NESHAP, we are allowing only two alternatives, a COMS or a PM detector. There are no requirements to establish ESP voltage and current operating limits.

In the proposed NESHAP, we specified that EPA Method 9 in Appendix A to 40 CFR part 60 should be used to determine opacity from fugitive emissions. We have retained this requirement in the final NESHAP, but we have added additional requirements on how EPA method 9 in Appendix A to 40 CFR part 60 should be implemented to determine fugitive visible emissions. This language was taken directly from 40 CFR 60.675(c)(1).

In the proposed NESHAP, § 63.7120(b) could be interpreted to imply that PSH operations must be continuously monitored. In the final NESHAP, PSH operations are subject to monthly (not continuous) visible emission testing.

In the proposed NESHAP, we required that lime kiln emission testing be conducted at the highest production level reasonably expected to occur. In the final NESHAP, we require that lime kilns be tested under representative operating conditions.

In the proposed NESHAP, we required reporting of deviations from operating, visible emissions, and opacity limits, including those deviations that occur during periods of startup, shutdown, or malfunction. In the final NESHAP, we require that reports are to be made in accordance with 40 CFR 63.10(d).

In the proposed NESHAP, we required testing of all kilns in order to claim area source status. In the final NESHAP, we have included a provision that allows the permitting authority to determine if idled kilns must be tested, and also to determine whether all kilns that use identical feed materials, fuels, and emission controls must still all be tested.

In the proposed NESHAP, the raw material storage bin was the first emission unit in the sequence of lime manufacturing that was part of the affected source. Materials processing operations between the storage bin and the kiln were also covered. In the final NESHAP, material stockpiles prior to the processed stone storage bin are not covered, open processed stone piles are not covered, storage bins are defined as manmade enclosures, and use the term processed stone handling operations instead of materials processing operations.

In the proposed NESHAP, we included as an affected source lime kilns that produced lime product from any calcareous substance. In the final NESHAP, we have excluded lime kilns that produce lime from water softening sludge that contain calcium carbonate.

In the proposed NESHAP, we excluded materials handling operations associated with lime product. In the final NESHAP, we have specifically stated that nuisance dust collectors are part of lime product handling systems and, therefore, are not part of the affected source.

In the proposed NESHAP, we required that facilities use rolling 3-hour averages to show compliance with wet scrubber operating limits. We noted that in the proposed rule, we did not clearly state how to calculate the rolling average. Based on compliance requirements of other NESHAP, we determined that a rolling average was not necessary to ensure compliance, but did increase the complexity of the average calculation and recordkeeping process. Therefore, in the final NESHAP, we require block 3-hour averages instead of rolling 3-hour averages, which is consistent with the requirement to use block averaging required for ESP that choose to monitor using COM.

In the proposed NESHAP, we allowed averaging among all lime kilns and coolers at existing sources, and all new lime kilns and coolers at new sources, but did not allow averaging of existing and new lime kilns and coolers together. In addition, the averaging provisions and equations applied whether or not the facility desired to average. We have written the final NESHAP to state that each individual new lime kiln and its associated cooler must meet a 0.10 lb/tsf PM emission limit, and each individual existing lime kilns and its associated cooler must meet a 0.12 lb/tsf PM emission limit. Averaging is optional, so that if each individual kiln meets its emission limit, averaging is not required. The exception to this is for existing kilns which are subject to the

0.60 lb/tsf PM emission limit. These kilns are not eligible for averaging.

If the lime manufacturing plant has multiple kilns and wants to average kilns together to meet the PM emission limit, this is allowed (with one limitation discussed below, and the exception for kilns subject to the 0.60 lb/tsf PM emission limit noted above) and the averaging equations in the final rule must be used. However, in no case may a new kiln exceed a 0.10 lb/tsf emission limit. Where there are both new and existing lime kilns at a facility, then the PM emission limit will be an average of the existing and new kiln PM emissions limits, weighted by the annual actual production rates of the individual kilns. We believe that allowing averaging is appropriate here because of the identity of the units (kilns and coolers in all cases), and the emissions (same HAP in same type of emissions, since all emissions result from kilns and coolers). Averaged emissions under these circumstances would, thus, still reflect MACT for the affected source. The averaging provisions are included in the final NESHAP as a result of the recommendations of the Small Business Advocacy Panel convened as required by section 609(b) of the Regulatory Flexibility Act (RFA) and improves the compliance flexibility options for small businesses, which is the intent of the RFA.

The only limitation we are requiring on averaging is that any new kiln, when considered alone, must meet the 0.10 lb/tsf emission limit. We do not consider this to be a significant limitation because the most likely averaging scenario involving new and existing kilns will be a facility that erects a new kiln that is designed to meet a level below the 0.10 lb/tsf emission limit. It is also appropriate to prevent a situation where a new kiln could be erected that did not perform at the same level as the best controlled facility.

We are not allowing kilns equipped with wet scrubbers for PM emissions control to be eligible for averaging. As explained more fully below, we are establishing a separate PM emissions standard for kilns equipped with wet scrubbers to avoid potentially forcing wet scrubbers to be replaced with dry systems, which could lead to less control of SO_2 emissions and atmospheric formation of sulfate PM (a type of PM2.5). These considerations, however, do not justify allowing averaging between kilns with such large differences in PM emission limits. Our intent in allowing averaging was to avoid the situation where some kilns at a facility were slightly above the 0.12 lb/tsf emission limit would have to completely replace existing PM controls for only a slight reduction on overall PM emissions. If we were to allow averaging where some of the kilns only have to meet a 0.60 lb/tsf emission limit, it could result in some kilns being allowed to emit PM at levels significantly above the levels that have been determined to be best control.

We are not allowing averaging for other emission sources. Processed stone handling operations that exhaust through stacks have an emission limit of 0.50 g/dscm. We did not see an advantage to allowing averaging for these operations because they are small compared to the PM emissions for the lime kilns. The other emission limits in the final rule are for PSH operations, and the limits are expressed as opacity. As stated previously, averaging opacity limits is not appropriate. No commenter requested averaging for PSH operations.

In the proposed rule, we defined the affected source as the collection of all of the lime kilns, lime coolers and materials processing operations. We noted that this language could be misinterpreted to imply that a new lime kiln erected at an existing lime manufacturing plant would be considered existing, not new. In the final NESHAP, we have written the language in 40 CFR 63.7082 to make our intent clear. New lime kilns, whether or not they are built at an existing lime manufacturing plant, must meet the PM emission limits for new sources.

IV. Summary of Environmental, Energy and Economic Impacts

We considered water, solid waste, and energy impacts as part of our so-called beyond-the-floor analysis pursuant to section 112(d)(2) of the CAA, which requires consideration of "non-air quality health and environmental impacts and energy requirements," as well as "the cost of achieving such emissions reduction," in deciding whether or not to adopt standards more stringent than the MACT floor. The following section summarize portions of these analyses.

A. How Many Facilities Are Subject to the Final NESHAP?

There are approximately 110 lime manufacturing plants in the U.S., not including lime production facilities at pulp and paper mills. About 30 of these 110 plants are located at beet sugar manufacturing facilities which are not subject to the final rule. We estimate that 70 percent of the remaining 80 lime manufacturing plants will be major sources co-located with major sources, or part of major sources, and, thus, about 56 lime manufacturing plants will be subject to the final rule. The other 24 facilities will incur a small, one-time cost for HCl testing to demonstrate that they are area sources.

B. What Are the Air Quality Impacts?

We estimate that all sources (not including lime manufacturing plants at beet sugar factories) in the lime manufacturing source category collectively emit approximately 10,720 tpy of HAP. These HAP estimates include emissions of HCl and HAP metals from existing sources and projected new sources over the next 5 years. We estimate that the final NESHAP will reduce HAP metals emissions from the lime manufacturing source category by about 3.6 tpy, and will reduce HCl emissions by about 235 tpy. In addition, we estimate that the final NESHAP will reduce PM emissions by about 3,880 tpy from a baseline level of 16,730 tpy, and the final NESHAP will reduce SO_2 emissions by about 6,150 tpy from a baseline of 34,650 tpy. The roughly 14 percent decrease in HCl and SO_2 emissions is the projected result of uncontrolled sources installing baghouses to comply with the final PM standards.

Table 1 to this preamble summarizes the baseline emissions and emissions reductions.

TABLE 1.—TOTAL NATIONAL BASELINE EMISSIONS AND EMISSIONS REDUCTIONS FOR BOTH NEW AND EXISTING LIME MANUFACTURING PLANTS

Emissions	PM (tpy)	HAP metals (tpy)	HCl (tpy)	SO_2 (tpy)
Baseline emissions—existing sources	13,588	13.5	8,541	30,783
Baseline emissions—new sources	3,140	2.8	2,161	3,868

TABLE 1.—TOTAL NATIONAL BASELINE EMISSIONS AND EMISSIONS REDUCTIONS FOR BOTH NEW AND EXISTING LIME MANUFACTURING PLANTS—Continued

Emissions	PM (tpy)	HAP metals (tpy)	HCl (tpy)	SO_2 (tpy)
Total baseline emissions	16,728	16.3	10,702	34,651
Emissions reductions—existing sources	3,786	3.4	235	6,147
Emissions reductions—new sources	96	0.2	0	0
Total emissions reductions	3,882	3.6	235	6,147

The final NESHAP will also result in some offsetting emissions increases. These increases are due to additional emissions that will occur at electricity generating facilities as a result of the need to generate the electricity required to operate the control equipment, and power the fans necessary to overcome control device pressure drop. We estimate these emission increases to be 0.3 tpy for PM, 12.4 tpy for sulfur dioxide (SO_2), and 6.1 tpy for nitrogen oxides (NO_X). It should be noted that these emissions increases are insignificant when compared to the emissions decreases that result from the final NESHAP.

C. What Are the Water Impacts?

We expect overall water consumption for existing sources to increase by about 1,250 million gallons per year from current levels as a result of the final rule. This estimate is based on the assumption that sources will upgrade or replace about 30 percent of the existing wet scrubbers to comply with the PM standards, and these new or upgraded scrubbers will require a higher water flow rate that the scrubbers currently installed. For new sources, we expect no additional water consumption, as we do not expect new sources to install wet scrubbers for PM control.

D. What Are the Solid Waste Impacts?

As a result of the final rule, solid waste will be generated as additional PM is collected in complying with the PM standards. We estimate that about 3,880 tpy of additional solid waste will be generated as a result of today's final rule. This estimate does not include consideration that some of this will most likely be recycled directly to the lime kiln as feedstock or sold as byproduct material (agricultural lime).

E. What Are the Energy Impacts?

We expect electricity demand from existing sources to increase by about 4.0 million kilowatt-hours/yr (kWh/yr) as a result of the final rule. This estimate is based on the assumption that sources will replace existing wet scrubbers with new, more efficient venturi wet scrubbers (that require more electricity). For new sources, we expect an increase in electricity usage of about 0.1 million kWh/yr as a result of the final rule. This electricity demand is associated with complying with the PM standards for new sources.

F. What Are the Cost Impacts?

The estimated total national capital cost of today's final rule is $28.2 million. This capital cost applies to projected new and existing sources and includes the cost to purchase and install emissions control equipment (*e.g.*, existing PM control equipment upgrades); monitoring equipment; the costs of initial performance tests; and emissions tests to measure HCl to determine whether a source is a major source, and, hence subject to the final standards.

The estimated annualized costs of the final NESHAP are $18.0 million. The annualized costs account for the annualized capital costs of the control and monitoring equipment, operation and maintenance costs, periodic monitoring of materials handling operations, and annualized costs of the initial emissions testing.

G. What Are the Economic Impacts?

It should be noted that the economic impacts and social costs described below slightly overestimate the impacts for today's action, for they reflect the higher cost estimates ($22.4 million annualized costs) associated with the proposed rule.

The results of our economic impact analysis indicate the average price per ton for lime will increase by 2.1 percent (or $1.17 per metric ton) as a result of the final standards for lime manufacturers. Overall lime production is projected to decrease by 1.8 percent as a result of the final standards. Because of the uncertainty of control cost information for large firms, we accounted for these firms as a single aggregate firm in the economic model, so it is not plausible to estimate closures for large firms. However, among the 19 small firms in this industry, we project that two firms are at risk for closure.

Based on the market analysis, we project the annual social costs of the final rule to be $20.2 million. As a result of higher prices and lower consumption levels, we project the consumers of lime (both domestic and foreign) will lose $19.7 million annually, while domestic producer surplus will decline by $0.8 million. Foreign producers will gain as a result of the final rule with profit increasing by $0.2 million. For more information regarding the economic impacts, consult the economic impact analysis in the docket for the final rule.

V. Responses to Major Comments

This section presents a summary of responses to major comments. A summary of all comments received and our responses to those comments may be found in Docket ID No. OAR 2002–0052.

Comment: In the preamble to the proposed rule, EPA requested comment on establishing a subcategory for existing kilns equipped with wet scrubbers, if it could be demonstrated factually that there will otherwise be significant environmentally counterproductive effects due to increased emissions of acid gases, increased energy use, or increased water use. Several commenters asked that a subcategory for scrubber-equipped kilns be established since wet scrubbers cannot meet the proposed PM emission limit of 0.12 lb/tsf for existing affected kilns and, therefore, existing kilns with scrubbers will have to replace them with baghouses. They also asserted that in most cases, wet scrubbers have higher annualized costs than baghouses. Therefore, even if a wet scrubber could meet a PM emission limit of 0.12 lb/tsf, facilities will opt to use baghouses due to cost considerations. This will result in an increase in emissions of HCl (a HAP) and SO_2 (a non-HAP criteria pollutant) for a nominal decrease in HAP metal emissions. In later discussions, this same commenter (the industry trade association) pointed out that SO_2 can undergo chemical reactions

in the atmosphere to form sulfate PM, which is a type of PM which is less than 2.5 micrometers in diameter (fine PM). In support of this request, one commenter provided estimates that not establishing the requested wet scrubber subcategory will result in a HAP metals emissions decrease of 3 tpy nationwide, but will result in increased emissions of 2,220 tpy for HCl and 2,475 tpy for SO_2. They also provided data indicating that 46 percent of the increased SO_2 emissions would react to form fine PM in the form of sulfates. They estimate that this would result in an increase of 1,645 tpy of fine PM emissions. Other commenters provided site-specific examples they claimed demonstrated the same effect. One commenter also claimed that the higher operating temperatures of dry systems cause metals to vaporize and pass through a particulate collector, resulting in a lower metal concentration in the captured particulate. As a result, they claimed that even though dry control equipment may reduce HAP metals emissions, the reduction will be minimal, while the release of HCl and SO_2 emissions will increase significantly. The commenter provided data which they claimed show the only conventional pollutant that will be reduced with the installation of a dry control system will be PM and, "fugitive dust emissions from a dry system could more than offset the improved particulate collection on the kiln exhausts."

Response: Standards implementing section 112(d) of the CAA must, of course, be of a minimum level of stringency, usually referred to as the MACT floor. For existing sources, this floor level of control cannot be less stringent than "the average emission limitation achieved by the best performing 12 percent of the existing sources (for which the Administrator has emissions information)." In the final rule, EPA is establishing section 112(d) standards to control emissions of HAP metals, for which PM is a surrogate. None of the commenters challenged that the level of PM emissions reflecting the average of the 12 percent of the best performing sources (for HAP metals reduction) is 0.12 lb/tsf. Notwithstanding, the commenters contended that EPA should subcategorize on the basis of the type of air pollution control device used and then separately determine the floor for each subcategory.

Although the CAA contemplates that EPA may establish subcategories when promulgating MACT standards, subcategorization typically reflects "differences in manufacturing process, emission characteristics, or technical feasibility" (67 FR 78058). A classic example, provided in the legislative history to CAA section 112(d), is of a different process leading to different emissions and different types of control strategies, the specific example being Soderberg and prebaked anode primary aluminum processes (see *A Legislative History of the Clean Air Act Amendments of 1990*, vol. 1 at 1138–39 (floor debates on Conference Report)).

Normally, it is legally impermissible to subcategorize based on the type of air pollution control device. See *Chemicals Manufacturers Association* v. *EPA*, 870 F. 2d 177, 218–19 (5th Cir. 1989) modified on different grounds on rehearing 884 F. 2d 253 (5th Cir. 1989) (rejecting subcategorization based on type of control device for purposes of the technology-based standards under the Clean Water Act, which are analogous to the CAA section 112 standards). The problem with subcategorizing on the basis of pollution control device, quite simply, is that it leads to situations where floors are established based on performance of sources that are not the best performing. For example, suppose a source category consists of 100 sources using the same process and having the same emission characteristics, but that 50 sources use control device A to control HAP emissions, and 50 use control device B which is two orders of magnitude less efficient. If one subcategorized based on the type of pollution control device, the MACT floor for the 50 sources with control device B would reflect worst, rather than best performance. Although the disparity in levels of emission control between the best-performing sources here, and the best-performing sources using wet scrubbers is not this dramatic, the difference is nonetheless evident.

Commenters provided no technical data that would justify subcategorizing. Nor are we aware of any. The commenters maintain instead that the best performing sources with respect to HAP metal reduction should not be considered "best performing" because that performance (achieved by use of FF) comes at an environmental cost, namely increased emissions of HCl and SO_2 compared to what lime kilns equipped with wet scrubbers will emit. There is some support for the idea that if an ostensibly best-performing pollution control device creates potentially significant and counterproductive environmental effects, its performance need no longer be considered best due to the counterproductive effects and could justify differentiation in the form of separate standards. Commenters suggested that the increased emissions of HCl and SO_2 will inevitably result (they maintain) if the owners of lime kilns replace wet scrubbers with baghouses. (The commenters did not suggest, however, that kilns with FF should replace them with a different type of control system to avoid these impacts; they sought the result of separate standards for FF-equipped kilns and wet system-equipped kilns.)

Although it is not clear that the commenters' starting premise, that baghouses are either needed or will be used to achieve the PM standard, is invariably correct (see Response to Comment Document where EPA responds to comments regarding the performance capabilities of venturi wet scrubber systems), EPA estimated at proposal and continues to estimate that at least in some cases, kilns would replace wet scrubbers with dry systems (for example, where it is more economical to do so).

The commenters provided no data to refute that a PM emission limit of a 0.12 lb/tsf represents best control of HAP emissions if we do not create any kiln subcategories. (We note that as part of their comments, they claimed that the higher temperatures of dry PM controls result in metals vaporizing and passing through the PM control. However, the data provided in their comment do not substantiate that claim, and studies done for the Hazardous Waste Combustor NESHAP indicate that all but a few percent of the metals in question exit the kilns as solid particulate.) However, our analysis indicates that the extent to which SO_2 and HCl emissions actually increase may have been overstated by the commenter. The EPA estimates that if all facilities currently using wet scrubbers switched to dry controls, HCl emissions would increase by approximately 1,310 tpy (vs. 1,800 tpy estimated by the commenter), and SO_2 emissions would increase by about 1,830 tpy (vs 2,900 tpy estimated by the commenter). (See the memorandum "Environmental Impacts of Decision on Best Control for Wet Scrubber-Controlled Kilns' in the docket for the final rule.) We do not regard either level of increased HCl emissions as significant. We modeled this emission increase as part of our determination (pursuant to CAA section 112(d)(4)) that emissions of HCl from lime kilns are below an HCl risk threshold within an ample margin of safety. See 67 FR 78054–78057 and the risk analysis in the docket for the final rule. Given this determination, we cannot view these HCl increases as being so significant as

to raise a question whether the best-performing sources with respect to HAP metal reductions are in fact best performing.

The commenters also cited projected increases in the criteria pollutant SO_2. They did not initially address the reductions in PM emissions resulting from the decision not to subcategorize by control device. The EPA estimates that nearly 1,080 tpy of additional PM is removed if all existing kilns were to meet a standard of 0.12 lb/tsf, of which approximately 1.6 tpy are metal HAP. Although EPA may not promulgate standards for non-HAP under CAA section 112(d), Congress expected reductions in emissions of criteria pollutants such as PM to be a benefit of the MACT program. In comparison to estimates of increased emissions of SO_2 and HCl by either the commenter or EPA, the decrease in captured PM emissions (and the attendant decrease in capture of non-mercury metal HAP) is significant.

There is a further consideration, however. Based on the available size distribution data from Compilation of Air Pollutant Emission Factors, AP–42, Fifth Edition, Volume I: Stationary Point and Area Sources, 73 percent of the PM emitted directly by lime kilns is coarse PM (PM in the size range of 10 to 2.5 micrometers). Some of the SO_2 emitted to the atmosphere undergoes chemical reactions to form fine PM. (See generally the respective Criteria Documents for PM (EPA/600/P–95/001aF–cF. 3v, 1996) and SO_2 (EPA/600/8–82–029aF–cF. 3v., 1982 and addenda)). Thus, in assessing whether some potential factor might justify a decision that kilns with dry systems are not best performing, some comparison of coarse v. fine PM emissions here is needed.

If we retain a single PM emission limit of 0.12 lb/tsf for all existing kilns, total PM emissions would be reduced (compared to separate standards for kilns with wet scrubbers and dry controls) by an additional 1,080 tpy. Of that number, 630 tpy is fine PM and 450 is coarse PM. The potential amount of increased SO_2 emissions is 1,830. A portion of this 1,830 tpy of SO_2 will be converted in the atmosphere to produce 1,270 tpy of fine PM. Therefore, the incremental impact of a single PM standard of 0.12 lb/tsf for both wet scrubbers and dry controls would be an increase of 640 (1,270–630) tpy in fine PM emissions, and a decrease of 450 tpy in coarse PM emissions. This assumes that all facilities that currently have wet scrubbers switch to dry controls, and that 46 percent of the SO_2 converts to fine PM. The 46 percent conversion estimate used by the commenter is consistent with information in the respective Criteria Documents for PM and SO_2 discussed above.

As recently summarized by EPA (68 FR 28339, May 23, 2003), scientific studies show ambient PM (both fine and coarse) is associated with a series of adverse health effects. Fine PM is associated with increases in daily mortality. Coarse PM is more strongly linked to morbidity (*e.g.* hospital admissions). See generally the respective Criteria Documents for PM (EPA/600/P–95/001aF–cF. 3v, 1996) and SO_2 (EPA/600/8–82–029aF–cF. 3v., 1982 and addenda). Therefore, it is difficult to make comparisons between the relative benefits of reducing emissions of fine and coarse PM.

The EPA views this situation as equivocal: It is unclear which of these types of performance is best since on the one hand there is reduced emissions of HAP metals and coarse PM but foregone control of SO_2 and sulfate (fine) PM, and, for kilns controlled with wet systems, the converse. In this situation, and based on these facts, which, with current analytic tools seem to us to be largely in equipoise, we are not prepared to view either wet or dry systems as best performing and instead are promulgating a separate PM standard for each.

The EPA emphasizes that considerations of risk and relative environmental benefits are normally irrelevant to MACT floor determinations (unless expressly authorized by statute, as in CAA section 112(d)(4) as applied in the final rule), since floor standards must reflect the performance of the specified number of designated sources. See *National Lime Ass'n* v. *EPA,* 233 F. 3d at 640 (considerations of cost and *de minimis* risk cannot be considered in making MACT floor determinations). We are considering these factors in the final rule solely for the purpose of evaluating the commenters' claim that sources using wet and dry control systems should be evaluated separately for MACT floor purposes due to environmental benefits and disbenefits associated with dry and dry control systems.

Comment: One commenter stated that wet scrubbers cannot meet the proposed PM emission limit of 0.12 lb/tsf. They claimed that a wet scrubber manufacturer will only guarantee this limit if less than 1 percent of the particles to be removed are less than 1 micrometer in diameter. The commenter stated that EPA assumes that the average mass diameter of particles in lime kiln gas effluent is 2 micrometers, and that this assumption is based on a single reference, and that reference was actually fugitive lime dust, not lime kiln particulate. They further claimed that volatilization and homogenous nucleation of potassium chloride particles in the gas stream generates particles in the 0.1 to 0.5 micrometers size range. "As particle size decreases below 1 micrometer, inertial compaction becomes decreasingly effective. Above 0.1 micrometers, Brownian displacement is ineffective. In the range between 0.1 and 0.5 micrometers, neither of these two main particle capture mechanisms relied upon in wet scrubber design is very effective." The commenter presented data from a recent scrubber installation to demonstrate the point.

A second commenter claimed that a scrubber performance efficiency of 99.9 percent will be required to meet the 0.0072 grain/dry standard cubic foot (gr/dscf) particulate concentration which they claimed corresponds to the proposed PM emission limit of 0.12 lb/tsf. The commenter's environmental consultant advised that it is unlikely a wet scrubber with a 35-inch pressure drop could achieve this level of performance with the facility's current inlet exhaust particulate loading.

Response: We have serious technical disagreements with this comment, as set out in the Response to Comment Background Document. However, because EPA feels that some kilns with wet systems would replace them with dry systems to comply with a PM emission limit of 0.12 lb/tsf, the potential tradeoff between coarse PM/HAP metals and fine PM/SO_2 reductions likely will still occur.

Comment: One commenter contended that EPA asserts incorrectly that lime plants will choose high-efficiency venturi scrubbers to replace their current wet scrubbers because high-efficiency venturi scrubbers have lower capital costs and sometimes lower annual costs than FF. They further stated that five of the six model kilns the Agency examined had much higher annualized costs for high-efficiency venturi scrubbers than for FF. This commenter submitted a manufacturer's cost proposal that shows a scrubber with a 35-inch pressure drop costs substantially more than EPA estimates. They conclude from this that lime kilns will be forced to use FF, with attendant increases in HCl and SO_2 emissions. Another commenter stated that the cost for the installation of a FF will be higher than EPA estimated due to the location of existing equipment in the area where the collector should be located, construction of the duct collector in a congested area with plant operations,

and accessibility to existing lime kiln dust handling systems.

Response: Regarding modeled high costs for scrubbers compared to FF, individual models may show this characteristic. However, the distribution of kiln sizes in the lime industry and the allocation of model plants to those kilns shows that estimated nationwide total annual costs for replacing existing wet scrubbers with high-efficiency venturi scrubbers is $6.6 million. The total annual cost if the existing wet scrubbers are replaced with FF is $7.0 million. So there is essentially no cost difference on a nationwide basis.

For both types of control system, costs for any specific plant may be more or less than the value shown by the model used to estimate nationwide cost. The plant is expected to buy whatever system its management believes is in the best business interests of the owners, but in the aggregate, estimated annual cost for control systems is about the same whether all plants replace existing equipment with venturi scrubbers or with FF. It is for this reason that EPA is finding that at least some kilns would replace wet systems with dry if required to meet a uniform PM limit of 0.12 lb/tsf.

There were two comments where specific facilities claimed that their costs will be higher than EPA estimated in our model plant analysis. One was a vendor's actual cost proposal for a scrubber with 35-inch w.g. pressure drop, and one was for installation of a FF. Our costs are based on model plants developed from industry responses to questionnaires. Given that we do not have site specific information on every facility, this is a reasonable approach to calculating costs. It is always possible that there are site specific factors that will result in any one facility having higher or lower costs than costs estimated using model plants. Our methodology is based on estimates of basic equipment costs, and factors to calculate direct and indirect capital costs that constitute total capital investment. Unit costs are applied to labor, utilities, waste disposal, and other operating and maintenance costs to obtain direct annual costs. Indirect annualized costs based on capital recovery and other service charges are also estimated and added to direct annual costs to obtain total annual cost. Costing based on a model plant gives an estimate that can be included in an aggregate estimation of costs across all model plants weighted by their representation in the nationwide population. This approach necessarily will not address each specific case found in industry. Therefore, one facility's reported costs not corresponding to our model plant costs does not indicate that our costs are underestimated. We also note that, except for a comment on flue gas flow which we previously addressed, the commenters did not take exception to the basic equipment costs, energy costs, or cost factors used by us in our model plant assessment of the rule's cost analysis as proposed.

One commenter also mentioned the cost resulting from the location of existing equipment and plant congestion. We have accounted for these costs by including factors for demolition and salvage of existing equipment that will have to be replaced by the new control system. A retrofit factor is also included to account for difficulties in replacing existing equipment with new equipment in an existing plant (see "Costing Algorithm for Venturi Scrubber on Lime Kilns with Existing Scrubbers").

Comment: Several commenters claimed that not establishing a subcategory for scrubber-equipped kilns will adversely affect small businesses. They stated that the annualized cost of upgrading all scrubbers is $9.45 million, based on EPA's estimate of total annualized costs. According to the commenter, EPA predicts that upgrading these kilns will reduce HAP metals by 3.1 tpy, resulting in a cost effectiveness of $3.0 million/ton of metal HAP. The commenter stated that EPA's assumption that 30 percent of lime plants are area sources and won't be affected by the final rule reduces the removal of metal HAP attributed to upgrading scrubber-equipped kilns to 2.2 tpy (although the commenter stated that EPA has provided no support for the assumption that 30 percent of lime plants are area sources).

Another commenter noted that EPA's estimated annualized cost for the commenter to install FF is $2,236,000, which equates to $9.3 million per ton of particulate HAP control.

Response: Section 112 of the CAA precludes us from considering cost when calculating MACT floors. Therefore, none of the cost issues discussed above are sufficient to support a separate subcategory for existing kilns with wet scrubbers, or otherwise support a different standard.

Though costs cannot be a consideration here, our estimate shows a cost of $6.6 million to upgrade all scrubbers to meet the rule as proposed, versus the $9.45 million figure provided by the commenter. Our estimate assumed 70 percent of kilns are located at major sources, and 90 percent of scrubbers would require an upgrade. This was probable an overly conservative way to estimate costs. In reality, it is reasonable to assume that, on average, the existing scrubbers have only 50 percent of their useful life remaining. Because we allocated all of the capital cost of a new scrubber to the rule, our costs are conservative.

However, we have written the final rule to allow separate PM emission limits for kilns with wet versus dry controls. Therefore, the premise of the comment, that not subcategorizing by control device will adversely affect small business, is now moot. In the final costs, we estimate that only 30 percent of existing wet scrubbers will require upgrade or replacement. As noted previously, because we are allocating all the capital replacement cost to the final rule, our costs are still conservative.

Comment: One commenter objected to EPA's rationale of using PM as a surrogate for controlling toxic metals emissions. The commenter stated that if EPA has sufficient data to indicate that toxic emissions from lime kilns are an ambient air problem, then the regulation should focus on reducing gaseous emissions such as HCl.

Response: By limiting emissions of PM, the final rule will reduce emissions of non-volatile and semi-volatile metal HAP, which are a subset of PM, and are necessarily removed when PM is removed by air pollution control equipment. As stated in the preamble to the proposed rule, air pollution controls for HAP metals are the same as the PM controls used by the lime manufacturing industry, *i.e.*, FF, ESP, and wet scrubbers. These controls capture non-volatile and semi-volatile metal HAP non-preferentially along with other PM, thus making PM an acceptable indicator of these HAP metals. Particulate matter control technology, thus, indiscriminately captures HAP metals along with other particulate. Consequently, it is an appropriate indicator when the technical basis of the standard is performance of back-end particulate control technology.

Another reason for using a surrogate is the lower cost of emissions testing and monitoring for PM as compared to the cost of emissions testing and monitoring for multiple metal HAP that will be required to demonstrate compliance. Because PM control devices control metal HAP to the same efficiency and because of the associated cost savings associated with emissions testing and monitoring, the Agency has promulgated several other NESHAP where PM is a surrogate for non-volatile and semi-volatile metal HAP.

Regarding the commenter's second point concerning regulating emission of

HCl, the preamble to the proposed rule explained in detail the Agency's decision not to regulate HCl emissions from lime kilns. To summarize that discussion, the EPA determined that, under the authority of section 112(d)(4) of the CAA, no further control was necessary because HCl is a threshold pollutant, and HCl levels emitted from lime kilns are below the threshold value within an ample margin of safety to humans and to the environment, and considering the possibility that facilities that currently have wet scrubbers for PM emissions control may switch to dry PM controls. (The CAA section 112(d)(4) analysis also considered the potential for environmental harm posed by HCl emissions from these sources.)

Comment: One commenter stated that the PM emission limit for new lime kilns should be 0.12 lb/tsf, the same as the emission limit for existing kilns. The commenter noted that the proposed limit is based on two 3-hour test runs at one plant. According to the commenter, EPA recognized in the proposal preamble that 3-hour test results are just a snapshot in time and should not be used as the basis for establishing an enforceable standard, and that EPA expressly rejected such an approach when establishing the MACT floor for existing kilns. The commenter stated that data in the docket shows that 0.10 lb/tsf is not continuously achievable by lime kilns, and EPA should not establish a separate PM limit for new lime kilns.

Another commenter stated 0.10 lbs PM/ton stone feed for a new kiln is too restrictive, and EPA does not have adequate data to determine that a FF or scrubber-equipped kiln could achieve this low level of emissions on a sustained basis.

Response: The approach to which the commenter refers whereby EPA rejected the use of the "average or mean" in establishing the MACT floor for existing sources did not refer to the average of individual test runs as implied by the comment. Rather, it refers to EPA's decision to use the median (instead of a simple mean) of the top-performing 12 percent to set the MACT floor. Furthermore, as an indication of the achievability of the technology over the long term, EPA chose to rely on State-imposed permit limits (in conjunction with emissions test data showing that those permit limits are representative of actual performance) in arriving at the MACT floor emission limit.

In test data cited by the commenter, the three-run averages for two sets of emissions tests for the kiln used to set the MACT new PM limit are below (0.079 and 0.091 lb/tsf) the proposed PM limit of 0.1 lb/tsf for new lime kilns. The commenter noted that one of the test runs was at the proposed 0.1 lb/tsf PM limit and that the proposed 0.1 lb/tsf limit was, therefore, inappropriate.

It is reasonable for EPA to establish a standard based on the same methodology that will be used for complying with that standard. See, *e.g.*, *Chemical Waste Management* v. *EPA*, 976 F. 2d 2, 34 (D.C. Cir. 1992). We note that compliance with emission limits is normally based on a three-run average which can accommodate occasional elevated results as long as the average is at or below the established limit. Furthermore, the emission test results for five of the six top performing kilns were 0.0091, 0.013, 0.026, 0.027, and 0.091 lb/tsf. These results adequately account for operating variability and indicate that any new kiln using well designed and operated control devices can meet the 0.1 lb/tsf limit. Based on this, we see no basis to state that a 0.10 lb/tsf PM emission limit is not achievable or appropriate.

Comment: One commenter claimed that the proposed NESHAP will require the replacement of their two wet scrubbers with baghouses. They claim there is no space for FF retrofit, and that converting to baghouses will trigger prevention of significant deterioration (PSD) nonattainment review due to increased SO_2 emissions.

Response: While we recognize that a facility may (or may not) have site-specific space restrictions, we have, on average, adequately accounted for these factors by incorporating cost analysis factors to account for retrofit and equipment demolition. We have also allowed a facility 3 years to comply with the final NESHAP. This should allow sufficient time for facilities to replace or upgrade existing equipment during scheduled outages. The averaging provisions in the final NESHAP also provide facilities with additional flexibility concerning replacement or upgrade of existing equipment.

Requiring an existing facility with a wet scrubber to upgrade their PM controls to meet 0.12 lb/tsf will not necessarily trigger new source review (NSR). First, as previously discussed, the facility can choose to replace or upgrade their existing scrubbers, which means there will be no SO_2 (or other collateral pollutant) emissions increase to trigger NSR requirements. Second, if they choose to use a baghouse, they may be able to avoid NSR by qualifying for a pollution control project exclusion (67 FR 80186).

Comment: One commenter stated the particulate matter emission limits proposed for lime manufacturing kilns and coolers do not represent the maximum achievable control technology and are much less stringent than the limits actually required by the CAA. The commenter noted that the proposed rule discredits performance test data which demonstrate that particulate emissions of less than half the proposed standard for existing plants are routinely achieved by claiming they may not be consistently achievable, but EPA has provided no statistics. The commenter claimed that EPA has chosen instead to base the standards on permit limits, but has selectively eliminated from consideration those permits calling for stringent controls which are currently in place. The commenter gives the examples of Continental Lime which is in compliance with a best available control technology (BACT) limit for PM emissions of 0.05 lb/ton limestone, and Western Lime which is in compliance with a permit limit for PM emissions of 0.06 lb/ton limestone.

The commenter noted that if performance data do not represent achievable emission limits, EPA should consider design standards based on air-to-cloth ratios. The commenter also stated the proposed particulate emission limits for grinders, conveyors, and bins are also based on data which overstate emissions (in nearly all cases) and do not represent MACT. The commenter stated EPA should examine actual performance test data test or actual permit limitations.

Response: The EPA reviewed data on the kilns referred to in the comment. The permit limits cited by the commenter were apparently reported on the EPA Technology Transfer Network (TTN) website. The EPA contacted the Montana Department of Environment and found that the limit for one of these kilns is actually 0.5 lb/tsf and not 0.05 lb/tsf as reported on the TTN website. Also, the complete permit for the other kiln mentioned was located on the Wisconsin Department of Natural Resources website, which showed the permit limit for the kiln in question as being 0.12 lb/tsf rather than the 0.058 lb/tsf as reported on the TTN website. Based on the correct PM permit limits for these two lime sources, EPA's conclusions regarding MACT PM limits for existing and new sources are still appropriate. As the response to the previous question shows, these permit limits are also representative of actual performance.

The floor for grinders, conveyors, and bins is based on the existing new source performance standards (NSPS). We have no data to support a different floor.

Comment: One commenter stated that opacity does not correlate to PM mass emissions. The commenter noted the EPA has stated on several occasions that a COMS can determine opacity, but a COMS cannot determine PM emissions. And if particle density changes but the particle size remains the same, opacity will not change while the mass emission rate will change in proportion to the density change. The commenter agreed that PM is a technically sound surrogate for HAP metals, but disagreed that opacity serves as a surrogate for HAP metals as stated in the proposal preamble.

The commenter stated that a COMS can not be used to evaluate the continuous compliance status of kilns, coolers, or PSH operations that have a mass emission limit. The commenter was not aware of any data that show a definitive link between opacity and mass emissions except in very limited and controlled situations. In addition, the commenter did not understand how a 15 percent 6-minute average opacity limit can be correlated to a 3-hour rolling average PM emission limit of lb/ton of stone feed.

The commenter stated a better alternative is to use a PM continuous emissions monitor system (CEMS) that measures PM mass emissions in units that are directly related to the mass emission limit. The commenter noted that EPA's stated reluctance to use a PM CEMS in the absence of performance specifications is inconsistent with the remainder of the standard, since the use of BLDS and a PM detector are proposed without performance specifications. The commenter also noted that an extractive type PM CEMS designed to operate in wet exhaust streams can provide a direct indication of compliance for wet scrubbers.

Response: We agree that a COMS cannot directly measure PM emissions. However, a properly calibrated and maintained COMS is sufficient to demonstrate long term PM control device performance. The purpose of the monitor is to demonstrate with reasonable certainty that the PM control device is operating as well as it did during the PM emission test used to demonstrate compliance.

We also note that PM CEMS are significantly more expensive to purchase and maintain than a COMS or PM detector. Also, PM CEMS measure concentration, while the basis of the standard is mass per unit of feed input. Because the standard is not based on PM concentration, and no PM CEMS are currently installed and operating on the best controlled kilns, we have no data to develop a PM standard based on the use of PM CEMS.

Comment: Several commenters stated EPA Method 9 in Appendix A to 40 CFR part 60 should be allowed for a positive pressure baghouse. According to one commenter, the bag leak detector guidance document recognizes that requiring BLDS will be very costly, and stated that the document does not apply to this type of baghouse (EPA's "Fabric Filter Bag Leak Detection Guidance" (EPA–454/R–98–015, September 1997, pg 2). This commenter gave the example of a small business that will be required to have a bag leak detector for each of the eight compartments in its baghouse under the final rule, and whose title V permit allows Method 9 monitoring for the baghouse. According to one commenter, the associated costs of installing a separate bag leak detector or PM CEM sensor on each discharge or new common stack could easily exceed $1,000,000. The commenter noted that, "baghouse pressure differential readings, together with fan amperage and daily visible emission notations will provide the necessary performance assurance with ample and timely indication of baghouse failures or malfunctions."

Response: We acknowledge that there are precedents for the use of alternatives to COMS, BLDS, and PM detectors on positive pressure baghouses that have multiple stacks. The NESHAP for portland cement, an industry that has similarities to the lime manufacturing industry, allows the use of opacity monitoring using Method 9 in Appendix A of 40 CFR part 60 for kilns having control devices with multiple stacks. Based on this analogous situation, we have decided that existing lime kilns controlled by control devices having multiple stacks will have the option of using Method 9 in Appendix A of 40 CFR part 60 for daily opacity monitoring.

Comment: One commenter stated that a single excursion from operating parameters recorded during a 3-hour compliance test should not constitute a violation. The commenter stated that, "the new source performance standard (NSPS) kilns are the lime industry's top performers, and their monitoring regime should be the benchmark against which monitoring under the MACT rule is prescribed." Since a violation under the NSPS does not occur unless the parameter is greater than 30 percent below the rates established during the performance test, the commenter recommends a 30 percent "buffer" between the permit limit and the 3-hour average recorded during the compliance test. Or, "alternatively, like the Pulp and Paper MACT, the rule should specify that a violation of the standard does not occur unless 6 or more 3-hour average parameter values are recorded outside the established range within the 6 month reporting period."

The commenter noted that EPA's compliance assurance monitoring (CAM) guidance document states, "Use of only 3 hours of parameter data may not be sufficient to fully characterize parameter values during normal operation." The commenter also noted that language in the proposal preamble cautions against developing enforceable emission standards based on 3-hour compliance tests. The commenter also noted that none of the CAM plans for scrubbers base a permit limit on the 3-hour average reading that occurred during a compliance test, and two of the plans allow a 15 percent buffer to account for variability.

The commenter provided gas pressure drop readings and concurrent PM test data for three kilns, and noted that for each of them, gas pressure drop during one or more 1-hour runs was below the proposed 3-hour average. The commenter stated that under the proposed rules, these readings below the 3-hour average would constitute a violation.

The commenter also stated the final rule should provide an exemption from the PM emission limit during performance testing. The commenter stated, "plant operators may need to conduct a series of performance tests to determine the minimum pressure drop and liquid flow rate levels that will assure compliance for each set of operating conditions used for a particular kiln. Results for these tests are not available until post-test laboratory analyses are completed."

Response: Each owner/operator is required to define the compliance parameters to be monitored in their OM&M plan. Then, during the initial performance tests, they are required to monitor and establish the value or range of the parameters. The 30 percent buffers referred to by the commenters refer to NSPS, which, in general, predate NESHAP. In developing various NESHAP, we determined that the 30 percent buffers were not necessary. For this reason, most NESHAP specify that exceeding an operating parameter over the specified averaging period is a deviation. The commenters also mentioned the Pulp and Paper MACT. However, the Pulp and Paper MACT would appear to be unusual in regards to the allowance for exceedances. The commenters did not provide any rationale why we should add provisions similar to the Pulp and Paper MACT

when other MACT standards do not allow exceedances.

The commenters also referred to a statement in the CAM proposal and guidance document. The CAM rule only applies to emission limitations or standards proposed by the Administration on or before November 15, 1990. Monitoring and control technology have progressed significantly since the technology available when these older rules were developed. Also, facilities have 3 years to install control equipment and learn their processes' operating parameters and set up compliance test conditions that result in operating limits that both result in compliance with the PM emission limit and can be met on a continuous basis. For these reasons, we do not agree that the CAM applies here.

Most operating parameters are required to be calculated as 3-hour averages. This is generally consistent with performance test times. Thus, a 1-hour period of insufficient gas pressure drop will not, by itself, be considered an excursion.

Facilities must complete their performance tests prior to the compliance date. Therefore, they are not required to be in compliance with the emission limits during testing, and there is no reason to provide an exemption.

Comment: In response to EPA's request for comments on the appropriate opacity limit (EPA was considering an opacity limit of 10 to 15 percent), several commenters stated that the opacity standard for lime kilns should be 15 percent, as proposed. One commenter provided additional data in the form of opacity data from four kilns. According to this commenter, the opacity data for selected kilns are not reliable for establishing an opacity standard because they are from visible emission data collected for brief periods of time under poor viewing conditions.

Response: Based on information considered prior to proposal as well as additional information supplied by commenters, EPA is retaining the 15 percent opacity limit for sources controlled using FF and ESP. Information considered by EPA in proposing the opacity limit suggested that the average opacity permit limit of the top performing lime kilns was 15 percent. Information provided by the commenters supporting the proposed opacity limit indicated that opacity levels may vary between 10 and 15 percent even for well operated and maintained kilns. No information was provided supporting a more stringent, or more lenient opacity limit than the one proposed. Therefore, EPA is retaining the proposed 15 percent opacity limit in the final NESHAP.

Comment: Several commenters requested that the final rule specify a time period during which opacity readings greater than 15 percent are not considered a violation. One commenter requested at a minimum that the final rule state that opacity readings greater than 15 percent for less than 1 percent of the reporting period are not considered to be a violation.

Another commenter noted that they operate two of the top six performers in the industry, and it is impossible not to have occasional readings that would be violations if there were no allowances for them. The commenter's State permits allow 1 percent of operating time per quarter to exceed the opacity limit.

Another commenter suggested other time frames for allowable exceedances. Two commenters referred to the Pulp and Paper MACT as an example of an existing rule with such an exemption.

Response: We find no justification to support allowing excursions above the 15 percent opacity limit. Well operated and maintained control devices will typically operate at opacity levels much lower than 15 percent. Other NESHAP, including the portland cement NESHAP, contain opacity limits for which no exceedances are allowed. Data from limes kilns, cited below, support this. Because we have industry specific data, the Pulp and Paper MACT example is not applicable.

In response to the commenters' concerns about occasional excursions above the opacity limit, there are times when opacity levels above 15 percent are not considered to be a violation of the final rule. These include periods when a control device malfunctions, or is in a period startup or shutdown (as long as the facility follows its SSMP). If opacity levels exceed 15 percent as a result of a control device startup, shutdown, or malfunction, it will not be considered a violation of the opacity limit (see § 63.7121(b)of the final rule). The same is true during periods when a monitoring system malfunctions or is being calibrated (see § 63.7120(b) of the final rule).

Information supplied by one commenter showed opacity readings for several kilns over several days. Nearly all of the readings were well below the 15 percent limit with just a few exceptions for each kiln. The commenter who supplied the opacity readings was asked to supply additional information regarding the opacity excursions above 15 percent. In each instance, the high opacity reading was explained by a startup, shutdown, or malfunction of the control device or by a malfunctioning monitor or a monitoring system that was undergoing calibration, none of which will be considered a violation of the opacity limit as long as the facility follows its SSMP. Well run and maintained control devices can meet the opacity limit and the occasional excursion above the limit due to control device or monitoring system malfunction will not be a violation of the operating limit.

Comment: One commenter claimed that the economic impacts analysis (EIA) neglected to include some significant costs of implementing the rule, including the cost of dismantling existing equipment, lost sales during downtime, and the cost of re-hiring personnel after plant modifications if scrubbers must be replaced. The commenter also noted that maintenance and supervisory personnel currently do not work evening and weekend shifts, but will likely be required in the event of failure of the recommended monitoring equipment.

A second commenter stated EPA's estimated $1.17 per ton of lime cost estimate for control costs is low, and the cost to a typical lime producer will be significantly higher. In particular, the commenter noted that the additional power required for high pressure drop scrubbers alone would be approximately $1.30 per ton of produced lime. In addition, EPA's estimated equipment costs appear to be low.

Response: As discussed in the response to comments regarding a separate subcategory for scrubbers, estimated implementation costs used for the EPA model plants include costs for demolition of existing equipment and credits for salvage value. Because plants have a 3-year period in which to comply with the final NESHAP, it is expected that scheduled downtime will be used for disconnecting an existing scrubber and connecting a new scrubber. As a general practice, building a new scrubber while the existing scrubber remains in operation is preferable to taking the associated kiln out of service for an extended period of time and losing production from the kiln. The plant is expected to use its labor force in the manner normally found for planned downtime. Such labor costs (or savings) would not be attributable to compliance with the final NESHAP.

Power costs for new scrubbers are calculated incrementally, *i.e.*, costs are estimated for the difference between 35-inch. w.g. (new scrubbers) and 14 inch w.g. (existing scrubbers). For individual model kilns, summing the power costs and dividing by the model's production rate gives estimated incremental power

costs ranging from $0.82 to $1.47/ton of lime. On a nationwide basis, aggregating the model kiln costs apportioned among the affected kiln population provides average costs as estimated by EPA.

Comment: One commenter claimed that the EIA is seriously flawed because it assumes lime producers can pass control costs through to consumers. The commenter maintained that lime producers cannot raise prices. The reasons cited included a highly competitive market due to overcapacity, competition from unregulated sources, the existence of competitive substitutes for most key markets, and significant market resistance. The commenter also claimed that recent history proves that prices cannot be increased. Finally, the commenter stated that because the price increase assumed by EPA is erroneous, EPA's prediction that only two lime plants will close seriously understates the impact. One other commenter also stated that they could not increase prices.

Response: We conducted an economic analysis primarily as part of the Executive Order 12866 analysis and partly to ascertain impacts on small businesses for purposes of compliance with the Small Business Regulatory and Enforcement Fairness Act (SBREFA). The analysis is also used to determine economic impacts of any beyond-the-floor considerations under section 112(d)(2) of the CAA. However, as provided by section 112(d)(3), and confirmed by the D.C. Circuit in the *National Lime* case, considerations of costs are simply irrelevant to determinations of MACT floors. Thus, EPA did not consider any of the economic analysis as part of its floor determinations, and that context should be understood in all of the responses to comments relating to the Agency's economic impact analysis.

The fact that many lime plants are currently operating at less than full capacity implies that their supply curves should be relatively elastic (flat) at current production levels because lime producers can fairly easily change output without running into capacity constraints.

Assuming that the lime industry is very competitive (as stated by the commenter) and has substantial overcapacity implies that the industry marginal cost curve (and the market supply curve) should be relatively flat at current production levels. To the extent that the costs of the lime manufacturing MACT standards increase the marginal costs of lime production, having a very elastic (flat) supply curve is a textbook case where the majority of the costs are passed on to consumers. A highly competitive market implies, by definition, that individual producers cannot unilaterally increase their prices without losing most, if not all, of their customers. It does not imply that the market price will not increase in response to a general increase in the cost of lime production due to environmental regulations.

It is certainly true that foreign lime suppliers (including suppliers located in Mexico) gain because the final rule applies only to domestic lime producers. However, imports of lime account for an extremely tiny share of the lime market prior to the final rule (about 1 percent nationally), and even a fairly large percentage increase in imports shows up as a very small change in absolute terms. High transportation costs are expected to prevent significant replacement of domestic lime with imported lime.

To examine the historical supply responsiveness in the lime market, we estimated the supply elasticity for lime using data from 1983–2001. These estimates capture the overall change in the quantity of lime supplied in response to a change in the real (inflation-adjusted) price of lime, including any entry or exit of captive suppliers from the market. Based on estimates obtained from the econometric model, the domestic lime supply elasticity was 1.24 at the average price and quantity for the period and 0.98 using the lime price and quantity for 1997, the baseline year for the EIA. The value for the baseline year implies that a 1 percent increase in price would lead lime producers to increase their lime production by 0.98 percent, other things being equal.

For the lime price to remain constant due to entry into the commercial market by captive suppliers, that entry would need to be sufficient that it led to the market supply curve being perfectly elastic. There is no evidence for a perfectly elastic market supply curve due to large-scale entry based on historical estimates of the responsiveness of lime supply to changes in real price.

There are substitutes for lime in many of the markets in which it competes, such as crushed limestone, caustic soda, soda ash, and other products. However, unless the alternatives are perfect substitutes, this does not imply that the price of lime will not increase in response to an increase in production costs.

The fact that lime prices have not increased in recent years despite plant closures and increases in real prices in no way implies that those events do not exert upward pressure on prices. The relevant comparison is the price with and without those events, not before and after they occur. It is expected that prices would have been even lower if there had not been closures and increases in input prices.

As outlined in the responses to these comments, there is no evidence to support the claim that the assumption that lime price will increase is erroneous, and that the estimated economic impact of the final rule is understated.

Comment: One commenter stated that the EPA economic model for the lime market assumes a nationally perfectly competitive market, but lime prices are primarily dictated by large producers who sell capacity regardless of price.

Response: This comment suggests that large lime producers have market power and, therefore, face a downward sloping demand curve and have some ability to set prices. If large lime producers do possess market power, then profit-maximizing behavior would imply that they would restrict output below the levels expected under perfect competition in order to increase market price to the point that their marginal revenue is equal to their marginal cost. The large producers may have lower marginal costs such that the resulting price makes it difficult for the small producers that take the market price as given to remain in business. However, the presence of market power in the lime industry would tend to increase prices relative to the perfectly competitive case, not decrease them.

Comment: One commenter was concerned over EPA's use of the Acute Exposure Guideline Level (AEGL) in assessing the health risk associated with HCl. While not directly objecting to the conclusions reached by EPA, the commenter noted that the intended use of the AEGL, according to the National Research Council, is in conjunction with "once in a lifetime" exposures for emergency exposures ranging from 10 minutes to 8 hours. Because the AEGL values are intended to be used in conjunction with a single lifetime exposure, they can be higher than short term limits recommended for populations with repeated exposures. It is not clear in the description of the industry analysis, if in their use of AEGL they were contemplating a once in a lifetime exposure or whether exposures would be occurring repeatedly. The commenter stated that EPA should explicitly state how they believe AEGL values should be used in their risk assessment process and what are the possible exposure levels to the public. The commenter was also troubled by the use in the rationale of

both the reference concentration (estimated daily exposure that over a lifetime is not likely to result in significant noncancer effect in humans) and the AEGL (once in a lifetime exposure).

The commenter asked that EPA clarify their position on the use of AEGL values for environmental risk assessments, and whether its use represents a "reasonable methodology" and "consistent with EPA methodology" as claimed in the preamble.

Response: In order to evaluate short-term exposure to hydrochloric acid, EPA reviewed the available acute dose-response values for this compound. Among these, the Calliope reference exposure level (REL) and AEGL–1 values (2.1 and 2.7 mg/M^3, respectively) were found to be the most health protective. Since these benchmarks were effectively the same, and AEGL values are products of a Federal effort in which EPA participates, we gave priority to the AEGL. Therefore, the AEGL–1 selected for analysis represented the most appropriate value.

Comment: Several commenters stated the final rule should not require HCl testing of all kilns. The commenters note that in recent years, many lime plants have been forced to idle or infrequently operate kilns at operating plants due to increased fuel cost, reduced customer demand, *etc.*, and start up of every kiln for the purpose of conducting HCl testing will require significant expenditures. This will also result in PM and other emissions that otherwise would not be generated. As a result, it was requested the final rule be written to provide state agencies with the discretion to determine whether testing of all kilns at a lime plant is necessary in order to demonstrate that a plant is an area source.

Response: In the final NESHAP, we have included language allowing the permitting authority discretion concerning whether idle kilns must be tested.

Comment: Several commenters stated that performance testing should be conducted under "representative" conditions rather than under the "highest production level reasonably expected to occur." One commenter noted inconsistencies between what is proposed in Table 4 in the proposed rule and what is required under the General Provisions at 40 CFR 63.7(e)(1). The EPA has recently amended the Cement MACT to fix similar inconsistencies, and the commenter suggested the lime MACT be similarly revised.

Response: We have written the requirement in the final rule to require testing under representative conditions, which is in agreement with the language in the General Provisions.

Comment: Two commenters stated the final rule should provide a risk-based exemption from the entire rule (not just from HCl standards) for plants at which modeled risks are below health based thresholds. One commenter noted that EPA recently solicited comment on providing risk-based exemptions in proposed MACT standards for several source categories. This commenter strongly supported the view that such exemptions should be provided in MACT standards that impose substantial costs while achieving negligible reductions in risks to public health and stated the lime MACT fits this description.

Response: Other than the decision to not regulate emissions of HCl from lime manufacturing, EPA did not consider and did not request comments on providing risk-based exemptions for lime manufacturing facilities. Although EPA is aware that risk-based exemptions were being discussed in other proposed rules, no decisions have been made by the Agency regarding risk-based exemptions and application to industry groups or individual plants. Due to the uncertainty of how these exemptions would be structured, it would not be appropriate to include these site specific risk-based exemptions in the final rule. Including such a substantive statement change in the final rule without allowing the general public an opportunity to comment would be a violation of the notice and comment requirements found in section 307(d) of the CAA, especially in light of the fact that their inclusion in other proposed rules have generated significant negative public comment.

Comment: One commenter stated the benefits analysis is based on inaccurate assumptions, and presented conclusions regarding reductions in metal HAP that are greatly overstated.

The commenter also claimed that the emission factor for existing uncontrolled stone handling operations is also overstated; it was derived using AP–42 emission factors with "E" ratings. The commenter stated that it presented to the SBREFA Panel a more reliable emission factor for these units that is rated "C" and was revised in 1995.

In addition, the commenter claimed that EPA overstated the amount of new capacity and the emissions from new rotary kilns. The commenter stated, "EPA should either reflect (our) estimates in the preamble to the final rule, or provide a reasoned response to our comments that EPA's estimates are overstated" * * * we believe the best estimate of metal HAP reductions is 3.5 tons (7,000 pounds) per year. Based on the 56 lime plants predicted to be subject to the MACT rule, this translates into an annual reduction in metal HAP per lime plant of 124 pounds.

Response: We reviewed the new information on PM emissions presented by the commenter, as well as their calculations of baseline emissions and emission reductions resulting from the final rule. In the case of baseline emissions from kilns and coolers, the information provided by the commenter is a more reasonable estimate than the emission factors we used at proposal. Therefore, we revised our baseline PM emissions estimates to incorporate this new information. In the case of emissions from PSH operations, we based our emission estimates on a mass balance approach. This method is reasonably accurate, and we did not revise baseline emission estimates for PSH operations. This resulted in our estimate of metal HAP emission reductions to be changed to 14.4 tpy, compared to an estimate of 23 tpy.

V. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we are required to determine whether the regulatory action is "significant" and, therefore, subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may:

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

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

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

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

Pursuant to the terms of Executive Order 12866, OMB notified EPA at proposal that it considered this rulemaking a "significant regulatory action" within the meaning of the Executive Order. The EPA submitted the

proposed rule to OMB for review. Changes made in response to OMB suggestions or recommendations are documented and included in the public record. The OMB has informed EPA that it considers this final action nonsignificant. Therefore, it is not subject to further OMB review. The OMB was briefed on the responses to major comments, and was provided a copy of the regulation and preamble prior to publication. However, they did not request any changes in the final rule.

B. Paperwork Reduction Act

The information collection requirements in the final rule have been submitted for approval to the Office of Management and Budget under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* We have prepared an Information Collection Request (ICR) document (2072.01), and a copy may be obtained from Susan Auby by mail at U.S. EPA, Office of Environmental Information, Collection Strategies Division (2822T), 1200 Pennsylvania Avenue, NW., Washington DC 20460, by e-mail at *auby.susan@epa.gov,* or by calling (202) 566–1672. You may also download a copy off the Internet at *http://www.epa.gov/icr.* The information requirements are not effective until OMB approves them.

The information requirements are based on notification, recordkeeping, and reporting requirements in the NESHAP General Provisions (40 CFR part 63, subpart A), which are mandatory for all operators subject to national emission standards. These recordkeeping and reporting requirements are specifically authorized by section 114 of the CAA (42 U.S.C. 7414). All information submitted to the EPA pursuant to the recordkeeping and reporting requirements for which a claim of confidentiality is made is safeguarded according to Agency policies set forth in 40 CFR part 2, subpart B.

The final rule will require development and implementation of an OM&M plan, which will include inspections of the control devices but will not require any notifications or reports beyond those required by the NESHAP General Provisions (40 CFR part 63, subpart A). The recordkeeping requirements require only the specific information needed to determine compliance.

The annual monitoring, reporting, and recordkeeping burden for this collection (averaged over the first 3 years after the effective date of the rule) is estimated to be 7,800 labor hours per year, at a total annual cost of $621,600. This estimate includes notifications that facilities are subject to the rule; notifications of performance tests; notifications of compliance status, including the results of performance tests and other initial compliance demonstrations that do not include performance tests; startup, shutdown, and malfunction reports; semiannual compliance reports; and recordkeeping. Total capital/startup costs associated with the testing, monitoring, reporting, and recordkeeping requirements over the 3-year period of the ICR are estimated to be $1,000,000, with annualized costs of $377,900.

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.

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 our regulations are listed in 40 CFR part 9 and 48 CFR chapter 15. When the OMB approves the information collection requirements of the final rule, the EPA will amend the table in 40 CFR part 9 of currently approved ICR control numbers issued by OMB for various regulations.

C. Regulatory Flexibility Analysis

The EPA has prepared a final regulatory flexibility analysis (FRFA) in connection with the final rule. For purposes of assessing the impacts of today's final rule on small entities, a small entity is defined as (1) a small business as a lime manufacturing company with less than 500 employees; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. Despite the determination that the final rule will have no significant impact on a substantial number of small entities, EPA prepared a Small Business Flexibility Analysis that has all the components of a FRFA. An FRFA examines the impact of the final rule on small entities. The Small Business Flexibility Analysis (which is included in the economic impact analysis) is available for review in the docket, and is summarized below.

It should be noted that the small business impacts described below slightly overestimate the impacts for today's action, for they reflect the higher cost estimates ($22.4 million) associated with the proposed rule.

Based on SBA's size definitions for the affected industries and reported sales and employment data, EPA identified 19 of the 45 companies owning potentially affected facilities as small businesses. Eight of these 45 companies manufacture beet sugar (which will not be subject to the final NESHAP), three of which are small firms. Further, an additional 3 of the 19 small companies will not be subject to the final NESHAP because they do not manufacture lime in a kiln (*e.g.*, they are only depot or hydration facilities), and/or we do not expect them to be major sources. It is, therefore, expected that 13 small businesses will be subject to the final NESHAP. Although small businesses represent 40 percent of the companies within the source category, they are expected to incur 30 percent of the total industry annual compliance costs of $18.0 million.

The economic impact analysis we prepared for the final NESHAP includes an estimate of the changes in product price and production quantities for the firms that the final NESHAP would affect. The analysis shows that of the facilities owned by potentially affected small firms, two may shut down rather than incur the cost of compliance with the final rule. Because of the nature of their production processes and existing controls, we expect these two firms will incur significantly higher compliance costs than the other small firms.

Although any facility closure is cause for concern, it should be noted that in general, the burden on most small firms is low when compared to that of large firms. The average annual compliance costs for all small firms is $358,000, compared to $592,000 per year for large firms. If the two small firms expected to incur significantly higher control costs are excluded, the average annual compliance cost for the remaining firms

will be $205,000, which is much less than the average control costs for large firms.

The EPA's efforts to minimize small business impacts have materially improved today's final rule. Economic analysis of provisions under earlier consideration prior to the rule's proposal indicated greater impacts on small businesses than those in today's final rule. For the small companies expected to incur compliance costs, the average total annual compliance cost would have been roughly $567,000 per small company (compared with $358,000 in today's final rule). About 85 percent (11 firms) of those small businesses expected to incur compliance costs would have experienced an impact greater than 1 percent of sales (compared with 69 percent of those small businesses in today's final rule). And, 77 percent (10 firms) of those small businesses expected to incur compliance costs would have experienced impacts greater than 3 percent of sales (compared with 31 percent of those small businesses in today's final rule).

Before concluding that the Agency could properly certify today's final rule under the terms of the RFA, EPA conducted outreach to small entities and convened a Panel as required by section 609(b) of the RFA to obtain the advice and recommendations from representatives of the small entities that potentially would be subject to the proposed rule requirements. The Panel convened on January 22, 2002, and was comprised of representatives from OMB, the SBA Office of Advocacy, the EPA Small Business Advocacy Chair, and the Emission Standards Division of the Office of Air Quality Planning and Standards of EPA. The Panel solicited advice from eight small entity representatives (SER), including the National Lime Association (NLA) and member companies and non-member companies of the NLA. On January 30, 2002, the Panel distributed a package of descriptive and technical materials explaining the rule-in-progress to the SER. On February 19, 2002, the Panel met with the SER to hear their comments on preliminary options for regulatory flexibility and related information. The Panel also received written comments from the SER in response to both the outreach materials and the discussions at the meeting.

Consistent with RFA/SBREFA requirements, the Panel evaluated the assembled materials and small-entity comments on issues related to the elements of the initial RFA. A copy of the Panel report is included in the docket for the final rule.

The Panel considered numerous regulatory flexibility options in response to concerns raised by the SER. The major concerns included the affordability and technical feasibility of add-on controls.

These are the Panel recommendations and EPA's responses:

• Recommend that the proposed rule should not include the HCl work practice standard, invoking section 112(d)(4) of CAA.

Response: The proposed rule did not include an emission standard for HCl. The final rule also contains no emission standard for HCl.

• Recommend that in the proposed rule, the MPO in the quarry should not be considered as emission units under the definition of affected source.

Response: The MPO in the quarry were excluded from the definition of affected source in the proposed rule. They are also excluded in the final rule.

• Recommend that the proposed rule allow for the "bubbling" of PM emissions from all of the lime kilns and coolers at a lime plant, such that the sum of all kilns' and coolers' PM emissions at a lime plant would be subject to the PM emission limit, rather than each individual kiln and cooler.

Response: The proposed rule defined the affected source as including all kilns and coolers (among other listed emission units) at the lime manufacturing plant. This would allow the source to average emissions from the kilns and coolers for compliance determination. In the final rule we have retained averaging provisions with the following modifications. New kilns and existing kilns may be averaged together, new kilns must individually meet the 0.10 lb/tsf PM emission limit, and existing kilns subject to the 0.60 lb/tsf PM emission limit may not be included in any averaging scheme. Due to other changes in the rule, the changes in the averaging provisions do not increase the stringency of the final rule compared to the proposed rule.

• Recommend that we request comment on establishing a subcategory for existing kilns that currently have wet scrubbers for PM control because of the potential increase in SO_2 and HCl emissions that may result in complying with the PM standard in the proposed rule.

Response: We requested comment on this issue in the proposed rule. Based on the comments received, we determined that a separate subcategory for scrubber equipped kilns was not appropriate. However, we have included in the final rule separate standards for kilns with dry PM emissions control systems, and wet scrubbers. This change addresses the underlying concern of the original comment.

• Recommend that we undertake an analysis of the costs and emissions impacts of replacing scrubbers with dry APCD and present the results of that analysis in the preamble; and that we request comment on any operational, process, product, or other technical and/or spatial constraints that would preclude installation of a dry APCD.

Response: We requested comment on these issues in the proposed rule and presented said analysis. We responded to all comments on these issues in the final rule.

• Recommend that the proposed rule allow a source to use the ASTM HCl manual method for the measurement of HCl for area source determinations.

Response: The proposed rule included this provision. This provision has been retained in the final rule.

• Recommend that we clarify in the preamble to the proposed rule that we are not specifically requiring sources to test for all HAP to make a determination of whether the lime plant is a major or area source, and that we solicit public comment on related issues.

Response: The preamble of the proposed rule contained this language. In the final rule, we do not specify that testing for all HAP is required. However, we do not specifically say it is precluded because these determinations are better made on a case-by-case basis by the permitting authority.

• Recommend that we solicit comment on providing the option of using COMS in place of BLDS; recommend that we solicit comment on various approaches to using COMS; and recommend soliciting comment on what an appropriate opacity limit would be.

Response: The preamble of the proposed rule solicited comment on these issues.

• Recommend that EPA take comment on other monitoring options or approaches, including the following: using longer averaging time periods (or greater frequencies of occurrence) for demonstrating compliance with parameter limits; demonstrating compliance with operating parameter limits using a two-tier approach; and the suitability of other PM control device operating parameters that can be monitored to demonstrate compliance with the PM emission limits, in lieu of or in addition to the parameters currently required in the draft rule.

Response: The preamble of the proposed rule solicited comment on these issues.

• Recommend that the incorporation by reference of Chapters 3 and 5 of the American Conference of Governmental

Industrial Hygienists (ACGIH) Industrial Ventilation manual be removed from the proposed rule.

Response: The proposed rule did not include this requirement. This requirement is also not present in today's final rule.

• Recommend that EPA reevaluate the assumptions used in modeling the economic impacts of the standards and conduct a sensitivity analysis using different price and supply elasticities reflective of the industry's claims that there is little ability to pass on control costs to their customers, and there is considerable opportunity for product substitution in a number of the lime industry's markets.

Response: The EIA does include the aforementioned considerations and analyses at proposal. In addition, we have performed additional economic sensitivity analyses for the final rule.

In summary, to better understand the implications of the proposed rule from the industries' perspective, we engaged with the lime manufacturing companies in an exchange of information, including small entities, during the overall rule development. Prior to convening the Panel, we had worked aggressively to minimize the impact of the proposed rule on small entities, consistent with our obligations under the CAA. These efforts are summarized below.

• Lime manufacturing operations at beet sugar plants, of which three are small businesses, will not be affected sources.

• Lime manufacturing plants that produce hydrated lime only will not be affected sources as well.

• We proposed PM emission limits which allow the affected source, including small entities, flexibility in choosing how they will meet the emission limit. And in general, the emission limitations selected are all based on the MACT floor, as opposed to more costly beyond-the-MACT-floor options that we considered. An emission limit for mercury was rejected since it would have been based on a beyond-the-MACT-floor control option.

• We proposed that compliance demonstrations for PSH operations be conducted monthly rather than on a daily basis. This reduced the amount of records needed to demonstrate compliance with the rule when implemented. Furthermore, we proposed the minimum performance testing frequency (every 5 years), monitoring, recordkeeping, and reporting requirements specified in the General Provisions (40 CFR part 63, subpart A).

• Finally, many lime manufacturing plants owned by small businesses will not be subject to the proposed standards because they are area sources.

We received several comments on the economic analysis for the proposed rule. The majority of these comments related to the analysis in general, rather than the initial regulatory flexibility analysis. Two comments that specifically addressed small business concerns follow.

Comment: One commenter claimed that EPA did not perform a sufficient sensitivity analysis of different price and supply elasticities in the EIA as recommended in the Panel's final report.

Response: We estimated the market supply and demand elasticities for lime. The values from the preferred model for 1997 are very close to the primary elasticities used in the main text of the EIA for the proposed rule and are well within the range of elasticities used in the sensitivity analysis in Appendix B of the EIA for the proposed rule. In addition to the preferred model, numerous alternative models were estimated. As with any modeling exercise, there were some differences in results across different model specifications. However, the results were generally similar across specifications and there were no cases in which the estimated supply or demand elasticity fell outside the ranges currently used in the Appendix B sensitivity analysis included in the EIA. Thus, the current analysis adequately responds to SBREFA panel recommendations that a reasonable sensitivity analysis be employed and the empirical evidence is supportive of the current scenario presented in the main text.

Comment: One commenter claimed that although EPA has indicated its rule will have larger impacts on small businesses than large ones, the disparity is even greater than EPA estimates. The reductions in pre-tax earnings presented in the EIA understate losses for small firms because the costs of implementation will be higher than EPA estimates and the price of lime will not increase. They also state that even if only 2 to 3 of the 14 small lime firms close, that would still be closure of 14 percent to 21 percent of the small lime firms in the domestic industry. This seems to be such a significant economic impact that it should encourage the EPA to seriously consider additional ways to minimize the impact on small businesses.

Response: It is unclear what the basis for the first part of this comment is (it seems the same claims they are making for small firms would also apply to large firms). As far as the second part, to the extent that actual costs differ from EPA estimates, it is possible that the actual losses experienced by firms will be higher or lower than presented in the EIA. However, the costs of implementation currently used for analysis reflect EPA's best estimate of actual costs. The assertion that lime prices cannot increase in response to an increase in production costs is not credible.

We also disagree that the number of small firms at risk of closure, 2 to 3, can be considered a significant number in the context of SBREFA. In any case, EPA has seriously considered ways to minimize the impact on small businesses based on comments from industry and has substantially reduced the costs of the rule relative to the draft of the rule we were considering prior to the small business advocacy review panel. As previously discussed, EPA, along with the SBA and the OMB, convened a panel under the authority of SBREFA to talk with small business representatives on how to mitigate potential impacts to small businesses associated with the lime manufacturing NESHAP. This panel yielded a report that included many recommendations on how potential impacts to small businesses from the proposal could be mitigated. All of these recommendations are reflected in the final rule.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, we generally would be required to prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures by State, local, and tribal governments, in aggregate, or by the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires us to identify and consider a reasonable number of regulatory alternatives and adopt the least-costly, most cost-effective, or least-burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows us to adopt an alternative other than the least-costly, most cost-effective, or least-burdensome alternative if the

Administrator publishes with the final rule an explanation why that alternative was not adopted. Before we establish any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, we would be required to have developed under section 203 of the UMRA a small government agency plan. The plan will be required to provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of our regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the final rule does not contain a Federal mandate that may result in expenditures of $100 million or more by State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. The total cost to the private sector is approximately $22.4 million per year. The final rule contains no mandates affecting State, local, or tribal governments. Thus, today's final rule is not subject to the requirements of sections 202 and 205 of the UMRA.

We have determined that the final rule contains no regulatory requirements that might significantly or uniquely affect small governments because it contains no requirements that apply to such governments or impose obligations upon them.

E. Executive Order 13132, Federalism

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

Under Section 6 of Executive Order 13132, we may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or we consult with State and local officials early in the process of developing the proposed regulation. We also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If we comply by consulting, Executive Order 13132 requires us to provide to OMB, in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS would be required to include a description of the extent of our prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when we transmit a draft final NESHAP with federalism implications to OMB for review pursuant to Executive Order 12866, we would be required to include a certification from the Agency's Federalism Official stating that we have met the requirements of Executive Order 13132 in a meaningful and timely manner.

The final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The final rule will not impose directly enforceable requirements on States, nor will it preempt them from adopting their own more stringent programs to control emissions from lime manufacturing facilities. Moreover, States are not required under the CAA to take delegation of Federal NESHAP and bear their implementation costs, although States are encouraged and often choose to do so. Thus, Executive Order 13132 does not apply to the final rule.

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

Executive Order 13175 (65 FR 67249, November 9, 2000) requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." The final rule does not have tribal implications, as specified in Executive Order 13175. There are no lime manufacturing plants located on tribal land. Thus, Executive Order 13175 does not apply to the final rule.

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

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that: (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we would be required to evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by us.

We interpret Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. The final rule is not subject to Executive Order 13045 because it is based on technology performance and not on health or safety risks.

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

The final rule is not a "significant energy action" as defined in Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Although compliance with the final rule could possibly lead to increased electricity consumption as sources may replace existing wet scrubbers with venturi wet scrubbers that require more electricity, the final rule will not require that venturi scrubbers be installed, and in fact, there are some alternatives that may decrease electrical demand. Further, the final rule will have no effect on the supply or distribution of energy. Although we considered certain fuels as potential bases for MACT, none of our MACT determinations are based on fuels. Finally, we acknowledge that an interpretation limiting fuel use to the top 6 percent of 'clean HAP' fuels (if they existed) could potentially have adverse implications on energy supply.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) of 1995 (Pub. L. No. 104–113; 15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in their regulatory and procurement

activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, business practices) developed or adopted by one or more voluntary consensus bodies. The NTTAA directs EPA to provide Congress, through annual reports to the OMB, with explanations when an agency does not use available and applicable voluntary consensus standards.

The final rule involves technical standards. The EPA cites the following standards in the final rule: EPA Methods 1, 1A, 2, 2A, 2C, 2D, 2F, 2G, 3, 3A, 3B, 4, 5, 5D, 9, 17, 18, 22, 320, 321. Consistent with the NTTAA, EPA conducted searches to identify voluntary consensus standards in addition to these EPA methods. No applicable voluntary consensus standards were identified for EPA Methods 1A, 2A, 2D, 2F, 2G, 5D, 9, 22, and 321. The search and review results have been documented and are placed in the docket (OAR–2002–0052) for the final rule.

The three voluntary consensus standards described below were identified as acceptable alternatives to EPA test methods for the purposes of the final rule.

The voluntary consensus standard ASME PTC 19–10–1981-Part 10, "Flue and Exhaust Gas Analyses," is cited in the final rule for its manual method for measuring the oxygen, carbon dioxide, and carbon monoxide content of exhaust gas. This part of ASME PTC 19–10–1981-Part 10 is an acceptable alternative to Method 3B.

The voluntary consensus standard ASTM D6420–99, "Standard Test Method for Determination of Gaseous Organic Compounds by Direct Interface Gas Chromatography-Mass Spectrometry (GC/MS)," is appropriate in the cases described below for inclusion in the final rule in addition to EPA Method 18 codified at 40 CFR part 60, appendix A, for the measurement of organic HAP from lime kilns.

Similar to EPA's performance-based Method 18, ASTM D6420–99 is also a performance-based method for measurement of gaseous organic compounds. However, ASTM D6420–99 was written to support the specific use of highly portable and automated GC/MS. While offering advantages over the traditional Method 18, the ASTM method does allow some less stringent criteria for accepting GC/MS results than required by Method 18. Therefore, ASTM D6420–99 is a suitable alternative to Method 18 only where the target compound(s) are those listed in Section 1.1 of ASTM D6420–99, and the target concentration is between 150 parts per billion by volume and 100 parts per million by volume.

For target compound(s) not listed in Section 1.1 of ASTM D6420–99, but potentially detected by mass spectrometry, the final rule specifies that the additional system continuing calibration check after each run, as detailed in Section 10.5.3 of the ASTM method, must be followed, met, documented, and submitted with the data report even if there is no moisture condenser used or the compound is not considered water soluble. For target compound(s) not listed in Section 1.1 of ASTM D6420–99, and not amenable to detection by mass spectrometry, ASTM D6420–99 does not apply.

As a result, EPA will cite ASTM D6420–99 in the final rule. The EPA will also cite Method 18 as a GC option in addition to ASTM D6420–99. This will allow the continued use of GC configurations other than GC/MS.

The voluntary consensus standard ASTM D6735–01, "Standard Test Method for Measurement of Gaseous Chlorides and Fluorides from Mineral Calcining Exhaust Sources—Impinger Method," is an acceptable alternative to EPA Method 320 for the purposes of the final rule provided that the additional requirements described in Section 63.7142 of the final rule are also addressed in the methodology.

In addition to the voluntary consensus standards EPA uses in the final rule, the search for emissions measurement procedures identified 15 other voluntary consensus standards. The EPA determined that 12 of these 15 standards identified for measuring emissions of the HAP or surrogates subject to emission standards in the final rule were impractical alternatives to EPA test methods for the purposes of this rule. Therefore, EPA does not intend to adopt these standards for this purpose. The reasons for this determination can be found in the docket for the final rule.

Three of the 15 voluntary consensus standards identified in this search were not available at the time the review was conducted for the purposes of the final rule because they are under development by a voluntary consensus body: ASME/BSR MFC 13M, "Flow Measurement by Velocity Traverse," for EPA Method 2 (and possibly 1); ASME/BSR MFC 12M, "Flow in Closed Conduits Using Multiport Averaging Pitot Primary Flowmeters," for EPA Method 2; and ASTM D6348–98, "Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform (FTIR) Spectroscopy," for EPA Method 320.

The standard ASTM D6348–98, "Determination of Gaseous Compounds by Extractive Direct Interface Fourier Transform (FTIR) Spectroscopy" has been reviewed by the EPA and comments were sent to ASTM. Currently, the ASTM Subcommittee D22–03 is undertaking a revision of ASTM D6348–98. Upon successful ASTM balloting and demonstration of technical equivalency with the EPA FTIR methods, the revised ASTM standard could be incorporated by reference for EPA regulatory applicability.

Section 63.7112 and Table 4 to subpart AAAAA of 40 CFR part 63 list the EPA testing methods included in the final rule. Under §§ 63.7(f) and 63.8(f) of subpart A of the General Provisions, a source may apply to EPA for permission to use alternative test methods or alternative monitoring requirements in place of any of the EPA testing methods, performance specifications, or procedures.

J. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the SBREFA, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing the final 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 final 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). The final rule will be effective on January 5, 2004.

List of Subjects in 40 CFR Part 63

Administrative practice and procedure, Air pollution control, Environmental protection, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: August 25, 2003.

Marianne Lamont Horinko,

Acting Administrator.

■ For the reasons stated in the preamble, title 40, chapter I, part 63 of the Code of the Federal Regulations is to be amended as follows:

PART 63—[AMENDED]

■ 1. The authority citation for part 63 continues to read as follows:

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

Subpart A—[Amended]

■ 2. Part 63 is amended by adding subpart AAAAA to read as follows:

Subpart AAAAA—National Emission Standards for Hazardous Air Pollutants for Lime Manufacturing Plants

Sec.

What This Subpart Covers

63.7080 What is the purpose of this subpart?
63.7081 Am I subject to this subpart?
63.7082 What parts of my plant does this subpart cover?
63.7083 When do I have to comply with this subpart?

Emission Limitations

63.7090 What emission limitations must I meet?

General Compliance Requirements

63.7100 What are my general requirements for complying with this subpart?

Testing and Initial Compliance Requirements

63.7110 By what date must I conduct performance tests and other initial compliance demonstrations?
63.7111 When must I conduct subsequent performance tests?
63.7112 What performance tests, design evaluations, and other procedures must I use?
63.7113 What are my monitoring installation, operation, and maintenance requirements?
63.7114 How do I demonstrate initial compliance with the emission limitations standard?

Continuous Compliance Requirements

63.7120 How do I monitor and collect data to demonstrate continuous compliance?
63.7121 How do I demonstrate continuous compliance with the emission limitations standard?

Notifications, Reports, and Records

63.7130 What notifications must I submit and when?
63.7131 What reports must I submit and when?
63.7132 What records must I keep?
63.7133 In what form and for how long must I keep my records?

Other Requirements and Information

63.7140 What parts of the General Provisions apply to me?
63.7141 Who implements and enforces this subpart?
63.7142 What are the requirements for claiming area source status?
63.7143 What definitions apply to this subpart?

Tables to Subpart AAAAA of Part 63

Table 1 to Subpart AAAAA of Part 63—Emission Limits
Table 2 to Subpart AAAAA of Part 63—Operating Limits
Table 3 to Subpart AAAAA of Part 63—Initial Compliance with Emission Limits
Table 4 to Subpart AAAAA of Part 63—Requirements for Performance Tests
Table 5 to Subpart AAAAA of Part 63—Continuous Compliance with Operating Limits
Table 6 to Subpart AAAAA of Part 63—Periodic Monitoring for Compliance with Opacity and Visible Emissions Limits
Table 7 to Subpart AAAAA of Part 63—Requirements for Reports
Table 8 to Subpart AAAAA of Part 63—Applicability of General Provisions to Subpart AAAAA

What This Subpart Covers

§ 63.7080 What is the purpose of this subpart?

This subpart establishes national emission standards for hazardous air pollutants (NESHAP) for lime manufacturing plants. This subpart also establishes requirements to demonstrate initial and continuous compliance with the emission limitations.

§ 63.7081 Am I subject to this subpart?

(a) You are subject to this subpart if you own or operate a lime manufacturing plant (LMP) that is a major source, or that is located at, or is part of, a major source of hazardous air pollutant (HAP) emissions, unless the LMP is located at a kraft pulp mill, soda pulp mill, sulfite pulp mill, beet sugar manufacturing plant, or only processes sludge containing calcium carbonate from water softening processes.

(1) An LMP is an establishment engaged in the manufacture of lime product (calcium oxide, calcium oxide with magnesium oxide, or dead burned dolomite) by calcination of limestone, dolomite, shells or other calcareous substances.

(2) A major source of HAP is a plant site that emits or has the potential to emit any single HAP at a rate of 9.07 megagrams (10 tons) or more per year or any combination of HAP at a rate of 22.68 megagrams (25 tons) or more per year from all emission sources at the plant site.

(b) [Reserved]

§ 63.7082 What parts of my plant does this subpart cover?

(a) This subpart applies to each existing or new lime kiln(s) and their associated cooler(s), and processed stone handling (PSH) operations system(s) located at an LMP that is a major source.

(b) A new lime kiln is a lime kiln, and (if applicable) its associated lime cooler, for which construction or reconstruction began after December 20, 2002, if you met the applicability criteria in § 63.7081 at the time you began construction or reconstruction.

(c) A new PSH operations system is the equipment in paragraph (g) of this section, for which construction or reconstruction began after December 20, 2002, if you met the applicability criteria in § 63.7081 at the time you began construction or reconstruction.

(d) A lime kiln or PSH operations system is reconstructed if it meets the criteria for reconstruction defined in § 63.2.

(e) An existing lime kiln is any lime kiln, and (if applicable) its associated lime cooler, that does not meet the definition of a new kiln of paragraph (b) of this section.

(f) An existing PSH operations system is any PHS operations system that does not meet the definition of a new PSH operations system in paragraph (c) of this section.

(g) A PSH operations system includes all equipment associated with PSH operations beginning at the processed stone storage bin(s) or open storage pile(s) and ending where the processed stone is fed into the kiln. It includes man-made processed stone storage bins (but not open processed stone storage piles), conveying system transfer points, bulk loading or unloading systems, screening operations, surge bins, bucket elevators, and belt conveyors. No other materials processing operations are subject to this subpart.

(h) Nuisance dust collectors on lime coolers are part of the lime materials processing operations and are not covered by this subpart.

(i) Lime hydrators are not subject to this subpart.

(j) Open material storage piles are not subject to this subpart.

§ 63.7083 When do I have to comply with this subpart?

(a) If you have a new affected source, you must comply with this subpart according to paragraphs (a)(1) and (2) of this section.

(1) If you start up your affected source before January 5, 2004, you must comply with the emission limitations no later than January 5, 2004, and you must have completed all applicable performance tests no later than July 5, 2004.

(2) If you start up your affected source after January 5, 2004, then you must comply with the emission limitations for new affected sources upon startup of your affected source and you must have completed all applicable performance tests no later than 180 days after startup.

(b) If you have an existing affected source, you must comply with the applicable emission limitations for the existing affected source, and you must have completed all applicable performance tests no later than January 5, 2007.

(c) If you have an LMP that is an area source that increases its emissions or its potential to emit such that it becomes a major source of HAP, the deadlines specified in paragraphs (c)(1) and (2) of this section apply.

(1) New affected sources at your LMP you must be in compliance with this subpart upon startup.

(2) Existing affected sources at your LMP must be in compliance with this subpart within 3 years after your source becomes a major source of HAP.

(d) You must meet the notification requirements in § 63.7130 according to the schedule in § 63.7130 and in subpart A of this part. Some of the notifications must be submitted before you are required to comply with the emission limitations in this subpart.

Emission Limitations

§ 63.7090 What emission limitations must I meet?

(a) You must meet each emission limit in Table 1 to this subpart that applies to you.

(b) You must meet each operating limit in Table 2 to this subpart that applies to you.

General Compliance Requirements

§ 63.7100 What are my general requirements for complying with this subpart?

(a) After your initial compliance date, you must be in compliance with the emission limitations (including operating limits) in this subpart at all times, except during periods of startup, shutdown, and malfunction.

(b) You must be in compliance with the opacity and visible emission (VE) limits in this subpart during the times specified in § 63.6(h)(1).

(c) You must always operate and maintain your affected source, including air pollution control and monitoring equipment, according to the provisions in § 63.6(e)(1)(i).

(d) You must prepare and implement for each LMP, a written operations, maintenance, and monitoring (OM&M) plan. You must submit the plan to the applicable permitting authority for review and approval as part of the application for a 40 CFR part 70 or 40 CFR part 71 permit. Any subsequent changes to the plan must be submitted to the applicable permitting authority for review and approval. Pending approval by the applicable permitting authority of an initial or amended plan, you must comply with the provisions of the submitted plan. Each plan must contain the following information:

(1) Process and control device parameters to be monitored to determine compliance, along with established operating limits or ranges, as applicable, for each emission unit.

(2) A monitoring schedule for each emission unit.

(3) Procedures for the proper operation and maintenance of each emission unit and each air pollution control device used to meet the applicable emission limitations and operating limits in Tables 1 and 2 to this subpart, respectively.

(4) Procedures for the proper installation, operation, and maintenance of monitoring devices or systems used to determine compliance, including:

(i) Calibration and certification of accuracy of each monitoring device;

(ii) Performance and equipment specifications for the sample interface, parametric signal analyzer, and the data collection and reduction systems;

(iii) Ongoing operation and maintenance procedures in accordance with the general requirements of § 63.8(c)(1), (3), and (4)(ii); and

(iv) Ongoing data quality assurance procedures in accordance with the general requirements of § 63.8(d).

(5) Procedures for monitoring process and control device parameters.

(6) Corrective actions to be taken when process or operating parameters or add-on control device parameters deviate from the operating limits specified in Table 2 to this subpart, including:

(i) Procedures to determine and record the cause of a deviation or excursion, and the time the deviation or excursion began and ended; and

(ii) Procedures for recording the corrective action taken, the time corrective action was initiated, and the time and date the corrective action was completed.

(7) A maintenance schedule for each emission unit and control device that is consistent with the manufacturer's instructions and recommendations for routine and long-term maintenance.

(e) You must develop and implement a written startup, shutdown, and malfunction plan (SSMP) according to the provisions in § 63.6(e)(3).

Testing and Initial Compliance Requirements

§ 63.7110 By what date must I conduct performance tests and other initial compliance demonstrations?

(a) If you have an existing affected source, you must complete all applicable performance tests within January 5, 2007, according to the provisions in §§ 63.7(a)(2) and 63.7114.

(b) If you have a new affected source, and commenced construction or reconstruction between December 20, 2002, and January 5, 2004, you must demonstrate initial compliance with either the proposed emission limitation or the promulgated emission limitation no later than 180 calendar days after January 5, 2004 or within 180 calendar days after startup of the source, whichever is later, according to §§ 63.7(a)(2)(ix) and 63.7114.

(c) If you commenced construction or reconstruction between December 20, 2002, and January 5, 2004, and you chose to comply with the proposed emission limitation when demonstrating initial compliance, you must conduct a demonstration of compliance with the promulgated emission limitation within January 5, 2007 or after startup of the source, whichever is later, according to §§ 63.7(a)(2)(ix) and 63.7114.

(d) For each initial compliance requirement in Table 3 to this subpart that applies to you where the monitoring averaging period is 3 hours, the 3-hour period for demonstrating continuous compliance for emission units within existing affected sources at LMP begins at 12:01 a.m. on the compliance date for existing affected sources, that is, the day following completion of the initial compliance demonstration, and ends at 3:01 a.m. on the same day.

(e) For each initial compliance requirement in Table 3 to this subpart that applies to you where the monitoring averaging period is 3 hours, the 3-hour period for demonstrating continuous compliance for emission units within new or reconstructed affected sources at LMP begins at 12:01 a.m. on the day following completion of the initial compliance demonstration, as required in paragraphs (b) and (c) of this section, and ends at 3:01 a.m. on the same day.

§ 63.7111 When must I conduct subsequent performance tests?

You must conduct a performance test within 5 years following the initial performance test and within 5 years following each subsequent performance test thereafter.

§ 63.7112 What performance tests, design evaluations, and other procedures must I use?

(a) You must conduct each performance test in Table 4 to this subpart that applies to you.

(b) Each performance test must be conducted according to the requirements in § 63.7(e)(1) and under the specific conditions specified in Table 4 to this subpart.

(c) You may not conduct performance tests during periods of startup, shutdown, or malfunction, as specified in § 63.7(e)(1).

(d) Except for opacity and VE observations, you must conduct three separate test runs for each performance test required in this section, as specified in § 63.7(e)(3). Each test run must last at least 1 hour.

(e) The emission rate of particulate matter (PM) from each lime kiln (and each lime cooler if there is a separate exhaust to the atmosphere from the lime cooler) must be computed for each run using Equation 1 of this section:

$$E = (C_k Q_k + C_c Q_c)/PK \qquad \text{(Eq. 1)}$$

Where:

E = Emission rate of PM, pounds per ton (lb/ton) of stone feed.

C_k = Concentration of PM in the kiln effluent, grain/dry standard cubic feet (gr/dscf).

Q_k = Volumetric flow rate of kiln effluent gas, dry standard cubic feet per hour (dscf/hr).

C_c = Concentration of PM in the cooler effluent, grain/dscf. This value is zero if there is not a separate cooler exhaust to the atmosphere.

Q_c = Volumetric flow rate of cooler effluent gas, dscf/hr. This value is zero if there is not a separate cooler exhaust to the atmosphere.

P = Stone feed rate, tons per hour (ton/hr).

K = Conversion factor, 7000 grains per pound (grains/lb).

(f)(1) If you choose to meet a weighted average emission limit as specified in item 4 of Table 1 to this subpart, you must calculate a combined particulate emission rate from all kilns and coolers within your LMP using Equation 2 of this section:

$$E_T = \sum_{i=1}^{n} E_i P_i / \sum_{i=1}^{n} P_i \qquad \text{(Eq. 2)}$$

Where:

E_T = Emission rate of PM from all kilns and coolers, lb/ton of stone feed.

E_i = Emission rate of PM from kiln i, or from kiln/cooler combination i, lb/ton of stone feed.

P_i = Stone feed rate to kiln i, ton/hr.

n = Number of kilns you wish to include in averaging.

(2) You do not have to include every kiln in this calculation, only include kilns you wish to average. Kilns that have a PM emission limit of 0.60 lb/tsf are ineligible for any averaging.

(g) The weighted average PM emission limit from all kilns and coolers for which you are averaging must be calculated using Equation 3 of this section:

$$E_{TN} = \sum_{j=1}^{m} E_j P_j / \sum_{j=1}^{m} P_j \qquad \text{(Eq. 3)}$$

Where:

E_{TN} = Weighted average PM emission limit for all kilns and coolers being included in averaging at the LMP, lb/ton of stone feed.

E_j = PM emission limit (0.10 or 0.12) for kiln j, or for kiln/cooler combination j, lb/ton of stone feed.

P_j = Stone feed rate to kiln j, ton/hr.

m = Number of kilns and kiln/cooler combinations you are averaging at your LMP. You must include the same kilns in the calculation of E_T and E_{TN}. Kilns that have a PM emission limit of 0.60 lb/tsf are ineligible for any averaging.

(h) Performance test results must be documented in complete test reports that contain the information required by paragraphs (h)(1) through (10) of this section, as well as all other relevant information. The plan to be followed during testing must be made available to the Administrator at least 60 days prior to testing.

(1) A brief description of the process and the air pollution control system;

(2) Sampling location description(s);

(3) A description of sampling and analytical procedures and any modifications to standard procedures;

(4) Test results, including opacity;

(5) Quality assurance procedures and results;

(6) Records of operating conditions during the test, preparation of standards, and calibration procedures;

(7) Raw data sheets for field sampling and field and laboratory analyses;

(8) Documentation of calculations;

(9) All data recorded and used to establish operating limits; and

(10) Any other information required by the test method.

(i) [Reserved]

(j) You must establish any applicable 3-hour block average operating limit indicated in Table 2 to this subpart according to the applicable requirements in Table 3 to this subpart and paragraphs (j)(1) through (4) of this section.

(1) Continuously record the parameter during the PM performance test and include the parameter record(s) in the performance test report.

(2) Determine the average parameter value for each 15-minute period of each test run.

(3) Calculate the test run average for the parameter by taking the average of all the 15-minute parameter values for the run.

(4) Calculate the 3-hour operating limit by taking the average of the three test run averages.

(k) For each building enclosing any PSH operations that is subject to a VE limit, you must conduct a VE check according to item 18 in Table 4 to this subpart, and in accordance with paragraphs (k)(1) through (3) of this section.

(1) Conduct visual inspections that consist of a visual survey of the building over the test period to identify if there are VE, other than condensed water vapor.

(2) Select a position at least 15 but not more 1,320 feet from each side of the building with the sun or other light source generally at your back.

(3) The observer conducting the VE checks need not be certified to conduct EPA Method 9 in appendix A to part 60 of this chapter, but must meet the training requirements as described in EPA Method 22 in appendix A to part 60 of this chapter.

(l) When determining compliance with the opacity standards for fugitive emissions from PSH operations in item 7 of Table 1 to this subpart, you must conduct EPA Method 9 in appendix A to part 60 of this chapter according to item 17 in Table 4 to this subpart, and in accordance with paragraphs (l)(1) through (3) of this section.

(1) The minimum distance between the observer and the emission source shall be 4.57 meters (15 feet).

(2) The observer shall, when possible, select a position that minimizes interference from other fugitive emission sources (*e.g.*, road dust). The required observer position relative to the sun must be followed.

(3) If you use wet dust suppression to control PM from PSH operations, a visible mist is sometimes generated by the spray. The water mist must not be confused with particulate matter emissions and is not to be considered VE. When a water mist of this nature is present, you must observe emissions at a point in the plume where the mist is no longer visible.

§ 63.7113 What are my monitoring installation, operation, and maintenance requirements?

(a) You must install, operate, and maintain each continuous parameter monitoring system (CPMS) according to your OM&M plan required by § 63.7100(d) and paragraphs (a)(1) through (5) of this section, and you must install, operate, and maintain each continuous opacity monitoring system (COMS) as required by paragraph (g) of this section

(1) The CPMS must complete a minimum of one cycle of operation for each successive 15-minute period.

(2) To calculate a valid hourly value, you must have at least four equally spaced data values (or at least two, if that condition is included to allow for periodic calibration checks) for that hour from a CPMS that is not out of control according your OM&M plan, and use all valid data.

(3) To calculate the average for each 3-hour block averaging period, you must use all valid data, and you must have at least 66 percent of the hourly averages for that period using only hourly average values that are based on valid data (*i.e.*, not from out-of-control periods).

(4) You must conduct a performance evaluation of each CPMS in accordance with your OM&M plan.

(5) You must continuously operate and maintain the CPMS according to the OM&M plan, including, but not limited to, maintaining necessary parts for routine repairs of the monitoring equipment.

(b) For each flow measurement device, you must meet the requirements in paragraphs (a)(1) through (5) and (b)(1) through (4) of this section.

(1) Use a flow sensor with a minimum tolerance of 2 percent of the flow rate.

(2) Reduce swirling flow or abnormal velocity distributions due to upstream and downstream disturbances.

(3) Conduct a flow sensor calibration check at least semiannually.

(4) At least monthly, inspect all components for integrity, all electrical connections for continuity, and all mechanical connections for leakage.

(c) For each pressure measurement device, you must meet the requirements in paragraphs (a)(1) through (5) and (c)(1) through (7) of this section.

(1) Locate the pressure sensor(s) in or as close to as possible a position that provides a representative measurement of the pressure.

(2) Minimize or eliminate pulsating pressure, vibration, and internal and external corrosion.

(3) Use a gauge with a minimum tolerance of 0.5 inch of water or a transducer with a minimum tolerance of 1 percent of the pressure range.

(4) Check pressure tap pluggage daily.

(5) Using a manometer, check gauge calibration quarterly and transducer calibration monthly.

(6) Conduct calibration checks any time the sensor exceeds the manufacturer's specified maximum operating pressure range or install a new pressure sensor.

(7) At least monthly, inspect all components for integrity, all electrical connections for continuity, and all mechanical connections for leakage.

(d) For each bag leak detection system (BLDS), you must meet any applicable requirements in paragraphs (a)(1) through (5) and (d)(1) through (8) of this section.

(1) The BLDS must be certified by the manufacturer to be capable of detecting PM emissions at concentrations of 10 milligrams per actual cubic meter (0.0044 grains per actual cubic foot) or less.

(2) The sensor on the BLDS must provide output of relative PM emissions.

(3) The BLDS must have an alarm that will sound automatically when it detects an increase in relative PM emissions greater than a preset level.

(4) The alarm must be located in an area where appropriate plant personnel will be able to hear it.

(5) For a positive-pressure fabric filter (FF), each compartment or cell must have a bag leak detector (BLD). For a negative-pressure or induced-air FF, the BLD must be installed downstream of the FF. If multiple BLD are required (for either type of FF), the detectors may share the system instrumentation and alarm.

(6) Bag leak detection systems must be installed, operated, adjusted, and maintained according to the manufacturer's written specifications and recommendations. Standard operating procedures must be incorporated into the OM&M plan.

(7) At a minimum, initial adjustment of the system must consist of establishing the baseline output in both of the following ways:

(i) Adjust the range and the averaging period of the device.

(ii) Establish the alarm set points and the alarm delay time.

(8) After initial adjustment, the range, averaging period, alarm set points, or alarm delay time may not be adjusted except as specified in the OM&M plan required by § 63.7100(d). In no event may the range be increased by more than 100 percent or decreased by more than 50 percent over a 365-day period unless a responsible official, as defined in § 63.2, certifies in writing to the Administrator that the FF has been inspected and found to be in good operating condition.

(e) For each PM detector, you must meet any applicable requirements in paragraphs (a)(1) through (5) and (e)(1) through (8) of this section.

(1) The PM detector must be certified by the manufacturer to be capable of detecting PM emissions at concentrations of 10 milligrams per actual cubic meter (0.0044 grains per actual cubic foot) or less.

(2) The sensor on the PM detector must provide output of relative PM emissions.

(3) The PM detector must have an alarm that will sound automatically when it detects an increase in relative PM emissions greater than a preset level.

(4) The alarm must be located in an area where appropriate plant personnel will be able to hear it.

(5) For a positive-pressure electrostatic precipitator (ESP), each compartment must have a PM detector. For a negative-pressure or induced-air ESP, the PM detector must be installed downstream of the ESP. If multiple PM detectors are required (for either type of ESP), the detectors may share the system instrumentation and alarm.

(6) Particulate matter detectors must be installed, operated, adjusted, and maintained according to the manufacturer's written specifications and recommendations. Standard operating procedures must be incorporated into the OM&M plan.

(7) At a minimum, initial adjustment of the system must consist of establishing the baseline output in both of the following ways:

(i) Adjust the range and the averaging period of the device.

(ii) Establish the alarm set points and the alarm delay time.

(8) After initial adjustment, the range, averaging period, alarm set points, or alarm delay time may not be adjusted except as specified in the OM&M plan required by § 63.7100(d). In no event may the range be increased by more than 100 percent or decreased by more than 50 percent over a 365-day period unless a responsible official as defined in § 63.2 certifies in writing to the Administrator that the ESP has been inspected and found to be in good operating condition.

(f) For each emission unit equipped with an add-on air pollution control device, you must inspect each capture/collection and closed vent system at least once each calendar year to ensure that each system is operating in accordance with the operating

requirements in item 6 of Table 2 to this subpart and record the results of each inspection.

(g) For each COMS used to monitor an add-on air pollution control device, you must meet the requirements in paragraphs (g)(1) and (2) of this section.

(1) Install the COMS at the outlet of the control device.

(2) Install, maintain, calibrate, and operate the COMS as required by 40 CFR part 63, subpart A, General Provisions and according to Performance Specification (PS)–1 of appendix B to part 60 of this chapter. Facilities that operate COMS installed on or before February 6, 2001, may continue to meet the requirements in effect at the time of COMS installation unless specifically required to re-certify the COMS by their permitting authority.

§ 63.7114 How do I demonstrate initial compliance with the emission limitations standard?

(a) You must demonstrate initial compliance with each emission limit in Table 1 to this subpart that applies to you, according to Table 3 to this subpart. For existing lime kilns and their associated coolers, you may perform VE measurements in accordance with EPA Method 9 of appendix A to part 60 in lieu of installing a COMS or PM detector if any of the conditions in paragraphs (a)(1) through (3) of this section exist:

(1) You use a FF for PM control, and the FF is under positive pressure and has multiple stacks; or

(2) The control device exhausts through a monovent; or

(3) The installation of a COMS in accordance with PS–1 of appendix B to part 60 is infeasible.

(b) You must establish each site-specific operating limit in Table 2 to this subpart that applies to you according to the requirements in § 63.7112(j) and Table 4 to this subpart. Alternative parameters may be monitored if approval is obtained according to the procedures in § 63.8(f)

(c) You must submit the Notification of Compliance Status containing the results of the initial compliance demonstration according to the requirements in § 63.7130(e).

Continuous Compliance Requirements

§ 63.7120 How do I monitor and collect data to demonstrate continuous compliance?

(a) You must monitor and collect data according to this section.

(b) Except for monitor malfunctions, associated repairs, required quality assurance or control activities (including, as applicable, calibration checks and required zero adjustments), and except for PSH operations subject to monthly VE testing, you must monitor continuously (or collect data at all required intervals) at all times that the emission unit is operating.

(c) Data recorded during the conditions described in paragraphs (c)(1) through (3) of this section may not be used either in data averages or calculations of emission or operating limits; or in fulfilling a minimum data availability requirement. You must use all the data collected during all other periods in assessing the operation of the control device and associated control system.

(1) Monitoring system breakdowns, repairs, preventive maintenance, calibration checks, and zero (low-level) and high-level adjustments;

(2) Periods of non-operation of the process unit (or portion thereof), resulting in cessation of the emissions to which the monitoring applies; and

(3) Start-ups, shutdowns, and malfunctions.

§ 63.7121 How do I demonstrate continuous compliance with the emission limitations standard?

(a) You must demonstrate continuous compliance with each emission limitation in Tables 1 and 2 to this subpart that applies to you according to the methods specified in Tables 5 and 6 to this subpart.

(b) You must report each instance in which you did not meet each operating limit, opacity limit, and VE limit in Tables 2 and 6 to this subpart that applies to you. This includes periods of startup, shutdown, and malfunction. These instances are deviations from the emission limitations in this subpart. These deviations must be reported according to the requirements in § 63.7131.

(c) You must operate in accordance with the SSMP during periods of startup, shutdown, and malfunction.

(d) Consistent with §§ 63.6(e) and 63.7(e)(1), deviations that occur during a period of startup, shutdown, or malfunction are not violations if you demonstrate to the Administrator's satisfaction that you were operating in accordance with the SSMP. The Administrator will determine whether deviations that occur during a period of startup, shutdown, or malfunction are violations, according to the provisions in § 63.6(e).

(e) For each PSH operation subject to an opacity limit as specified in Table 1 to this subpart, and any vents from buildings subject to an opacity limit, you must conduct a VE check according to item 1 in Table 6 to this subpart, and as follows:

(1) Conduct visual inspections that consist of a visual survey of each stack or process emission point over the test period to identify if there are VE, other than condensed water vapor.

(2) Select a position at least 15 but not more 1,320 feet from the affected emission point with the sun or other light source generally at your back.

(3) The observer conducting the VE checks need not be certified to conduct EPA Method 9 in appendix A to part 60 of this chapter, but must meet the training requirements as described in EPA Method 22 of appendix A to part 60 of this chapter.

(f) For existing lime kilns and their associated coolers, you may perform VE measurements in accordance with EPA Method 9 of appendix A to part 60 in lieu of installing a COMS or PM detector if any of the conditions in paragraphs (f)(1) or (3) of this section exist:

(1) You use a FF for PM control, and the FF is under positive pressure and has multiple stacks; or

(2) The control device exhausts through a monovent; or

(3) The installation of a COMS in accordance with PS–1 of appendix B to part 60 is infeasible.

Notification, Reports, and Records

§ 63.7130 What notifications must I submit and when?

(a) You must submit all of the notifications in §§ 63.6(h)(4) and (5); 63.7(b) and (c); 63.8(e); (f)(4) and (6); and 63.9 (a) through (j) that apply to you, by the dates specified.

(b) As specified in § 63.9(b)(2), if you start up your affected source before January 5, 2004, you must submit an initial notification not later than 120 calendar days after January 5, 2004.

(c) If you startup your new or reconstructed affected source on or after January 5, 2004, you must submit an initial notification not later than 120 calendar days after you start up your affected source.

(d) If you are required to conduct a performance test, you must submit a notification of intent to conduct a performance test at least 60 calendar days before the performance test is scheduled to begin, as required in § 63.7(b)(1).

(e) If you are required to conduct a performance test, design evaluation, opacity observation, VE observation, or other initial compliance demonstration as specified in Table 3 or 4 to this subpart, you must submit a Notification of Compliance Status according to § 63.9(h)(2)(ii).

(1) For each initial compliance demonstration required in Table 3 to this subpart that does not include a performance test, you must submit the Notification of Compliance Status before the close of business on the 30th calendar day following the completion of the initial compliance demonstration.

(2) For each compliance demonstration required in Table 5 to this subpart that includes a performance test conducted according to the requirements in Table 4 to this subpart, you must submit the Notification of Compliance Status, including the performance test results, before the close of business on the 60th calendar day following the completion of the performance test according to § 63.10(d)(2).

§ 63.7131 What reports must I submit and when?

(a) You must submit each report listed in Table 7 to this subpart that applies to you.

(b) Unless the Administrator has approved a different schedule for submission of reports under § 63.10(a), you must submit each report by the date specified in Table 7 to this subpart and according to the requirements in paragraphs (b)(1) through (5) of this section:

(1) The first compliance report must cover the period beginning on the compliance date that is specified for your affected source in § 63.7083 and ending on June 30 or December 31, whichever date is the first date following the end of the first half calendar year after the compliance date that is specified for your source in § 63.7083.

(2) The first compliance report must be postmarked or delivered no later than July 31 or January 31, whichever date follows the end of the first half calendar year after the compliance date that is specified for your affected source in § 63.7083.

(3) Each subsequent compliance report must cover the semiannual reporting period from January 1 through June 30 or the semiannual reporting period from July 1 through December 31.

(4) Each subsequent compliance report must be postmarked or delivered no later than July 31 or January 31, whichever date is the first date following the end of the semiannual reporting period.

(5) For each affected source that is subject to permitting regulations pursuant to part 70 or part 71 of this chapter, if the permitting authority has established dates for submitting semiannual reports pursuant to §§ 70.6(a)(3)(iii)(A) or 71.6(a)(3)(iii)(A) of this chapter, you may submit the first and subsequent compliance reports according to the dates the permitting authority has established instead of according to the dates specified in paragraphs (b)(1) through (4) of this section.

(c) The compliance report must contain the information specified in paragraphs (c)(1) through (6) of this section.

(1) Company name and address.

(2) Statement by a responsible official with that official's name, title, and signature, certifying the truth, accuracy, and completeness of the content of the report.

(3) Date of report and beginning and ending dates of the reporting period.

(4) If you had a startup, shutdown or malfunction during the reporting period and you took actions consistent with your SSMP, the compliance report must include the information in § 63.10(d)(5)(i).

(5) If there were no deviations from any emission limitations (emission limit, operating limit, opacity limit, and VE limit) that apply to you, the compliance report must include a statement that there were no deviations from the emission limitations during the reporting period.

(6) If there were no periods during which the continuous monitoring systems (CMS) were out-of-control as specified in § 63.8(c)(7), a statement that there were no periods during which the CMS were out-of-control during the reporting period.

(d) For each deviation from an emission limitation (emission limit, operating limit, opacity limit, and VE limit) that occurs at an affected source where you are not using a CMS to comply with the emission limitations in this subpart, the compliance report must contain the information specified in paragraphs (c)(1) through (4) and (d)(1) and (2) of this section. The deviations must be reported in accordance with the requirements in § 63.10(d).

(1) The total operating time of each emission unit during the reporting period.

(2) Information on the number, duration, and cause of deviations (including unknown cause, if applicable), as applicable, and the corrective action taken.

(e) For each deviation from an emission limitation (emission limit, operating limit, opacity limit, and VE limit) occurring at an affected source where you are using a CMS to comply with the emission limitation in this subpart, you must include the information specified in paragraphs (c)(1) through (4) and (e)(1) through (11) of this section. This includes periods of startup, shutdown, and malfunction.

(1) The date and time that each malfunction started and stopped.

(2) The date and time that each CMS was inoperative, except for zero (low-level) and high-level checks.

(3) The date, time and duration that each CMS was out-of-control, including the information in § 63.8(c)(8).

(4) The date and time that each deviation started and stopped, and whether each deviation occurred during a period of startup, shutdown, or malfunction or during another period.

(5) A summary of the total duration of the deviations during the reporting period and the total duration as a percent of the total affected source operating time during that reporting period.

(6) A breakdown of the total duration of the deviations during the reporting period into those that are due to startup, shutdown, control equipment problems, process problems, other known causes, and other unknown causes.

(7) A summary of the total duration of CMS downtime during the reporting period and the total duration of CMS downtime as a percent of the total emission unit operating time during that reporting period.

(8) A brief description of the process units.

(9) A brief description of the CMS.

(10) The date of the latest CMS certification or audit.

(11) A description of any changes in CMS, processes, or controls since the last reporting period.

(f) Each facility that has obtained a title V operating permit pursuant to part 70 or part 71 of this chapter must report all deviations as defined in this subpart in the semiannual monitoring report required by §§ 70.6(a)(3)(iii)(A) or 71.6(a)(3)(iii)(A) of this chapter. If you submit a compliance report specified in Table 7 to this subpart along with, or as part of, the semiannual monitoring report required by §§ 70.6(a)(3)(iii)(A) or 71.6(a)(3)(iii)(A) of this chapter, and the compliance report includes all required information concerning deviations from any emission limitation (including any operating limit), submission of the compliance report shall be deemed to satisfy any obligation to report the same deviations in the semiannual monitoring report. However, submission of a compliance report shall not otherwise affect any obligation you may have to report deviations from permit requirements to the permit authority.

§ 63.7132 What records must I keep?

(a) You must keep the records specified in paragraphs (a)(1) through (3) of this section.

(1) A copy of each notification and report that you submitted to comply with this subpart, including all documentation supporting any Initial Notification or Notification of Compliance Status that you submitted, according to the requirements in § 63.10(b)(2)(xiv).

(2) The records in § 63.6(e)(3)(iii) through (v) related to startup, shutdown, and malfunction.

(3) Records of performance tests, performance evaluations, and opacity and VE observations as required in § 63.10(b)(2)(viii).

(b) You must keep the records in § 63.6(h)(6) for VE observations.

(c) You must keep the records required by Tables 5 and 6 to this subpart to show continuous compliance with each emission limitation that applies to you.

(d) You must keep the records which document the basis for the initial applicability determination as required under § 63.7081.

§ 63.7133 In what form and for how long must I keep my records?

(a) Your records must be in a form suitable and readily available for expeditious review, according to § 63.10(b)(1).

(b) As specified in § 63.10(b)(1), you must keep each record for 5 years following the date of each occurrence, measurement, maintenance, corrective action, report, or record.

(c) You must keep each record onsite for at least 2 years after the date of each occurrence, measurement, maintenance, corrective action, report, or record, according to § 63.10(b)(1). You may keep the records offsite for the remaining 3 years.

Other Requirements and Information

§ 63.7140 What parts of the General Provisions apply to me?

Table 8 to this subpart shows which parts of the General Provisions in §§ 63.1 through 63.15 apply to you. When there is overlap between subpart A and subpart AAAAA, as indicated in the "Explanations" column in Table 8, subpart AAAAA takes precedence.

§ 63.7141 Who implements and enforces this subpart?

(a) This subpart can be implemented and enforced by us, the U.S. EPA, or by a delegated authority such as your State, local, or tribal agency. If the U.S. EPA Administrator has delegated authority to your State, local, or tribal agency, then that agency (as well as the U.S. EPA) has the authority to implement and enforce this subpart. You should contact your U.S. EPA Regional Office to find out if this subpart is delegated to your State, local, or tribal agency.

(b) In delegating implementation and enforcement authority of this subpart to a State, local, or tribal agency under subpart E of this part, the authorities contained in paragraph (c) of this section are retained by the Administrator of the U.S. EPA and are not transferred to the State, local, or tribal agency.

(c) The authorities that will not be delegated to State, local, or tribal agencies are as specified in paragraphs (c)(1) through (6) of this section.

(1) Approval of alternatives to the non-opacity emission limitations in § 63.7090(a).

(2) Approval of alternative opacity emission limitations in § 63.7090(a).

(3) Approval of alternatives to the operating limits in § 63.7090(b).

(4) Approval of major alternatives to test methods under § 63.7(e)(2)(ii) and (f) and as defined in § 63.90.

(5) Approval of major alternatives to monitoring under § 63.8(f) and as defined in § 63.90.

(6) Approval of major alternatives to recordkeeping and reporting under § 63.10(f) and as defined in § 63.90.

§ 63.7142 What are the requirements for claiming area source status?

(a) If you wish to claim that your LMP is an area source, you must measure the emissions of hydrogen chloride from all lime kilns, except as provided in paragraph (c) of this section, at your plant using either:

(1) EPA Method 320 of appendix A to this part,

(2) EPA Method 321 of appendix A to this part, or

(3) ASTM Method D6735–01, Standard Test Method for Measurement of Gaseous Chlorides and Fluorides from Mineral Calcining Exhaust Sources—Impinger Method, provided that the provisions in paragraphs (a)(3)(i) through (vi) of this section are followed.

(i) A test must include three or more runs in which a pair of samples is obtained simultaneously for each run according to section 11.2.6 of ASTM Method D6735–01.

(ii) You must calculate the test run standard deviation of each set of paired samples to quantify data precision, according to Equation 1 of this section:

$$RSD_a = (100)\ \text{Absolute Value} \left[\frac{C1_a - C2_a}{C1_a + C2_a} \right] \quad \text{(Eq. 1)}$$

Where:

RSD_a = The test run relative standard deviation of sample pair a, percent.

$C1_a$ and $C2_a$ = The HCl concentrations, milligram/dry standard cubic meter(mg/dscm), from the paired samples.

(iii) You must calculate the test average relative standard deviation according to Equation 2 of this section:

$$RSD_{TA} = \frac{\sum_{a=1}^{p} RSD_a}{p} \quad \text{(Eq. 2)}$$

Where:

RSD_{TA} = The test average relative standard deviation, percent.

RSD_a = The test run relative standard deviation for sample pair a.

p = The number of test runs, ≥3.

(iv) If RSD^{TA} is greater than 20 percent, the data are invalid and the test must be repeated.

(v) The post-test analyte spike procedure of section 11.2.7 of ASTM Method D6735–01 is conducted, and the percent recovery is calculated according to section 12.6 of ASTM Method D6735–01.

(vi) If the percent recovery is between 70 percent and 130 percent, inclusive, the test is valid. If the percent recovery is outside of this range, the data are considered invalid, and the test must be repeated.

(b) If you conduct tests to determine the rates of emission of specific organic HAP from lime kilns at LMP for use in applicability determinations under § 63.7081, you may use either:

(1) Method 320 of appendix A to this part, or

(2) Method 18 of appendix A to part 60 of this chapter, or

(3) ASTM D6420–99, Standard Test Method for Determination of Gaseous Organic Compounds by Direct Interface Gas Chromatography-Mass

Spectrometry (GC/MS), provided that the provisions of paragraphs (b)(3)(i) through (iv) of this section are followed:

(i) The target compound(s) are those listed in section 1.1 of ASTM D6420–99;

(ii) The target concentration is between 150 parts per billion by volume and 100 parts per million by volume;

(iii) For target compound(s) not listed in Table 1.1 of ASTM D6420–99, but potentially detected by mass spectrometry, the additional system continuing calibration check after each run, as detailed in section 10.5.3 of ASTM D6420–99, is conducted, met, documented, and submitted with the data report, even if there is no moisture condenser used or the compound is not considered water soluble; and

(iv) For target compound(s) not listed in Table 1.1 of ASTM D6420–99, and not amenable to detection by mass spectrometry, ASTM D6420–99 may not be used.

(c) It is left to the discretion of the permitting authority whether or not idled kilns must be tested for (HCl) to claim area source status. If the facility has kilns that use common feed materials and fuel, are essentially identical in design, and use essentially identical emission controls, the permitting authority may also determine if one kiln can be tested, and the HCl emissions for the other essentially identical kilns be estimated from that test.

§ 63.7143 What definitions apply to this subpart?

Terms used in this subpart are defined in the Clean Air Act, in § 63.2, and in this section as follows:

Bag leak detector system (BLDS) is a type of PM detector used on FF to identify an increase in PM emissions resulting from a broken filter bag or other malfunction and sound an alarm.

Belt conveyor means a conveying device that transports *processed stone* from one location to another by means of an endless belt that is carried on a series of idlers and routed around a pulley at each end.

Bucket elevator means a *processed stone* conveying device consisting of a head and foot assembly which supports and drives an endless single or double strand chain or belt to which buckets are attached.

Building means any frame structure with a roof.

Capture system means the equipment (including enclosures, hoods, ducts, fans, dampers, *etc.*) used to capture and transport PM to a control device.

Control device means the air pollution control equipment used to reduce PM emissions released to the atmosphere from one or more process operations at an LMP.

Conveying system means a device for transporting *processed stone* from one piece of equipment or location to another location within a plant. Conveying systems include but are not limited to feeders, belt conveyors, bucket elevators and pneumatic systems.

Deviation means any instance in which an affected source, subject to this subpart, or an owner or operator of such a source:

(1) Fails to meet any requirement or obligation established by this subpart, including but not limited to any emission limitation (including any operating limit);

(2) Fails to meet any term or condition that is adopted to implement an applicable requirement in this subpart and that is included in the operating permit for any affected source required to obtain such a permit; or

(3) Fails to meet any emission limitation (including any operating limit) in this subpart during startup, shutdown, or malfunction, regardless of whether or not such failure is allowed by this subpart.

Emission limitation means any emission limit, opacity limit, operating limit, or VE limit.

Emission unit means a lime kiln, lime cooler, storage bin, conveying system transfer point, bulk loading or unloading operation, bucket elevator or belt conveyor at an LMP.

Fugitive emission means PM that is not collected by a capture system.

Hydrator means the device used to produce hydrated lime or calcium hydroxide via the chemical reaction of the lime product with water.

Lime cooler means the device external to the lime kiln (or part of the lime kiln itself) used to reduce the temperature of the lime produced by the kiln.

Lime kiln means the device, including any associated preheater, used to produce a lime product from stone feed by calcination. Kiln types include, but are not limited to, rotary kiln, vertical kiln, rotary hearth kiln, double-shaft vertical kiln, and fluidized bed kiln.

Lime manufacturing plant (LMP) means any plant which uses a lime kiln to produce lime product from limestone or other calcareous material by calcination.

Lime product means the product of the lime kiln calcination process including, calcitic lime, dolomitic lime, and dead-burned dolomite.

Limestone means the material comprised primarily of calcium carbonate (referred to sometimes as calcitic or high calcium limestone), magnesium carbonate, and/or the double carbonate of both calcium and magnesium (referred to sometimes as dolomitic limestone or dolomite).

Monovent means an exhaust configuration of a building or emission control device (*e.g.*, positive pressure FF) that extends the length of the structure and has a width very small in relation to its length (*i.e.*, length-to-width ratio is typically greater than 5:1). The exhaust may be an open vent with or without a roof, louvered vents, or a combination of such features.

Particulate matter (PM) detector means a system that is continuously capable of monitoring PM loading in the exhaust of FF or ESP in order to detect bag leaks, upset conditions, or control device malfunctions and sounds an alarm at a preset level. A PM detector system includes, but is not limited to, an instrument that operates on triboelectric, light scattering, light transmittance, or other effects to continuously monitor relative particulate loadings. A BLDS is a type of PM detector.

Positive pressure FF or ESP means a FF or ESP with the fan(s) on the upstream side of the control device.

Process stone handling operations means the equipment and transfer points between the equipment used to transport *processed stone,* and includes, storage bins, conveying system transfer points, bulk loading or unloading systems, screening operations, bucket elevators, and belt conveyors.

Processed stone means limestone or other calcareous material that has been processed to a size suitable for feeding into a lime kiln.

Screening operation means a device for separating material according to size by passing undersize material through one or more mesh surfaces (screens) in series and retaining oversize material on the mesh surfaces (screens).

Stack emissions means the PM that is released to the atmosphere from a capture system or control device.

Storage bin means a manmade enclosure for storage (including surge bins) of *processed stone* prior to the lime kiln.

Transfer point means a point in a conveying operation where the material is transferred to or from a belt conveyor.

Vent means an opening through which there is mechanically induced air flow for the purpose of exhausting from a building air carrying PM emissions from one or more emission units.

Tables to Subpart AAAAA of Part 63

TABLE 1 TO SUBPART AAAAA OF PART 63.—EMISSION LIMITS

[As required in §63.7090(a), you must meet each emission limit in the following table that applies to you.]

For . . .	You must meet the following emission limit
1. Existing lime kilns and their associated lime coolers that did not have a wet scrubber installed and operating prior to January 5, 2004.	PM emissions must not exceed 0.12 pounds per ton of stone feed (lb/tsf).
2. Existing lime kilns and their associated lime coolers that have a wet scrubber, where the scrubber itself was installed and operating prior to January 5, 2004.	PM emissions must not exceed 0.60 lb/tsf. If at any time after January 5, 2004 the kiln changes to a dry control system, then the PM emission limit in item 1 of this Table 1 applies, and the kiln is hereafter ineligible for the PM emission limit in item 2 of this Table 1 regardless of the method of PM control.
3. New lime kilns and their associated lime coolers	PM emissions must not exceed 0.10 lb/tsf.
4. All existing and new lime kilns and their associated coolers at your LMP, and you choose to average PM emissions, except that any kiln that is allowed to meet the 0.60 lb/tsf PM emission limit is ineligible for averaging.	Weighted average PM emissions calculated according to Eq. 2 in §63.7112 must not exceed 0.12 lb/tsf (if you are averaging only existing kilns) or 0.10 lb/tsf (if you are averaging only new kilns). If you are averaging existing and new kilns, your weighted average PM emissions must not exceed the weighted average emission limit calculated according to Eq. 3 in §63.7112, except that no new kiln and its associated cooler considered alone may exceed an average PM emissions limit of 0.10 lb/tsf.
5. Stack emissions from all PSH operations at a new or existing affected source.	PM emissions must not exceed 0.05 grams per dry standard cubic meter (g/dscm).
6. Stack emissions from all PSH operations at a new or existing affected source, unless the stack emissions are discharged through a wet scrubber control device.	Emissions must not exceed 7 percent opacity.
7. Fugitive emissions from all PSH operations at a new or existing affected source, except as provided by item 8 of this Table 1.	Emissions must not exceed 10 percent opacity.
8. All PSH operations at a new or existing affected source enclosed in a building.	All of the individually affected PSH operations must comply with the applicable PM and opacity emission limitations in items 5 through 7 of this Table 1, or the building must comply with the following: There must be no VE from the building, except from a vent; and vent emissions must not exceed the stack emissions limitations in items 5 and 6 of this Table 1.
9. Each FF that controls emissions from only an individual, enclosed storage bin.	Emissions must not exceed 7 percent opacity.
10. Each set of multiple storage bins at a new or existing affected source, with combined stack emissions.	You must comply with the emission limits in items 5 and 6 of this Table 1.

TABLE 2 TO SUBPART AAAAA OF PART 63.—OPERATING LIMITS

[As required in §63.7090(b), you must meet each operating limit in the following table that applies to you.

For . . .	You must . . .
1. Each lime kiln and each lime cooler (if there is a separate exhaust to the atmosphere from the associated lime cooler) equipped with an FF.	Maintain and operate the FF such that the BLDS or PM detector alarm condition does not exist for more than 5 percent of the total operating time in a 6-month period; and comply with the requirements in §63.7113(d) through (f) and Table 5 to this subpart. In lieu of a BLDS or PM detector maintain the FF such that the 6-minute average opacity for any 6-minute block period does not exceed 15 percent; and comply with the requirements in §63.7113(f) and (g) and Table 5 to this subpart.
2. Each lime kiln equipped with a wet scrubber	Maintain the 3-hour block exhaust gas stream pressure drop across the wet scrubber greater than or equal to the pressure drop operating limit established during the most recent PM performance test; and maintain the 3-hour block scrubbing liquid flow rate greater than the flow rate operating limit established during the most recent performance test.
3. Each lime kiln equipped with an electrostatic precipitator	Install a PM detector and maintain and operate the ESP such that the PM detector alarm is not activated and alarm condition does not exist for more than 5 percent of the total operating time in a 6-month period, and comply with §63.7113(e); or, maintain the ESP such that the 6-minute average opacity for any 6-minute block period does not exceed 15 percent, and comply with the requirements in §63.7113(g); and comply with the requirements in §63.7113(f) and Table 5 to this subpart.
4. Each PSH operation subject to a PM limit which uses a wet scrubber.	Maintain the 3-hour block average exhaust gas stream pressure drop across the wet scrubber greater than or equal to the pressure drop operating limit established during the PM performance test; and maintain the 3-hour block average scrubbing liquid flow rate greater than or equal to the flow rate operating limit established during the performance test.

TABLE 2 TO SUBPART AAAAA OF PART 63.—OPERATING LIMITS—Continued

[As required in §63.7090(b), you must meet each operating limit in the following table that applies to you.

For . . .	You must . . .
5. All affected sources	Prepare a written OM&M plan; the plan must include the items listed in §63.7100(d) and the corrective actions to be taken when required in Table 5 to this subpart.
6. Each emission unit equipped with an add-on air pollution control device.	a. Vent captured emissions through a closed system, except that dilution air may be added to emission streams for the purpose of controlling temperature at the inlet to an FF; and b. Operate each capture/collection system according to the procedures and requirements in the OM&M plan.

TABLE 3 TO SUBPART AAAAA OF PART 63.—INITIAL COMPLIANCE WITH EMISSION LIMITS

[As required in §63.7114, you must demonstrate initial compliance with each emission limitation that applies to you, according to the following table.]

For . . .	For the following emission limit . . .	You have demonstrated initial compliance, if after following the requirements in §63.7112 . . .
1. All new or existing lime kilns and their associated lime coolers (kilns/coolers).	PM emissions must not exceed 0.12 lb/tsf for all existing kilns/coolers with dry controls, 0.60 lb/tsf for existing kilns/coolers with wet scrubbers, 0.10 lb/tsf for all new kilns/coolers, or a weighted average calculated according to Eq. 3 in §63.7112.	The kiln outlet PM emissions (and if applicable, summed with the separate cooler PM emissions), based on the PM emissions measured using Method 5 in appendix A to part 60 of this chapter and the stone feed rate measurement over the period of initial performance test, do not exceed the emission limit; if the lime kiln is controlled by an FF or ESP and you are opting to monitor PM emissions with a BLDS or PM detector, you have installed and are operating the monitoring device according to the requirements in §63.7113(d) or (e), respectively; and if the lime kiln is controlled by an FF or ESP and you are opting to monitor PM emissions using a COMS, you have installed and are operating the COMS according to the requirements in §63.7113(g).
2. Stack emissions from all PHS operations at a new or existing affected source.	PM emissions must not exceed 0.05 g/dscm	The outlet PM emissions, based on Method 5 or Method 17 in appendix A to part 60 of this chapter, over the period of the initial performance test do not exceed 0.05 g/dscm; and if the emission unit is controlled with a wet scrubber, you have a record of the scrubber's pressure drop and liquid flow rate operating parameters over the 3-hour performance test during which emissions did not exceed the emissions limitation.
3. Stack emissions from all PSH operations at a new or existing affected source, unless the stack emissions are discharged through a wet scrubber control device.	Emissions must not exceed 7 percent opacity	Each of the thirty 6-minute opacity averages during the initial compliance period, using Method 9 in appendix A to part 60 of this chapter, does not exceed the 7 percent opacity limit. At least thirty 6-minute averages must be obtained.
4. Fugitive emissions from all PSH operations at a new or existing affected source.	Emissions must not exceed 10 percent opacity.	Each of the 6-minute opacity averages during the initial compliance period, using Method 9 in appendix A to part 60 of this chapter, does not exceed the 10 percent opacity limit.
5. All PSH operations at a new or existing affected source, enclosed in building.	All of the individually affected PSH operations must comply with the applicable PM and opacity emission limitations for items 2 through 4 of this Table 3, or the building must comply with the following: There must be no VE from the building, except from a vent, and vent emissions must not exceed the emission limitations in items 2 and 3 of this Table 3.	All the PSH operations enclosed in the building have demonstrated initial compliance according to the applicable requirements for items 2 through 4 of this Table 3; or if you are complying with the building emission limitations, there are no VE from the building according to item 18 of Table 4 to this subpart and §63.7112(k), and you demonstrate initial compliance with applicable building vent emissions limitations according to the requirements in items 2 and 3 of this Table 3.

TABLE 3 TO SUBPART AAAAA OF PART 63.—INITIAL COMPLIANCE WITH EMISSION LIMITS—Continued

[As required in §63.7114, you must demonstrate initial compliance with each emission limitation that applies to you, according to the following table.]

For . . .	For the following emission limit . . .	You have demonstrated initial compliance, if after following the requirements in §63.7112 . . .
6. Each FF that controls emissions from only an individual storage bin.	Emissions must not exceed 7 percent opacity	Each of the ten 6-minute averages during the 1-hour initial compliance period, using Method 9 in appendix A to part 60 of this chapter, does not exceed the 7 percent opacity limit.
7. Each set of multiple storage bins with combined stack emissions.	You must comply with emission limitations in items 2 and 3 of this Table 3.	You demonstrate initial compliance according to the requirements in items 2 and 3 of this Table 3.

TABLE 4 TO SUBPART AAAAA OF PART 63.—REQUIREMENTS FOR PERFORMANCE TESTS

[As required in §63.7112, you must conduct each performance test in the following table that applies to you.]

For . . .	You must . . .	Using . . .	According to the following requirements . . .
1. Each lime kiln and each associated lime cooler, if there is a separate exhaust to the atmosphere from the associated lime cooler.	Select the location of the sampling port and the number of traverse ports.	Method 1 or 1A of appendix A to part 60 of this chapter; and §63.6(d)(1)(i).	Sampling sites must be located at the outlet of the control device(s) and prior to any releases to the atmosphere.
2. Each lime kiln and each associated lime cooler, if there is a separate exhaust to the atmosphere from the associated lime cooler.	Determine velocity and volumetric flow rate.	Method 2, 2A, 2C, 2D, 2F, or 2G in appendix A to part 60 of this chapter.	Not applicable.
3. Each lime kiln and each associated lime cooler, if there is a separate exhaust to the atmosphere from the associated lime cooler.	Conduct gas molecular weight analysis.	Method 3, 3A, or 3B in appendix A to part 60 of this chapter.	Not applicable.
4. Each lime kiln and each associated lime cooler, if there is a separate exhaust to the atmosphere from the associated lime cooler.	Measure moisture content of the stack gas.	Method 4 in appendix A to part 60 of this chapter.	Not applicable.
5. Each lime kiln and each associated lime cooler, if there is a separate exhaust to the atmosphere from the associated lime cooler, and which uses a negative pressure PM control device.	Measure PM emissions	Method 5 in appendix A to part 60 of this chapter.	Conduct the test(s) when the source is operating at representative operating conditions in accordance with §63.7(e); the minimum sampling volume must be 0.85 dry standard cubic meter (dscm) (30 dry standard cubic foot (dscf)); if there is a separate lime cooler exhaust to the atmosphere, you must conduct the Method 5 test of the cooler exhaust concurrently with the kiln exhaust test.
6. Each lime kiln and each associated lime cooler, if there is a separate exhaust to the atmosphere from the associated lime cooler, and which uses a positive pressure FF or ESP.	Measure PM emissions	Method 5D in appendix A to part 60 of this chapter.	Conduct the test(s) when the source is operating at representative operating conditions in accordance with §63.7(e); if there is a separate lime cooler exhaust to the atmosphere, you must conduct the Method 5 test of the separate cooler exhaust concurrently with the kiln exhaust test.
7. Each lime kiln	Determine the mass rate of stone feed to the kiln during the kiln PM emissions test.	Any suitable device	Calibrate and maintain the device according to manufacturer's instructions; the measuring device used must be accurate to within ±5 percent of the mass rate of stone feed over its operating range.

TABLE 4 TO SUBPART AAAAA OF PART 63.—REQUIREMENTS FOR PERFORMANCE TESTS—Continued

[As required in § 63.7112, you must conduct each performance test in the following table that applies to you.]

For . . .	You must . . .	Using . . .	According to the following requirements . . .
8. Each lime kiln equipped with a wet scrubber.	Establish the operating limit for the average gas stream pressure drop across the wet scrubber.	Data for the gas stream pressure drop measurement device during the kiln PM performance test.	The continuous pressure drop measurement device must be accurate within plus or minus 1 percent; you must collect the pressure drop data during the period of the performance test and determine the operating limit according to § 63.7112(j).
9. Each lime kiln equipped with a wet scrubber.	Establish the operating limit for the average liquid flow rate to the scrubber.	Data from the liquid flow rate measurement device during the kiln PM performance test.	The continuous scrubbing liquid flow rate measuring device must be accurate within plus or minus 1 percent; you must collect the flow rate data during the period of the performance test and determine the operating limit according to § 63.7112(j).
10. Each lime kiln equipped with a FF or ESP that is monitored with a PM detector.	Have installed and have operating the BLDS or PM detector prior to the performance test.	Standard operating procedures incorporated into the OM&M plan.	According to the requirements in § 63.7113(d) or (e), respectively.
11. Each lime kiln equipped with a FF or ESP that is monitored with a COMS.	Have installed and have operating the COMS prior to the performance test.	Standard operating procedures incorporated into the OM&M plan and as required by 40 CFR part 63, subpart A, General Provisions and according to PS–1 of appendix B to part 60 of this chapter, except as specified in § 63.7113(g)(2).	According to the requirements in § 63.7113(g).
12. Each stack emission from a PSH operation, vent from a building enclosing a PSH operation, or set of multiple storage bins with combined stack emissions, which is subject to a PM emission limit.	Measure PM emissions	Method 5 or Method 17 in appendix A to part 60 of this chapter.	The sample volume must be at least 1.70 dscm (60 dscf); for Method 5, if the gas stream being sampled is at ambient temperature, the sampling probe and filter may be operated without heaters; and if the gas stream is above ambient temperature, the sampling probe and filter may be operated at a temperature high enough, but no higher than 121 °C (250 °F), to prevent water condensation on the filter (Method 17 may be used only with exhaust gas temperatures of not more than 250 °F).
13. Each stack emission from a PSH operation, vent from a building enclosing a PSH operation, or set of multiple storage bins with combined stack emissions, which is subject to an opacity limit.	Conduct opacity observations	Method 9 in appendix A to part 60 of this chapter.	The test duration must be for at least 3 hours and you must obtain at least thirty, 6-minute averages.
14. Each stack emissions source from a PSH operation subject to a PM or opacity limit, which uses a wet scrubber.	Establish the average gas stream pressure drop across the wet scrubber.	Data for the gas stream pressure drop measurement device during the PSH operation stack PM performance test.	The pressure drop measurement device must be accurate within plus or minus 1 percent; you must collect the pressure drop data during the period of the performance test and determine the operating limit according to § 63.7112(j).
15. Each stack emissions source from a PSH operation subject to a PM or opacity limit, which uses a wet scrubber.	Establish the operating limit for the average liquid flow rate to the scrubber.	Data from the liquid flow rate measurement device during the PSH operation stack PM performance test.	The continuous scrubbing liquid flow rate measuring device must be accurate within plus or minus 1 percent; you must collect the flow rate data during the period of the performance test and determine the operating limit according to § 63.7112(j).

TABLE 4 TO SUBPART AAAAA OF PART 63.—REQUIREMENTS FOR PERFORMANCE TESTS—Continued

[As required in § 63.7112, you must conduct each performance test in the following table that applies to you.]

For . . .	You must . . .	Using . . .	According to the following requirements . . .
16. Each FF that controls emissions from only an individual, enclosed, new or existing storage bin.	Conduct opacity observations	Method 9 in appendix A to part 60 of this chapter.	The test duration must be for at least 1 hour and you must obtain ten 6-minute averages.
17. Fugitive emissions from any PSH operation subject to an opacity limit.	Conduct opacity observations	Method 9 in appendix A to part 60 of this chapter.	The test duration must be for at least 3 hours, but the 3-hour test may be reduced to 1 hour if, during the first 1-hour period, there are no individual readings greater than 10 percent opacity and there are no more than three readings of 10 percent during the first 1-hour period.
18. Each building enclosing any PSH operation, that is subject to a VE limit.	Conduct VE check	The specifications in § 63.7112(k)	The performance test must be conducted while all affected PSH operations within the building are operating; the performance test for each affected building must be at least 75 minutes, with each side of the building and roof being observed for at least 15 minutes.

TABLE 5 TO SUBPART AAAAA OF PART 63.—CONTINUOUS COMPLIANCE WITH OPERATING LIMITS

[As required in § 63.7121, you must demonstrate continuous compliance with each operating limit that applies to you, according to the following table.]

For . . .	For the following operating limit . . .	You must demonstrate continuous compliance by . . .
1. Each lime kiln controlled by a wet scrubber	Maintain the 3-hour block average exhaust gas stream pressure drop across the wet scrubber greater than or equal to the pressure drop operating limit established during the PM performance test; and maintain the 3-hour block average scrubbing liquid flow rate greater than or equal to the flow rate operating limit established during the performance test.	Collecting the wet scrubber operating data according to all applicable requirements in § 63.7113 and reducing the data according to § 63.7113(a); maintaining the 3-hour block average exhaust gas stream pressure drop across the wet scrubber greater than or equal to the pressure drop operating limit established during the PM performance test; and maintaining the 3-hour block average scrubbing liquid flow rate greater than or equal to the flow rate operating limit established during the performance test (the continuous scrubbing liquid flow rate measuring device must be accurate within ±1% and the continuous pressure drop measurement device must be accurate within ±1%).
2. Each lime kiln or lime cooler equipped with a FF and using a BLDS, and each lime kiln equipped with an ESP or FF using a PM detector.	a. Maintain and operate the FF or ESP such that the bag leak or PM detector alarm, is not activated and alarm condition does not exist for more than 5 percent of the total operating time in each 6-month period.	(i) Operating the FF or ESP so that the alarm on the bag leak or PM detection system is not activated and an alarm condition does not exist for more than 5 percent of the total operating time in each 6-month reporting period; and continuously recording the output from the BLD or PM detection system; and (ii) Each time the alarm sounds and the owner or operator initiates corrective actions within 1 hour of the alarm, 1 hour of alarm time will be counted (if the owner or operator takes longer than 1 hour to initiate corrective actions, alarm time will be counted as the actual amount of time taken by the owner or operator to initiate corrective actions); if inspection of the FF or ESP system demonstrates that no corrective actions are necessary, no alarm time will be counted.

TABLE 5 TO SUBPART AAAAA OF PART 63.—CONTINUOUS COMPLIANCE WITH OPERATING LIMITS—Continued

[As required in § 63.7121, you must demonstrate continuous compliance with each operating limit that applies to you, according to the following table.]

For . . .	For the following operating limit . . .	You must demonstrate continuous compliance by . . .
3. Each stack emissions source from a PSH operation subject to an opacity limit, which is controlled by a wet scrubber.	Maintain the 3-hour block average exhaust gas stream pressure drop across the wet scrubber greater than or equal to the pressure drop operating limit established during the PM performance test; and maintain the 3-hour block average scrubbing liquid flow rate greater than or equal to the flow rate operating limit established during the performance test.	Collecting the wet scrubber operating data according to all applicable requirements in § 63.7113 and reducing the data according to § 63.7113(a); maintaining the 3-hour block average exhaust gas stream pressure drop across the wet scrubber greater than or equal to the pressure drop operating limit established during the PM performance test; and maintaining the 3-hour block average scrubbing liquid flow rate greater than or equal to the flow rate operating limit established during the performance test (the continuous scrubbing liquid flow rate measuring device must be accurate within ±1% and the continuous pressure drop measurement device must be accurate within ±1%).
4. For each lime kiln or lime cooler equipped with a FF or an ESP that uses a COMS as the monitoring device.	a. Maintain and operate the FF or ESP such that the average opacity for any 6-minute block period does not exceed 15 percent.	i. Installing, maintaining, calibrating and operating a COMS as required by 40 CFR part 63, subpart A, General Provisions and according to PS–1 of appendix B to part 60 of this chapter, except as specified in § 63.7113(g)(2); and ii. Collecting the COMS data at a frequency of at least once every 15 seconds, determining block averages for each 6-minute period and demonstrating for each 6-minute block period the average opacity does not exceed 15 percent.

TABLE 6 TO SUBPART AAAAA OF PART 63.—PERIODIC MONITORING FOR COMPLIANCE WITH OPACITY AND VISIBLE EMISSIONS LIMITS

[As required in § 63.7121 you must periodically demonstrate compliance with each opacity and VE limit that applies to you, according to the following table]

For . . .	For the following emission limitation . . .	You must demonstrate ongoing compliance . . .
1. Each PSH operation subject to an opacity limitation as required in Table 1 to this subpart, or any vents from buildings subject to an opacity limitation.	a. 7–10 percent opacity, depending on the PSH operation, as required in Table 1 to this subpart.	(i) Conducting a monthly 1-minute VE check of each emission unit in accordance with § 63.7121(e); the check must be conducted while the affected source is in operation; (ii) If no VE are observed in 6 consecutive monthly checks for any emission unit, you may decrease the frequency of VE checking from monthly to semi-annually for that emission unit; if VE are observed during any semiannual check, you must resume VE checking of that emission unit on a monthly basis and maintain that schedule until no VE are observed in 6 consecutive monthly checks; (iii) If no VE are observed during the semi-annual check for any emission unit, you may decrease the frequency of VE checking from semi-annually to annually for that emission unit; if VE are observed during any annual check, you must resume VE checking of that emission unit on a monthly basis and maintain that schedule until no VE are observed in 6 consecutive monthly checks; and

TABLE 6 TO SUBPART AAAAA OF PART 63.—PERIODIC MONITORING FOR COMPLIANCE WITH OPACITY AND VISIBLE EMISSIONS LIMITS—Continued

[As required in §63.7121 you must periodically demonstrate compliance with each opacity and VE limit that applies to you, according to the following table]

For . . .	For the following emission limitation . . .	You must demonstrate ongoing compliance . . .
		(iv) If VE are observed during any VE check, you must conduct a 6-minute test of opacity in accordance with Method 9 of appendix A to part 60 of this chapter; you must begin the Method 9 test within 1 hour of any observation of VE and the 6-minute opacity reading must not exceed the applicable opacity limit.
2. Any building subject to a VE limit, according to item 8 of Table 1 to this subpart.	a. No VE	(i) Conducting a monthly VE check of the building, in accordance with the specifications in §63.7112(k); the check must be conducted while all the enclosed PSH operations are operating; (ii) The check for each affected building must be at least 5 minutes, with each side of the building and roof being observed for at least 1 minute; (iii) If no VE are observed in 6 consecutive monthly checks of the building, you may decrease the frequency of checking from monthly to semi-annually for that affected source; if VE are observed during any semi-annual check, you must resume checking on a monthly basis and maintain that schedule until no VE are observed in 6 consecutive monthly checks; and (iv) If no VE are observed during the semi-annual check, you may decrease the frequency of checking from semi-annually to annually for that affected source; and if VE are observed during any annual check, you must resume checking of that emission unit on a monthly basis and maintain that schedule until no VE are observed in 6 consecutive monthly checks (the source is in compliance if no VE are observed during any of these checks).

TABLE 7 TO SUBPART AAAAA OF PART 63.—REQUIREMENTS FOR REPORTS

[As required in §63.7131, you must submit each report in this table that applies to you.]

You must submit a . . .	The report must contain . . .	You must submit the report . . .
1. Compliance report	a. If there are no deviations from any emission limitations (emission limit, operating limit, opacity limit, and VE limit) that applies to you, a statement that there were no deviations from the emission limitations during the reporting period;	Semiannually according to the requirements in §63.7131(b).
	b. If there were no periods during which the CMS, including any operating parameter monitoring system, was out-of-control as specified in §63.8(c)(7), a statement that there were no periods during which the CMS was out-of-control during the reporting period;	Semiannually according to the requirements in §63.7131(b).
	c. If you have a deviation from any emission limitation (emission limit, operating limit, opacity limit, and VE limit) during the reporting period, the report must contain the information in §63.7131(d);	Semiannually according to the requirements in §63.7131(b).
	d. If there were periods during which the CMS, including any operating parameter monitoring system, was out-of-control, as specified in §63.8(c)(7), the report must contain the information in §63.7131(e); and	Semiannually according to the requirements in §63.7131(b).

TABLE 7 TO SUBPART AAAAA OF PART 63.—REQUIREMENTS FOR REPORTS—Continued

[As required in § 63.7131, you must submit each report in this table that applies to you.]

You must submit a . . .	The report must contain . . .	You must submit the report . . .
	e. If you had a startup, shutdown or malfunction during the reporting period and you took actions consistent with your SSMP, the compliance report must include the information in § 63.10(d)(5)(i).	Semiannually according to the requirements in § 63.7131(b).
2. An immediate startup, shutdown, and malfunction report if you had a startup, shutdown, or malfunction during the reporting period that is not consistent with your SSMP.	Actions taken for the event	By fax or telephone within 2 working days after starting actions inconsistent with the SSMP.
3. An immediate startup, shutdown, and malfunction report if you had a startup, shutdown, or malfunction during the reporting period that is not consistent with your SSMP.	The information in § 63.10(d)(5)(ii)	By letter within 7 working days after the end of the event unless you have made alternative arrangements with the permitting authority. See § 63.10(d)(5)(ii).

TABLE 8 TO SUBPART AAAAA OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART AAAAA

[As required in § 63.7140, you must comply with the applicable General Provisions requirements according to the following table.]

Citation	Summary of requirement	Am I subject to this requirement?	Explanations
§ 63.1(a)(1)–(4)	Applicability	Yes.	
§ 63.1(a)(5)		No.	
§ 63.1(a)(6)	Applicability	Yes.	
§ 63.1(a)(7)–(a)(9)		No.	
§ 63.1(a)(10)–(a)(14)	Applicability	Yes.	
§ 63.1(b)(1)	Initial Applicability Determination	Yes	§§ 63.7081 and 63.7142 specify additional applicability determination requirements.
§ 63.1(b)(2)		No.	
§ 63.1(b)(3)	Initial Applicability Determination	Yes.	
§ 63.1(c)(1)	Applicability After Standard Established.	Yes.	
§ 63.1(c)(2)	Permit Requirements	No	Area sources not subject to subpart AAAAA, except all sources must make initial applicability determination.
§ 63.1(c)(3)		No.	
§ 63.1(c)(4)–(5)	Extensions, Notifications	Yes.	
§ 63.1(d)		No.	
§ 63.1(e)	Applicability of Permit Program	Yes.	
§ 63.2	Definitions		Additional definitions in § 63.7143.
§ 63.3(a)–(c)	Units and Abbreviations	Yes.	
§ 63.4(a)(1)–(a)(2)	Prohibited Activities	Yes.	
§ 3.4(a)(3)–(a)(5)		No.	
§ 63.4(b)–(c)	Circumvention, Severability	Yes.	
§ 63.5(a)(1)–(2)	Construction/Reconstruction	Yes.	
§ 63.5(b)(1)	Compliance Dates	Yes.	
§ 63.5(b)(2)		No.	
§ 63.5(b)(3)–(4)	Construction Approval, Applicability	Yes.	
§ 63.5(b)(5)		No.	
§ 63.5(b)(6)	Applicability	Yes.	
§ 63.5(c)		No.	
§ 63.5(d)(1)–(4)	Approval of Construction/Reconstruction.	Yes.	
§ 63.5(e)	Approval of Construction/Reconstruction.	Yes.	
§ 63.5(f)(1)–(2)	Approval of Construction/Reconstruction.	Yes.	
§ 63.6(a)	Compliance for Standards and Maintenance.	Yes.	
§ 63.6(b)(1)–(5)	Compliance Dates	Yes.	
§ 63.6(b)(6)		No.	
§ 63.6(b)(7)	Compliance Dates	Yes.	
§ 63.6(c)(1)–(2)	Compliance Dates	Yes.	
§ 63.6(c)(3)–(c)(4)		No.	
§ 63.6(c)(5)	Compliance Dates	Yes.	
§ 63.6(d)		No.	
§ 63.6(e)(1)	Operation & Maintenance	Yes	See § 63.7100 for OM&M requirements.
§ 63.6(e)(2)		No.	

TABLE 8 TO SUBPART AAAAA OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART AAAAA—Continued

[As required in §63.7140, you must comply with the applicable General Provisions requirements according to the following table.]

Citation	Summary of requirement	Am I subject to this requirement?	Explanations
§63.6(e)(3)	Startup, Shutdown Malfunction Plan	Yes.	
§63.6(f)(1)–(3)	Compliance with Emission Standards	Yes.	
§63.6(g)(1)–(g)(3)	Alternative Standard	Yes.	
§63.6(h)(1)–(2)	Opacity/VE Standards	Yes.	
§63.6(h)(3)		No.	
§63.6(h)(4)–(h)(5)(i)	Opacity/VE Standards	Yes	This requirement only applies to opacity and VE performance checks required in Table 4 to subpart AAAAA.
§63.6(h)(5) (ii)–(iii)	Opacity/VE Standards	No	Test durations are specified in subpart AAAAA; subpart AAAAA takes precedence.
§63.6(h)(5)(iv)	Opacity/VE Standards	No.	
§63.6(h)(5)(v)	Opacity/VE Standards	Yes.	
§63.6(h)(6)	Opacity/VE Standards	Yes.	
§63.6(h)(7)	COM Use	Yes.	
§63.6(h)(8)	Compliance with Opacity and VE	Yes.	
§63.6(h)(9)	Adjustment of Opacity Limit	Yes.	
§63.6(i)(1)–(i)(14)	Extension of Compliance	Yes.	
§63.6(i)(15)		No.	
§63.6(i)(16)	Extension of Compliance	Yes.	
§63.6(j)	Exemption from Compliance	Yes.	
§63.7(a)(1)–(a)(3)	Performance Testing Requirements	Yes	§63.7110 specifies deadlines; §63.7112 has additional specific requirements.
§63.7(b)	Notification	Yes.	
§63.7(c)	Quality Assurance/Test Plan	Yes.	
§63.7(d)	Testing Facilities	Yes.	
§63.7(e)(1)–(4)	Conduct of Tests	Yes.	
§63.7(f)	Alternative Test Method	Yes.	
§63.7(g)	Data Analysis	Yes.	
§63.7(h)	Waiver of Tests	Yes.	
§63.8(a)(1)	Monitoring Requirements	Yes	See §63.7113.
§63.8(a)(2)	Monitoring	Yes.	
§63.8(a)(3)		No.	
§63.8(a)(4)	Monitoring	No	Flares not applicable.
§63.8(b)(1)–(3)	Conduct of Monitoring	Yes.	
§63.8(c)(1)–(3)	CMS Operation/Maintenance	Yes.	
§63.8(c)(4)	CMS Requirements	No	See §63.7121.
§63.8(c)(4)(i)–(ii)	Cycle Time for COM and CEMS	Yes	No CEMS are required under subpart AAAAA; see §63.7113 for CPMS requirements.
§63.8(c)(5)	Minimum COM procedures	Yes	COM not required.
§63.8(c)(6)	CMS Requirements	No	See §63.7113.
§63.8(c)(7)–(8)	CMS Requirements	Yes.	
§63.8(d)	Quality Control	No	See §63.7113.
§63.8(e)	Performance Evaluation for CMS	No.	
§63.8(f)(1)–(f)(5)	Alternative Monitoring Method	Yes.	
§63.8(f)(6)	Alternative to Relative Accuracy test	No.	
§63.8(g)(1)–(g)(5)	Data Reduction; Data That Cannot Be Used.	No	See data reduction requirements in §§63.7120 and 63.7121.
§63.9(a)	Notification Requirements	Yes	See §63.7130.
§63.9(b)	Initial Notifications	Yes.	
§63.9(c)	Request for Compliance Extension	Yes.	
§63.9(d)	New Source Notification for Special Compliance Requirements.	Yes.	
§63.9(e)	Notification of Performance Test	Yes.	
§63.9(f)	Notification of VE/Opacity Test	Yes	This requirement only applies to opacity and VE performance tests required in Table 4 to subpart AAAAA. Notification not required for VE/opacity test under Table 6 to subpart AAAAA.
§63.9(g)	Additional CMS Notifications	No	Not required for operating parameter monitoring.
§63.9(h)(1)–(h)(3)	Notification of Compliance Status	Yes.	
§63.9(h)(4)		No.	
§63.9(h)(5)–(h)(6)	Notification of Compliance Status	Yes.	
§63.9(i)	Adjustment of Deadlines	Yes.	
§63.9(j)	Change in Previous Information	Yes.	

TABLE 8 TO SUBPART AAAAA OF PART 63.—APPLICABILITY OF GENERAL PROVISIONS TO SUBPART AAAAA—Continued

[As required in § 63.7140, you must comply with the applicable General Provisions requirements according to the following table.]

Citation	Summary of requirement	Am I subject to this requirement?	Explanations
§ 63.10(a)	Recordkeeping/Reporting General Requirements.	Yes	See §§ 63.7131 through 63.7133.
§ 63.10(b)(1)–(b)(2)(xii)	Records	Yes.	
§ 63.10(b)(2)(xiii)	Records for Relative Accuracy Test	No.	
§ 63.10(b)(2)(xiv)	Records for Notification	Yes.	
§ 63.10(b)(3)	Applicability Determinations	Yes.	
§ 63.10(c)	Additional CMS Recordkeeping	No	See § 63.7132.
§ 63.10(d)(1)	General Reporting Requirements	Yes.	
§ 63.10(d)(2)	Performance Test Results	Yes.	
§ 63.10(d)(3)	Opacity or VE Observations	Yes	For the periodic monitoring requirements in Table 6 to subpart AAAAA, report according to § 63.10(d)(3) only if VE observed and subsequent visual opacity test is required.
§ 63.10(d)(4)	Progress Reports	Yes.	
§ 63.10(d)(5)	Startup, Shutdown, Malfunction Reports.	Yes.	
§ 63.10(e)	Additional CMS Reports	No	See specific requirements in subpart AAAAA, see § 63.7131.
§ 63.10(f)	Waiver for Recordkeeping/Reporting	Yes.	
§ 63.11(a)–(b)	Control Device Requirements	No	Flares not applicable.
§ 63.12(a)–(c)	State Authority and Delegations	Yes.	
§ 63.13(a)–(c)	State/Regional Addresses	Yes.	
§ 63.14(a)–(b)	Incorporation by Reference	No.	
§ 63.15(a)–(b)	Availability of Information	Yes.	

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[FR Doc. 03–23057 Filed 12–31–03; 8:45 am]

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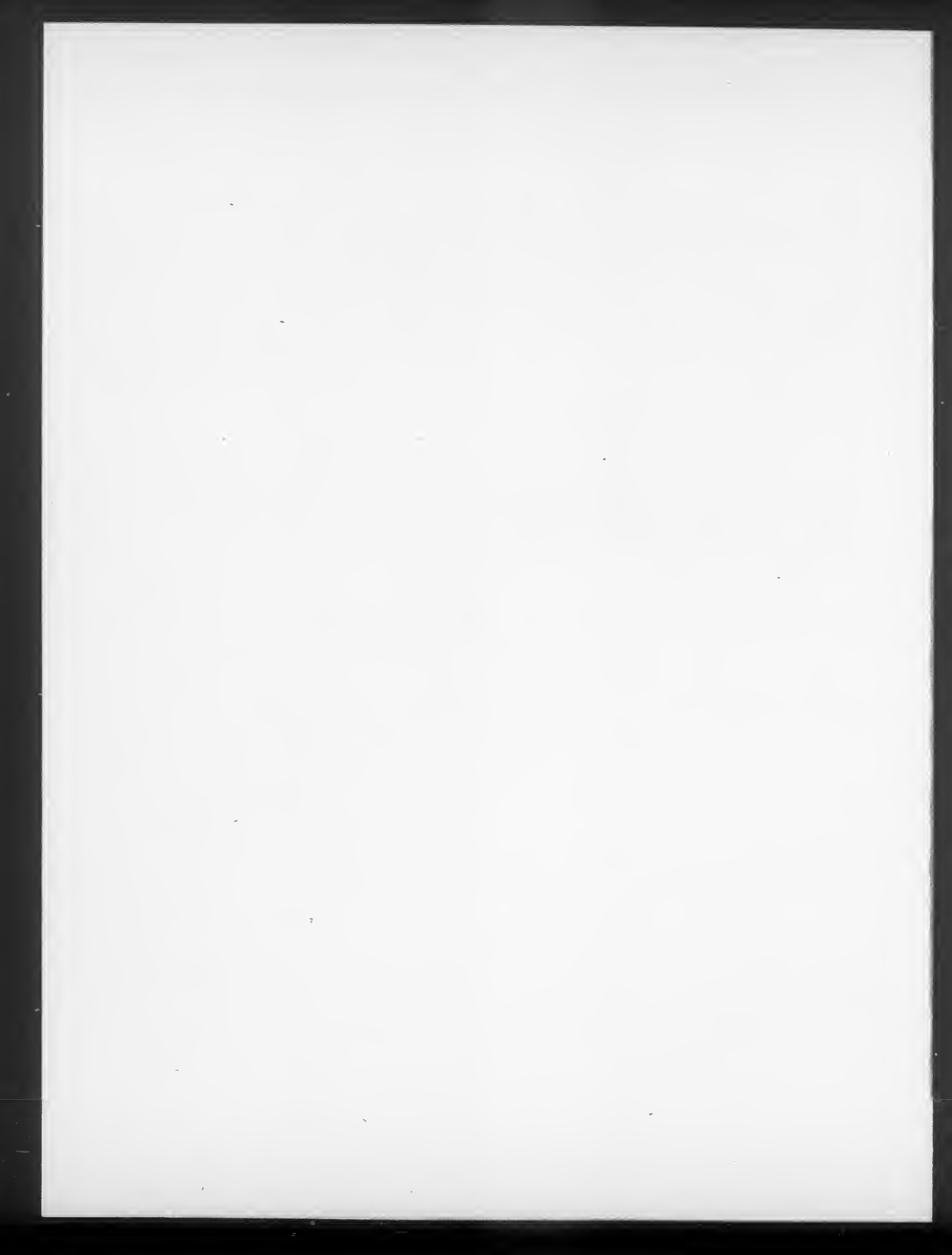


Monday,
January 5, 2004

Part III

Department of the Treasury

Internal Revenue Service

26 CFR Parts 1 and 602

Guidance Regarding Deduction and Capitalization of Expenditures; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[TD 9107]

RIN 1545–BA00

Guidance Regarding Deduction and Capitalization of Expenditures

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that explain how section 263(a) of the Internal Revenue Code (Code) applies to amounts paid to acquire or create intangibles. This document also contains final regulations under section 167 of the Code that provide safe harbor amortization for certain intangibles, and final regulations under section 446 of the Code that explain the manner in which taxpayers may deduct debt issuance costs.

DATES: *Effective Date:* These regulations are effective December 31, 2003.

Applicability Dates: For dates of applicability of the final regulations, *see* §§ 1.167(a)–3(b)(4), 1.263(a)–4(o), 1.263(a)–5(m), and 1.446–5(d).

FOR FURTHER INFORMATION CONTACT: Andrew J. Keyso, (202) 622–4800 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information in this final rule has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3507 and assigned control number 1545–1870.

The collection of information in this regulation is in § 1.263(a)–5(f). This information is required to verify the proper allocation of certain amounts paid in the process of investigating or otherwise pursuing certain transactions involving the acquisition of a trade or business. The collection of information is voluntary and is required to obtain a benefit. The likely recordkeepers are business entities.

Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by March 5, 2004. Comments are specifically requested concerning:

Whether the collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the collection of information (*see below*);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

Estimated total annual recordkeeping burden: 3,000 hours.

Estimated average annual burden hours per recordkeeper: 1 hour.

Estimated number of recordkeepers: 3,000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

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.

Background

On January 24, 2002, the IRS and Treasury Department published an advance notice of proposed rulemaking in the **Federal Register** (REG–125638–01; 67 FR 3461) announcing an intention to provide guidance on the extent to which section 263(a) of the Internal Revenue Code (Code) requires taxpayers to capitalize amounts paid to acquire, create, or enhance intangible assets. A notice of proposed rulemaking was published in the **Federal Register** (REG–125638–01; 67 FR 77701) on December 19, 2002, proposing regulations under section 263(a) (relating to the capitalization requirement), section 167 (relating to safe harbor amortization) and section 446 (relating to the allocation of debt issuance costs). A public hearing was held on April 22, 2003. In addition, written comments responding to the notice of proposed rulemaking were received. After consideration of all of the public comments, the proposed regulations are adopted as revised by this Treasury decision. The revisions are discussed below.

Explanation of Provisions

I. Format of the Final Regulations

The final regulations modify the format of the proposed regulations. The final regulations retain in § 1.263(a)–4 the rules requiring capitalization of amounts paid to acquire or create intangibles and amounts paid to facilitate the acquisition or creation of intangibles. However, the rules requiring capitalization of amounts paid to facilitate an acquisition of a trade or business, a change in the capital structure of a business entity, and certain other transactions are contained in a new § 1.263(a)–5. Dividing the rules into two sections enabled the IRS and Treasury Department to apply some of the simplifying conventions in the proposed regulations to certain acquisitions of tangible assets in § 1.263(a)–5, while limiting the application of § 1.263(a)–4 to costs of acquiring and creating intangibles. The format of the final regulations contained in §§ 1.446–5 and 1.167(a)–3 is essentially unchanged from the format of the proposed version of these regulations.

II. Explanation and Summary of Comments Concerning § 1.263(a)–4

A. General Principle of Capitalization

The final regulations identify categories of intangibles for which capitalization is required. As in the proposed regulations, the final regulations provide that an amount paid to acquire or create an intangible not otherwise required to be capitalized by the regulations is not required to be capitalized on the ground that it produces significant future benefits for the taxpayer, unless the IRS publishes guidance requiring capitalization of the expenditure. If the IRS publishes guidance requiring capitalization of an expenditure that produces future benefits for the taxpayer, such guidance will apply prospectively. While most commentators support this approach, some commentators expressed concerns that this approach, particularly the prospective nature of future guidance, will permit taxpayers to deduct expenditures that should properly be capitalized. The IRS and Treasury Department continue to believe that the capitalization principles in the regulations strike an appropriate balance between the capitalization

provisions of the Code and the ability of taxpayers and IRS personnel to administer the law, and are a reasonable means of enforcing the requirements of section 263(a).

The final regulations change the general principle of capitalization in three respects from the proposed regulations. First, § 1.263(a)–4 of the final regulations does not include the rule requiring capitalization of amounts paid to facilitate a "restructuring or reorganization of a business entity or a transaction involving the acquisition of capital, including a stock issuance, borrowing, or recapitalization." As noted above, the rules requiring taxpayers to capitalize amounts paid to facilitate these types of transactions are now contained in § 1.263(a)–5.

Second, the final regulations eliminate the word "enhance" from portions of the general principle. Commentators expressed concerns that the use of the term "enhance" would require capitalization in unintended circumstances. For example, if a taxpayer acquires goodwill as part of the acquisition of a trade or business, future expenditures to maintain the reputation of the trade or business arguably could constitute amounts paid to "enhance" the acquired goodwill. The final regulations remove the word "enhance" in favor of more specifically identifying the types of enhancement for which capitalization is appropriate. For example, the final regulations modify the proposed regulations to provide that a taxpayer must capitalize an amount paid to "upgrade" its rights under a membership or a right granted by a government agency.

Third, the final regulations eliminate the use of, and the definition of, the term "intangible asset" that was contained in the proposed regulations. This change was made in an effort to aid readability. The final regulations simply identify categories of "intangibles" for which amounts are required to be capitalized.

The final regulations clarify that nothing in § 1.263(a)–4 changes the treatment of an amount that is specifically provided for under any other provision of the Code (other than section 162(a) or 212) or regulations thereunder. Thus, where another section of the Code (or regulations under that section) prescribes a specific treatment of an amount, the provisions of that section apply and not the rules contained in these final regulations. For example, where the treatment of an insurance company's policy acquisition expenses is prescribed by sections 848 and 197(f)(5) of the Code, those sections apply and not these final regulations. Similarly, capitalization is not required under the final regulations for expenditures that are deductible under section 174.

The general definition of a separate and distinct intangible asset in paragraph (b)(3) of the final regulations is unchanged from the proposed regulations, except to clarify that a separate and distinct intangible asset must be intrinsically capable of being sold, transferred, or pledged (ignoring any restrictions imposed on assignability) separate and apart from a trade or business. The final regulations also clarify that a fund is treated as a separate and distinct intangible asset of the taxpayer if amounts in the fund may revert to the taxpayer.

In addition, the application of the separate and distinct intangible asset definition to specific intangibles has been further limited in the final regulations. The final regulations provide that an amount paid to create a package design, computer software or an income stream from the performance of services under a contract is not treated as an amount that creates a separate and distinct intangible asset. For a further discussion of issues pertaining to computer software, see the discussion in Part II.H. of this Preamble titled "Computer software issues." In addition, examples are added to paragraph (l) of the final regulations to clarify that product launch costs and stocklifting costs do not create a separate and distinct intangible asset.

B. Clear Reflection of Income

Commentators questioned how the regulations interact with the clear reflection of income requirement of section 446(b) and whether the IRS would argue that an expenditure that is not required to be capitalized by the regulations should nonetheless be capitalized on the ground that deduction of the expenditure does not clearly reflect income under section 446. If an amount paid to acquire or create an intangible is not required to be capitalized by another provision of the Code or regulations thereunder or by the final regulations or in subsequent published guidance, the IRS will not argue that the clear reflection of income requirement of section 446(b) and the regulations thereunder necessitates capitalization.

C. Intangibles Acquired From Another

The final regulations retain the requirement of the proposed regulations that a taxpayer must capitalize amounts paid to another party to acquire any intangible from that party in a purchase or similar transaction. Like the proposed regulations, the final regulations provide a nonexclusive list of intangibles for which capitalization is required. To further clarify that the list is illustrative, the final regulations modify the introductory language to specifically state that the list contains "examples" of intangibles within the scope of paragraph (c).

D. Created Intangibles

1. In General

The final regulations retain the eight categories of created intangibles contained in the proposed regulations. As discussed above, the final regulations eliminate the term "enhance" from the general principle. Instead, as described below, several of the categories of created intangibles are revised to more specifically identify the types of enhancements for which capitalization is required.

A commentator noted that the approach adopted in the regulations of defining categories of intangibles may be subject to abuse if taxpayers seek to deduct expenditures based on immaterial distinctions between those expenditures and expenditures included in the listed categories. To address this concern, the final regulations contain a rule providing that the determination of whether an amount is paid to create an intangible identified in the final regulations is made based on all of the facts and circumstances, disregarding distinctions between the labels used in the regulations to describe the intangible and the labels used by the taxpayer and other parties to describe the transaction. The IRS and Treasury Department intend to construe broadly the categories of intangibles identified in the regulations in response to any narrow technical arguments that an intangible created by the taxpayer is not literally described in the categories. For example, a taxpayer that obtains what is, in substance, a membership in an organization cannot avoid capitalization under paragraph (d)(4) of the final regulations by arguing that the right is titled an "admission" or that the right explicitly provides the taxpayer a "participation right" but not a membership.

2. Financial Interests

The final regulations require taxpayers to capitalize an amount paid to another party to create, originate, enter into, renew or renegotiate with that party certain financial interests. The final regulations retain the categories of financial interests contained in the proposed regulations, with minor modifications.

The final regulations eliminate the rule contained in paragraph (d)(2)(ii) of the proposed regulations providing that capitalization is not required for an amount paid to create or originate an option or forward contract if the amount is allocable to property required to be provided or acquired by the taxpayer prior to the end of the taxable year in which the amount is paid. This rule was unnecessary and was incorrectly read by some commentators to suggest that taxpayers could immediately deduct amounts paid to create or originate an option or forward contract. The final regulations clarify the treatment of these amounts.

3. Prepaid Expenses

The final regulations retain the rule contained in the proposed regulations. The reference to "benefits to be received in the future" has been deleted to avoid any implication of a "significant future benefits" test. No comments were received suggesting changes to the rule.

4. Certain Memberships and Privileges

The final regulations retain the rule contained in the proposed regulations, but clarify that capitalization also is required if a taxpayer renegotiates or upgrades a membership or privilege. The final regulations also modify an example contained in the proposed regulations that does not address the implications of section 274(a)(3) and unintentionally implies that an amount paid to obtain membership in a social club is required to be capitalized under the regulations. The revised example addresses an amount paid to obtain a membership in a trade association.

5. Certain Rights Obtained From a Governmental Agency

The final regulations retain the rule contained in the proposed regulations, but clarify that capitalization also is required if a taxpayer renegotiates or upgrades its rights. For example, a holder of a business license that pays an amount to upgrade its license, enabling it to sell additional types of products or services, must capitalize that amount.

Several commentators questioned whether an amount paid to a government agency to obtain a patent from that agency is required to be capitalized under this rule if section 174 applies to the amount. As previously discussed, the regulations do not affect the treatment of an expenditure under other provisions of the Code. Accordingly, an amount paid to a government agency to obtain a patent from that agency is not required to be capitalized under the final regulations if the amount is deductible under section 174.

6. Certain Contract Rights

The final regulations retain the rules contained in the proposed regulations regarding capitalization of amounts paid to enter into certain agreements. In addition, the final regulations clarify that taxpayers must capitalize amounts paid to another party to create, originate, enter into, renew, or renegotiate with that party an agreement not to acquire additional ownership interests in the taxpayer (*i.e.*, a standstill agreement). The IRS and Treasury Department believe that the benefits obtained by the taxpayer from a standstill agreement are similar to the benefits that result from other agreements identified in the rule and that capitalization is therefore appropriate. The rule does not apply to a standstill agreement governed by another provision of the Code, such as section 162(k). An example has been added to the final regulations to illustrate the application of this rule. The final regulations also clarify that a taxpayer must capitalize costs that facilitate the creation of an annuity, endowment contract or insurance contract that does not have or provide for cash value (*e.g.*, a comprehensive liability policy or a property and casualty policy) if the taxpayer is the covered party under the contract.

The final regulations add three rules to address public comments that capitalization is not appropriate if the taxpayer has only a hope or expectation that a customer or supplier will begin or continue a business relationship with the taxpayer. First, the final regulations provide that amounts paid with the mere hope or expectation of developing or maintaining a business relationship are not required to be capitalized, provided the amount is not contingent on the origination, renewal or renegotiation of an agreement. The IRS and Treasury Department believe that amounts that are contingent on the origination, renewal or renegotiation of an agreement are properly capitalized as amounts paid to originate, renew or renegotiate the agreement. Second, the final regulations provide that an agreement does not provide a "right" to provide services if the agreement merely provides that the taxpayer will stand ready to provide services if requested, but places no obligation on another party to request or pay for the taxpayer's services. Third, the final regulations provide that an agreement that may be terminated at will by the other party (or parties) to the agreement prior to the expiration of the period prescribed by the "12-month rule" does not constitute an agreement providing the taxpayer the right to use property or provide (or receive) services. However, where the other party (or parties) to the agreement is economically compelled not to terminate the agreement prior to the expiration of the period prescribed by the "12-month rule" in the regulations, then the agreement is not considered to be an agreement that may be terminated at will. Several examples are added to the final regulations to illustrate the application of these rules.

The final regulations also clarify the meaning of "renegotiate." Under the final regulations, a taxpayer is treated as renegotiating an agreement if the terms of the agreement are modified. In addition, a taxpayer is treated as renegotiating an agreement if the taxpayer enters into a new agreement with the same party (or substantially the same parties) to a terminated agreement, the taxpayer could not cancel the terminated agreement without the agreement of the other party (or parties), and the other party (or parties) would not have agreed to the cancellation unless the taxpayer entered into the new agreement. *See U.S. Bancorp* v. *Commissioner*, 111 T.C. 231 (1998).

The final regulations retain the $5,000 *de minimis* rule contained in the proposed regulations. In addition, the final regulations provide that, if an amount is paid in the form of property, the property is valued at its fair market value at the time of the payment for purposes of determining whether the *de minimis* rule applies. The final regulations also retain the pooling method for *de minimis* costs of creating similar agreements. See Part II.G. of this Preamble titled "Safe harbor pooling methods" for a further explanation of rules pertaining to pooling.

7. Certain Contract Terminations

The final regulations retain the rule contained in the proposed regulations. No comments were received suggesting changes to the rule. The final regulations, however, clarify that the contract termination provisions do not apply to amounts paid to terminate a transaction subject to § 1.263(a)–5. *See* Part III of this Preamble ("Explanation and Summary of Comments Concerning § 1.263(a)–5") for a discussion of the treatment of amounts paid to terminate a transaction described in § 1.263(a)–5.

8. Benefits Arising From the Provision, Production, or Improvement of Real Property

The final regulations retain the rule contained in the proposed regulations, but clarify that the exceptions to the

rule apply only to the extent the taxpayer receives fair market value consideration for the real property.

9. Defense or Perfection of Title to Intangible Property

The final regulations retain the rule contained in the proposed regulations. No comments were received suggesting changes to the rule. The final regulations clarify that amounts paid to another party to terminate an agreement permitting that party to purchase the taxpayer's intangible property or to terminate a transaction described in § 1.263(a)–5 are not treated as amounts paid to defend or perfect title. *See* Part III of this Preamble ("Explanation and Summary of Comments Concerning § 1.263(a)–5") for a discussion of the treatment of amounts paid to terminate a transaction described in § 1.263(a)–5.

E. Transaction Costs

1. In General

The final regulations require taxpayers to capitalize amounts that facilitate the acquisition or creation of an intangible. The proposed regulations provide that an amount facilitates a transaction if it is paid "in the process of pursuing the transaction." Some commentators questioned whether amounts paid to investigate a transaction constitute amounts paid in the process of pursuing the transaction. The IRS and Treasury Department believe that it is inappropriate to distinguish amounts paid to investigate the acquisition or creation of an intangible from other amounts paid in the process of acquiring or creating an intangible. To clarify that investigatory costs are within the scope of the rule, the final regulations provide that amounts facilitate a transaction if they are paid in the process of "investigating or otherwise pursuing the transaction." In addition, the final regulations clarify that an amount paid to determine the value or price of an intangible is an amount paid in the process of investigating or otherwise pursuing the transaction.

The proposed regulations provide that, in determining whether an amount is paid to facilitate a transaction, the fact that the amount would (or would not) have been paid "but for" the transaction is "not relevant." The IRS and Treasury Department believe that the fact that the amount would or would not have been paid "but for" the transaction is a relevant factor, but not the only factor, to be considered. Accordingly, the final regulations revise this rule to provide that the fact that the amount would (or would not) have been paid "but for" the transaction is a relevant but not a "determinative" factor.

The final regulations eliminate the rule in the proposed regulations that treats amounts paid to terminate (or facilitate the termination of) an existing agreement as facilitating another transaction that is expressly conditioned on the termination of the agreement. The IRS and Treasury Department decided that well advised taxpayers could easily avoid the rule by using general representations, while uninformed taxpayers inadvertently could be caught by the rule. The IRS and the Treasury Department considered replacing the "expressly conditioned" rule with a "mutually exclusive" rule similar to the one contained in § 1.263(a)–5 (*see* Part III of this Preamble). A mutually exclusive rule was not adopted in § 1.263(a)–4 because such a rule could have been interpreted as requiring capitalization of contract termination costs that historically have been deductible (for example, an amount paid to terminate a burdensome supply contract if the taxpayer enters into a new supply contract (for which capitalization is required under the regulations) with another party if the taxpayer could not contract with both parties). A mutually exclusive rule also was not adopted in the final regulations because it would have been administratively difficult to apply such a rule in the context of ordinary business transactions. Instead. § 1.263(a)–4 of the final regulations provides that an amount paid to terminate (or facilitate the termination of) an existing agreement does not facilitate the acquisition or creation of another agreement.

Commentators expressed concern that the rules in the proposed regulations requiring taxpayers to capitalize amounts paid in the process of pursuing certain agreements could be interpreted very broadly to require taxpayers to capitalize amounts that should be treated as deductible costs of sustaining or expanding the taxpayer's business. To address this concern, the final regulations add a rule providing that an amount is treated as not paid in the process of investigating or otherwise pursuing the creation of a contract right if the amount relates to activities performed before the earlier of the date the taxpayer begins preparing its bid for the contract or the date the taxpayer begins discussing or negotiating the contract with another party to the contract. An example is provided in the final regulations illustrating the application of the rule.

2. Simplifying Conventions

The final regulations retain the simplifying conventions applicable to employee compensation, overhead, and *de minimis* costs, with several modifications.

For example, the final regulations treat as employee compensation certain amounts paid to persons who may not be employees of the taxpayer under section 3401(c). Specifically, the final regulations provide that a guaranteed payment to a partner in a partnership is treated as employee compensation. In addition, annual compensation paid to a director of a corporation is treated as employee compensation. The final regulations also provide that, in the case of an affiliated group of corporations filing a consolidated federal income tax return, a payment by one member of the group to a second member of the group for services performed by an employee of the second member is treated as employee compensation if the services are performed at a time during which both members are affiliated. Other than this rule for entities joining in a consolidated return, the final regulations do not treat employees of one entity as employees of a related entity. The limited exception is made for entities joining in a consolidated return because these entities are appropriately viewed as a single taxpayer for purposes of the employee compensation simplifying convention. The IRS and Treasury Department believe that when other related entities provide services to each other, they generally will maintain records of the time charged and will not be subject to undue recordkeeping burdens as a result of section 263(a).

Several commentators suggested that the simplifying convention for employee compensation should apply to amounts paid to independent contractors who are not hired specifically to facilitate a capital transaction. For example, many companies hire outside contractors to provide administrative and secretarial services, and these contractors work on a variety of transactions, only some of which may be capital. The final regulations extend the employee compensation simplifying convention to amounts paid to outside contractors for secretarial, clerical, and similar administrative services.

The final regulations retain the $5,000 *de minimis* threshold contained in the proposed regulations. Some commentators suggested that the threshold be a higher amount, or at least be indexed for inflation. The final regulations do not adopt these

suggestions, but provide that the IRS may prescribe a higher threshold amount in future published guidance. The final regulations also provide that, for purposes of determining whether a transaction cost paid in the form of property is *de minimis*, the property is valued at its fair market value at the time of the payment. The final regulations also retain the pooling method for *de minimis* transaction costs. *See* Part II.G. of this Preamble titled "Safe harbor pooling methods" for a further explanation of the rules relating to pooling.

The final regulations permit taxpayers to elect to capitalize employee compensation, overhead, or *de minimis* costs. Several commentators noted that taxpayers may capitalize such costs for financial accounting purposes, and it may be difficult to segregate these costs for Federal income tax purposes. The final regulations permit taxpayers to make this capitalization election with regard to any or all of the three categories of costs covered by the simplifying conventions (*i.e.*, employee compensation, overhead, or *de minimis* costs).

F. 12-Month Rule

The regulations retain the 12-month rule contained in the proposed regulations. Under the 12-month rule, a taxpayer is not required to capitalize amounts paid to create (or facilitate the creation of) certain rights or benefits with a brief duration. Some commentators suggested that the first prong of the measuring period should be deleted, resulting in a rule that considers only whether the benefit extends beyond the end of the taxable year following the year in which the payment is made. The final regulations do not adopt this suggestion. The IRS and Treasury continue to believe that the rule contained in the proposed regulations is sufficient to ease the recordkeeping burden for transactions of relatively brief duration.

The final regulations clarify that if a taxpayer is permitted to terminate an agreement described in this rule after a notice period, in determining whether the "12 month rule" applies, amounts paid to terminate the agreement before the end of the notice period create a benefit for the taxpayer that lasts for the amount of time by which the notice period is shortened.

The final regulations permit taxpayers to elect not to apply the 12-month rule to categories of similar transactions. The IRS and Treasury Department recognize that some taxpayers may capitalize amounts for financial accounting purposes that would not be required to be capitalized for Federal income tax purposes due to the 12-month rule. In some cases, it may be difficult for taxpayers to identify and calculate these amounts for purposes of applying the 12-month rule. For this reason, the final regulations permit taxpayers to elect to capitalize these amounts notwithstanding that the 12-month rule would not require capitalization.

G. Safe Harbor Pooling Methods

The final regulations adopt, with slight modifications, the pooling methods contained in the proposed regulations for *de minimis* costs and the 12-month rule. The pooling rules in the final regulations are very general. However, the IRS may publish guidance in the Internal Revenue Bulletin prescribing additional rules for applying the pooling methods to particular industries or to specific types of transactions.

The final regulations provide that a taxpayer may utilize the pooling methods only if the taxpayer reasonably expects to engage in at least 25 similar transactions during the taxable year. The final regulations require a minimum number of similar transactions to prevent inappropriate skewing of the average cost or average benefit period. Although pooling reduces the burden on taxpayers of having to separately analyze each transaction, this burden is not as significant when there are only a small number of transactions to consider.

The final regulations do not require the same pools to be used under the pooling method as are required for depreciation purposes under section 167. However, taxpayers should draw no inferences that a pool permitted under the regulations constitutes an acceptable pool for depreciation purposes under section 167.

A commentator suggested that the final regulations permit taxpayers to estimate the costs (or renewal expectancy) of items included in a pool based on a sample of items included in the pool. The final regulations do not adopt this suggestion. The IRS and Treasury Department believe that it is inappropriate to apply the pooling rules by looking at a sample of items included in the pool. In estimating the renewal expectancy of items in a pool, however, taxpayers are permitted to consider their historic experience with similar items.

The final regulations clarify that a pooling method authorized by the regulations constitutes a method of accounting. Accordingly, a taxpayer that adopts (or changes to) a pooling method authorized by the regulations must use the method for the year of adoption (or year of change) and for all subsequent taxable years during which the taxpayer qualifies to use the method, unless a change to another method is required by the Commissioner, or unless permission to change to another method is granted by the Commissioner.

The final regulations also add a rule that is intended to prevent abuse of the *de minimis* rules through pooling of similar agreements. The IRS and Treasury Department are concerned that one or more large-dollar transactions may qualify under the *de minimis* rule if averaged with numerous small-dollar transactions. To discourage this potential abuse, the regulations prohibit the inclusion of an agreement in the pool if the amount paid to obtain the agreement is reasonably expected to differ significantly from the average amount attributable to other agreements properly included in the pool. The final regulations add an example illustrating the application of this rule.

H. Computer Software Issues

Based on public comments, the IRS and Treasury Department decided that issues relating to the development and implementation of computer software are more appropriately addressed in separate guidance, and not in these final regulations. While these final regulations require a taxpayer to capitalize an amount paid to another party to acquire computer software from that party in a purchase or similar transaction (*see* § 1.263(a)–4(c)), nothing in these regulations is intended to affect the determination of whether computer software is acquired from another party in a purchase or similar transaction, or whether computer software is developed or otherwise self-created (including amounts paid to implement Enterprise Resource Planning (ERP) software). While the proposed regulations identify ERP implementation costs as an issue to be addressed in the final regulations, the IRS and Treasury Department believe that rules regarding the treatment of such costs are more appropriately addressed in separate guidance dedicated exclusively to computer software issues. Until separate guidance is issued, taxpayers may continue to rely on Revenue Procedure 2000–50 (2000–2 C.B. 601).

III. Explanation and Summary of Comments Concerning § 1.263(a)–5

A. In General

Section 1.263(a)–5 contains rules requiring taxpayers to capitalize amounts paid to facilitate the acquisition of a trade or business, a

change in the capital structure of a business entity, and certain other transactions. The types of transactions covered by § 1.263(a)–5 are more clearly identified than in paragraph (b)(1)(iii) of the proposed regulations. Section 1.263(a)–5 applies to acquisitions of an ownership interest in an entity conducting a trade or business only if, immediately after the acquisition, the taxpayer and the entity are related within the meaning of section 267(b) or 707(b). Other acquisitions of an ownership interest in an entity are governed by the rules contained in § 1.263(a)–4, and not the rules contained in § 1.263(a)–5.

Similar to the § 1.263(a)–4 final regulations, the § 1.263(a)–5 regulations clarify that an amount facilitates a transaction if it is paid in the process of "investigating or otherwise pursuing the transaction" and that an amount paid to determine the value or price of a transaction is an amount paid in the process of investigating or otherwise pursuing that transaction. In addition, the fact that an amount would (or would not) have been paid "but for" the transaction is a relevant, but not determinative, factor in evaluating whether an amount is paid to facilitate a transaction.

B. Acquisition of Assets Constituting a Trade or Business

As explained in the preamble to the proposed regulations, the proposed regulations (and the simplifying conventions in the proposed regulations) apply only to amounts paid to acquire (or facilitate the acquisition of) intangibles acquired as part of a trade or business and do not apply to amounts paid to acquire (or facilitate the acquisition of) tangible assets acquired as part of a trade or business. The preamble to the proposed regulations further notes that the IRS and Treasury Department were considering the application of the rules in the proposed regulations to tangible assets acquired as part of a trade or business in order to provide a single administrable standard in these transactions. To avoid the application of one set of rules to intangible assets acquired in the acquisition of a trade or business and a different set of rules to the tangible assets acquired in the acquisition, the final regulations under § 1.263(a)–5 provide a single set of rules for amounts paid to facilitate an acquisition of a trade or business, regardless of whether the transaction is structured as an acquisition of the entity or as an acquisition of assets (including tangible assets) constituting a trade or business.

C. Special Rules for Certain Costs

1. Borrowing Costs

The final regulations retain the rule in the proposed regulations that an amount paid to facilitate a borrowing does not facilitate another transaction (other than the borrowing).

2. Costs of Asset Sales

The final regulations provide that an amount paid to facilitate a sale of assets does not facilitate a transaction other than the sale, regardless of the circumstances surrounding the sale. This modifies the rule in the proposed regulations, which requires capitalization of amounts paid to facilitate a sale of assets where the sale is required by law, regulatory mandate, or court order and the sale itself facilitates another capital transaction. Several commentators argued that costs to dispose of assets are properly viewed as costs to facilitate the sale, and not costs to facilitate a subsequent transaction. The IRS and Treasury Department have adopted this suggestion and revised the rule in the final regulations.

3. Mandatory Stock Distributions

The final regulations modify the rules in the proposed regulations relating to government mandated divestitures of stock. The proposed regulations provide that capitalization is not required for a distribution of stock by a taxpayer to its shareholders if the divestiture is required by law, regulatory mandate, or court order, except in cases where the divestiture itself facilitates another capital transaction. The final regulations eliminate the exception. In addition, the final regulations clarify that costs to organize an entity to receive the divested properties or to facilitate the transfer of certain divested properties to a distributed entity also are not required to be capitalized under section 263(a). *See* sections 248 and 709. An example has been added to the final regulations illustrating this rule.

4. Bankruptcy Reorganization Costs

Commentators suggested that the final regulations clarify that not all costs incurred in the process of pursuing a bankruptcy reorganization under Chapter 11 of the Bankruptcy Code must be capitalized. The final regulations contain a special rule defining the scope of bankruptcy costs required to be capitalized. Under the rule, costs of the debtor to institute or administer a Chapter 11 proceeding generally are required to be capitalized. However, costs to operate the debtor's business during a Chapter 11 proceeding (including the types of costs described in Revenue Ruling 77–204 (1977–1 C.B. 40)) do not facilitate the bankruptcy and are treated in the same manner as such costs would have been treated had the bankruptcy proceeding not been instituted. In addition, the final regulations provide that capitalization is not required for amounts paid by a taxpayer to defend against the commencement of an involuntary bankruptcy proceeding against the taxpayer.

Commentators specifically requested that the final regulations address the treatment of costs incurred in a Chapter 11 bankruptcy proceeding that is instituted in order to manage and resolve tort claims and distinguish these proceedings from other bankruptcy cases. The final regulations do not distinguish between a bankruptcy proceeding that is instituted to resolve tort claims and other bankruptcy proceedings. However, the final regulations clarify that a specific amount paid to formulate, analyze, contest or obtain approval of the portion of a plan of reorganization under Chapter 11 that resolves the taxpayer's tort liability is not required to be capitalized if the amount would have been treated as an ordinary and necessary business expense under section 162 had the bankruptcy proceeding not been instituted

5. Stock Issuance Costs of Open-End Regulated Investment Companies

The final regulations retain the rule that amounts paid by an open-end regulated investment company to facilitate an issuance of its stock are treated as amounts that do not facilitate a capital transaction unless the amounts are paid during the initial stock offering period.

6. Integration Costs

The final regulations retain the rule in the proposed regulations that an amount paid to integrate the business operations of the taxpayer with the business operations of another entity does not facilitate a transaction described in § 1.263(a)–5, regardless of when the integration activities occur.

7. Costs Associated With Terminated Transactions

The final regulations clarify when costs of terminating a transaction described in § 1.263(a)–5 (including break-up fees) are treated as facilitating another transaction described in § 1.263(a)–5. Under the proposed regulations, termination costs facilitate a subsequent transaction if the subsequent transaction is "expressly conditioned"

on the termination. The final regulations do not contain an "expressly conditioned" rule. Instead, an amount paid to terminate (or facilitate the termination of) an agreement to enter into a transaction described in the regulations is treated as facilitating another transaction described in the regulations only if the transactions are mutually exclusive and the agreement is terminated to enable the taxpayer to engage in the second transaction. In addition, an amount paid to facilitate a transaction described in the regulations is treated as facilitating a second transaction described in the regulations only if the transactions are mutually exclusive and the first transaction is abandoned to enable the taxpayer to engage in the second transaction. The final regulations contain several examples to demonstrate the application of these rules.

D. Simplifying Conventions

In general, the simplifying conventions applicable to transactions described in § 1.263(a)–5 are similar to the simplifying conventions applicable to acquisitions or creations of intangibles governed by § 1.263(a)–4. See Part II.E.2 of this Preamble titled "Simplifying Conventions" for an explanation of the simplifying conventions applicable to the acquisition or creation of an intangible governed by § 1.263(a)–4.

The simplifying convention for employee compensation treats amounts paid to persons who are not employees as employee compensation if the amounts are paid for secretarial, clerical, or similar administrative support services. In the context of transactions described in § 1.263(a)–5, this rule does not apply to services involving the preparation and distribution of proxy solicitations and other documents seeking shareholder approval of a transaction described in § 1.263(a)–5. The IRS and Treasury Department believe that these inherently facilitative services, which are commonly performed by independent contractors, are appropriately capitalized.

In addition, the final regulations provide that the term "*de minimis* costs" does not include commissions paid to facilitate a transaction described in § 1.263(a)–5. This rule maintains consistency with the rule in § 1.263(a)–4(e)(4)(iii)(B), which provides that the *de minimis* rule does not apply to commissions paid to facilitate the acquisition or creation of certain financial interests.

E. Special Rules for Certain Acquisitive Transactions

The final regulations contain a "bright line date" rule and an "inherently facilitative" rule intended to aid the determination of amounts paid to facilitate certain acquisitive transactions. The final regulations modify the bright line date rule provided in the proposed regulations. Under the final regulations, an amount (that is not an inherently facilitative amount) facilitates the transaction only if the amount relates to activities performed on or after the earlier of (i) the date on which a letter of intent, exclusivity agreement, or similar written communication is executed by representatives of the acquirer and the target or (ii) the date on which the material terms of the transaction are authorized or approved by the taxpayer's board of directors (or other appropriate governing officials). Where board approval is not required for a particular transaction, the bright line date for the second prong of the test is the date on which the acquirer and the target execute a binding written contract reflecting the terms of the transaction.

Many comments were received concerning the bright line dates. Some commentators noted that any bright line date is inappropriate and that the determination should be based on all of the facts and circumstances surrounding the transaction. As discussed in the preamble to the proposed regulations, the IRS and Treasury Department continue to believe that a bright line rule is necessary to eliminate the subjectivity and controversy inherent in this area. Further, the IRS and Treasury Department believe that the bright line rule is within the scope of the authority of the IRS and Treasury Department to prescribe rules necessary to enforce the requirements of section 263(a), and that the bright line rule, as modified in these final regulations, serves as an appropriate and objective standard for determining the point in time at which amounts paid in certain acquisitive transactions must be capitalized.

Some commentators who agreed with the use of a bright line date rule to improve administrability of section 263(a) suggested that the bright line date should be the date the taxpayer's board of directors approves a transaction. The date of the board of directors approval may, in some cases, be the date determined under the rule contained in the final regulations. However, the IRS and Treasury Department believe that an earlier date is more appropriate where the parties have mutually agreed to pursue a transaction, notwithstanding the fact that the parties are not bound to complete the transaction. Accordingly, the rule requires capitalization if the parties execute a letter of intent, exclusivity agreement, or similar written communication. The term *similar written communication* in the rule is not intended to include a confidentiality agreement.

The board of directors approval date contemplated by the rule is not the date the board authorizes a committee (or management) to explore the possibility of a transaction with another party. Additionally, the board of directors approval date contemplated by the rule is not intended to be the date the board ratifies a shareholder vote in favor of the transaction.

Some commentators suggested that the final regulations clarify how the bright line date rule applies to a target that puts itself up for auction. These commentators noted that, under the proposed regulations, submission of a bid by a bidder could trigger the bright line date for the target, even if the target has not made any decision regarding the bid. Under the final regulations, submission of a bid by a bidder does not trigger the bright line date for the target because the first part of the test requires execution by both the acquirer and the target and the second part of the test is applied independently by the acquirer and the target. The final regulations include an example illustrating the application of the rule in this case.

The final regulations specifically identify the types of transactions to which the bright line date and inherently facilitative rules apply. Some commentators suggested that the final regulations extend the rule to apply not only to acquisitive transactions, but to spin-offs, stock offerings, and acquisitions of individual assets that do not constitute a trade or business. The IRS and Treasury Department believe that the bright line test is not suitable for these transactions and that amounts paid in the process of investigating or otherwise pursuing these transactions are appropriately capitalized.

Regarding the inherently facilitative rule contained in the proposed regulations, several commentators suggested that the rule be deleted or changed to a rebuttable presumption that the identified amounts are capital. The final regulations do not adopt this suggestion. The IRS and Treasury Department believe that the list of inherently facilitative amounts properly identifies certain types of costs that are capital regardless of when they are incurred. In addition, a rebuttable presumption would not provide the certainty sought by the regulations.

However, the final regulations modify the list of inherently facilitative amounts to more clearly identify the types of costs considered inherently facilitative. For example, the proposed regulations treat "amounts paid for activities performed in determining the value of the target" as inherently facilitative costs. Commentators expressed concerns that this language would require taxpayers to capitalize all due diligence costs. The final regulations tighten this category to include amounts paid for "securing an appraisal, formal written evaluation, or fairness opinion related to the transaction." General due diligence costs are intended to be addressed by the bright line test, not the inherently facilitative rules.

Some commentators questioned whether the regulations are intended to affect the treatment of an expenditure under section 195. As a result of section 195(c)(1)(B), the regulations are relevant in determining whether an expenditure constitutes a start-up expenditure within the meaning of section 195. An amount cannot constitute a start-up expenditure within the meaning of section 195(c)(1)(B) if the amount is a capital expenditure under section 263(a). Accordingly, amounts required to be capitalized under the final regulations do not constitute start-up expenditures within the meaning of section 195(c)(1). Conversely, amounts that are not required to be capitalized under the final regulations may constitute start-up expenditures within the meaning of section 195(c)(1) provided the other requirements of that section are met.

F. Hostile Takeover Defense Costs

The IRS and Treasury Department decided that the rules in the proposed regulations for amounts paid to defend against a hostile takeover attempt are unnecessary. The hostile transaction rule in the proposed regulations does not permit taxpayers to deduct costs that otherwise would have been capitalized under the regulations. For example, the hostile transaction rule does not apply to any inherently facilitative costs or to costs that facilitate another capital transaction (for example, a recapitalization or a proposed merger with a white knight). Other amounts that a target would pay in defending against a hostile acquisition would not be capitalized under the final regulations either because the costs would not be paid in investigating or otherwise pursuing the transaction with the hostile acquirer (for example, costs to seek an injunction against the acquisition) or would relate to activities performed before the bright line dates (while the transaction is hostile, the target will not execute any agreements with the acquirer and the target's board of directors will not authorize the acquisition). Thus, the IRS and Treasury Department believe the hostile transaction rule in the proposed regulations is unnecessary and could cause needless controversy over when a transaction changes from hostile to friendly. Accordingly, the final regulations do not contain any special rules related to hostile acquisition attempts. The final regulations contain an example illustrating how the regulations apply in the context of a hostile acquisition attempt.

G. Documentation of Success-Based Fees

Under the proposed regulations, a payment that is contingent on the successful closing of an acquisition facilitates the acquisition except to the extent that evidence clearly demonstrates that some portion of the payment is allocable to activities that do not facilitate the acquisition. The final regulations retain the success-based fee rule, but extend it to all transactions to which § 1.263(a)–5 applies, instead of just acquisitive transactions. In addition, the final regulations eliminate the "clearly demonstrates" standard in favor of a rule providing that success-based fees facilitate a transaction except to the extent the taxpayer maintains sufficient documentation to establish that a portion of the fee is allocable to activities that do not facilitate the transaction. The regulations require that this documentation consist of more than a mere allocation between activities that facilitate the transaction and activities that do not facilitate the transaction.

H. Treatment of Capitalized Costs

The final regulations provide that amounts required to be capitalized by an acquirer in a taxable acquisitive transaction are added to the basis of the acquired assets in an asset transaction or to the basis of the acquired stock in a stock transaction. Amounts required to be capitalized by the target in an acquisition of its assets in a taxable transaction are treated as a reduction of the target's amount realized on the disposition of its assets.

The final regulations do not address the treatment of amounts required to be capitalized in certain other transactions to which § 1.263(a)–5 applies (for example, amounts required to be capitalized in tax-free transactions, costs of a target in a taxable stock acquisition and stock issuance costs). The IRS and Treasury Department intend to issue separate guidance to address the treatment of these amounts and will consider at that time whether such amounts should be eligible for the 15-year safe harbor amortization period described in § 1.167(a)–3.

IV. Effective Dates and Changes in Methods of Accounting

The final regulations under §§ 1.263(a)–4 and 1.263(a)–5 apply to amounts paid or incurred on or after December 31, 2003. Except as provided below regarding changes to a pooling method authorized by these regulations, a taxpayer seeking to change a method of accounting to comply with the final regulations must make the change on a modified cut-off basis, taking into account for purposes of section 481(a) only amounts paid or incurred in taxable years ending on or after January 24, 2002 (the date of publication of the advance notice of proposed rulemaking in the **Federal Register**).

As explained in the preamble to the proposed regulations, the IRS and Treasury Department are concerned that an unrestricted section 481(a) adjustment for changes in methods of accounting made to comply with these regulations would create administrative burdens on taxpayers and the IRS. In addition, many of the simplification conventions in the final regulations (including the 12-month rule and the rules for employee compensation, overhead and *de minimis* costs) represent a change in the position traditionally taken by the IRS and the Treasury Department in interpreting section 263(a). However, the IRS and Treasury Department also want to reduce the potential for inconsistent treatment of conservative and aggressive taxpayers. Allowing a section 481(a) adjustment for amounts paid or incurred in taxable years ending on or after the date of the advance notice of proposed rulemaking achieves the best balance of these concerns.

For changes relating to the use of a pooling method under § 1.263(a)–4, taxpayers must apply a cut-off method. Applying a cut-off method reduces the burden on taxpayers of having to determine which assets fit into a pool on a retroactive basis.

The preamble to the proposed regulations provides that taxpayers may not change a method of accounting in reliance upon the rules contained in the proposed regulations until the rules are published as final regulations. Nonetheless, the IRS has received numerous Forms 3115 from taxpayers seeking the Commissioner's consent to change their method of accounting for items addressed in the advance notice of

proposed rulemaking or in the proposed regulations. The IRS suspended processing of these requests pending publication of these final regulations. Upon publication of the final regulations, the IRS intends to process these requests in a manner consistent with the rules contained in the final regulations, including the effective date rules and rules relating to the computation of the section 481(a) adjustment. For example, if the change is requested for a taxable year ending prior to the effective date of the final regulations and concerns a method of accounting that the Commissioner does not recognize as permissible prior to the effective date of the final regulations, the IRS intends to reject the request. Similarly, if the change is requested for a taxable year ending on or after the effective date of the final regulations and concerns a method of accounting that is permissible under the final regulations, the IRS intends to return the request to the taxpayer (and refund the user fee) and advise the taxpayer to utilize the automatic consent procedures as authorized by the final regulations. Subsequent to the publication of these final regulations, the IRS may issue additional guidance for utilizing the automatic consent procedures as authorized by these regulations. Unless these regulations specifically identify a treatment of amounts as a method of accounting (for example, the safe harbor pooling methods), nothing in these regulations is intended to address whether the treatment of amounts to which these regulations apply constitutes a method of accounting.

V. Explanation of Amendments to § 1.167(a)–3

The final regulations essentially retain the amendments to § 1.167(a)–3 as contained in the proposed regulations. The final regulations provide that those amendments are effective for intangible assets created on or after the date the final regulations are published in the **Federal Register**.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information requirement in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the regulations merely require a taxpayer to retain records substantiating amounts paid in the process of investigating or otherwise pursuing certain transactions involving the acquisition of a trade or business. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business. The Chief Counsel for Advocacy did not submit any comments on the regulations.

Drafting Information

The principal author of these final regulations is Andrew J. Keyso of the Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

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

PART I—INCOME TAXES

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

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

■ **Par. 2.** Section 1.167(a)–3 is amended by:
■ 1. Designating the text of the section as paragraph (a) and adding a heading to newly designated paragraph (a).
■ 2. Adding paragraph (b).
The additions read as follows:

§ 1.167(a)–3 Intangibles.

(a) *In general.* * * *

(b) *Safe harbor amortization for certain intangible assets*—(1) *Useful life.* Solely for purposes of determining the depreciation allowance referred to in paragraph (a) of this section, a taxpayer may treat an intangible asset as having a useful life equal to 15 years unless—

(i) An amortization period or useful life for the intangible asset is specifically prescribed or prohibited by the Internal Revenue Code, the regulations thereunder (other than by this paragraph (b)), or other published guidance in the Internal Revenue Bulletin (see § 601.601(d)(2) of this chapter);

(ii) The intangible asset is described in § 1.263(a)–4(c) (relating to intangibles acquired from another person) or § 1.263(a)–4(d)(2) (relating to created financial interests);

(iii) The intangible asset has a useful life the length of which can be estimated with reasonable accuracy; or

(iv) The intangible asset is described in § 1.263(a)–4(d)(8) (relating to certain benefits arising from the provision, production, or improvement of real property), in which case the taxpayer may treat the intangible asset as having a useful life equal to 25 years solely for purposes of determining the depreciation allowance referred to in paragraph (a) of this section.

(2) *Applicability to acquisitions of a trade or business, changes in the capital structure of a business entity, and certain other transactions.* The safe harbor useful life provided by paragraph (b)(1) of this section does not apply to an amount required to be capitalized by § 1.263(a)–5 (relating to amounts paid to facilitate an acquisition of a trade or business, a change in the capital structure of a business entity, and certain other transactions).

(3) *Depreciation method.* A taxpayer that determines its depreciation allowance for an intangible asset using the 15-year useful life prescribed by paragraph (b)(1) of this section (or the 25-year useful life in the case of an intangible asset described in § 1.263(a)–4(d)(8)) must determine the allowance by amortizing the basis of the intangible asset (as determined under section 167(c) and without regard to salvage value) ratably over the useful life beginning on the first day of the month in which the intangible asset is placed in service by the taxpayer. The intangible asset is not eligible for amortization in the month of disposition.

(4) *Effective date.* This paragraph (b) applies to intangible assets created on or after December 31, 2003.

■ **Par. 3.** Section 1.263(a)–0 is added to read as follows:

§ 1.263(a)–0 Table of contents.

This section lists captioned paragraphs contained in §§ 1.263(a)–1 through 1.263(a)–5.

§ 1.263(a)–1 Capital expenditures; in general.

§ 1.263(a)–2 Examples of capital expenditures.

§ 1.263(a)–3 Election to deduct or capitalize certain expenditures.

§ 1.263(a)–4 Amounts paid to acquire or create intangibles.

(a) Overview.
(b) Capitalization with respect to intangibles.
(1) In general.
(2) Published guidance.
(3) Separate and distinct intangible asset.
(i) Definition.
(ii) Creation or termination of contract rights.
(iii) Amounts paid in performing services.
(iv) Creation of computer software.
(v) Creation of package design.
(4) Coordination with other provisions of the Internal Revenue Code.
(i) In general.
(ii) Example.
(c) Acquired intangibles.
(1) In general.
(2) Readily available software.
(3) Intangibles acquired from an employee.
(4) Examples.
(d) Created intangibles.
(1) In general.
(2) Financial interests.
(i) In general.
(ii) Amounts paid to create, originate, enter into, renew or renegotiate.
(iii) Renegotiate.
(iv) Coordination with other provisions of this paragraph (d).
(v) Coordination with § 1.263(a)–5.
(vi) Examples.
(3) Prepaid expenses.
(i) In general.
(ii) Examples.
(4) Certain memberships and privileges.
(i) In general.
(ii) Examples.
(5) Certain rights obtained from a government agency.
(i) In general.
(ii) Examples.
(6) Certain contract rights.
(i) In general.
(ii) Amounts paid to create, originate, enter into, renew or renegotiate.
(iii) Renegotiate.
(iv) Right.
(v) *De minimis* amounts.
(vi) Exception for lessee construction allowances.
(vii) Examples.
(7) Certain contract terminations.
(i) In general.
(ii) Certain break-up fees.
(iii) Examples.
(8) Certain benefits arising from the provision, production, or improvement of real property.
(i) In general.
(ii) Exclusions.
(iii) Real property.
(iv) Impact fees and dedicated improvements.
(v) Examples.
(9) Defense or perfection of title to intangible property.
(i) In general.
(ii) Certain break-up fees.
(iii) Example.
(e) Transaction costs.
(1) Scope of facilitate.
(i) In general.
(ii) Treatment of termination payments.
(iii) Special rule for contracts.
(iv) Borrowing costs.
(v) Special rule for stock redemption costs of open-end regulated investment companies.
(2) Coordination with paragraph (d) of this section.
(3) Transaction.
(4) Simplifying conventions.
(i) In general.
(ii) Employee compensation.
(iii) *De minimis* costs.
(iv) Election to capitalize.
(5) Examples.
(f) 12-month rule.
(1) In general.
(2) Duration of benefit for contract terminations.
(3) Inapplicability to created financial interests and self-created amortizable section 197 intangibles.
(4) Inapplicability to rights of indefinite duration.
(5) Rights subject to renewal.
(i) In general.
(ii) Reasonable expectancy of renewal.
(iii) Safe harbor pooling method.
(6) Coordination with section 461.
(7) Election to capitalize.
(8) Examples.
(g) Treatment of capitalized costs.
(1) In general.
(2) Financial instruments.
(h) Special rules applicable to pooling.
(1) In general.
(2) Method of accounting.
(3) Adopting or changing to a pooling method.
(4) Definition of pool.
(5) Consistency requirement.
(6) Additional guidance pertaining to pooling.
(7) Example.
(i) [Reserved].
(j) Application to accrual method taxpayers.
(k) Treatment of related parties and indirect payments.
(l) Examples.
(m) Amortization.
(n) Intangible interests in land [Reserved]
(o) Effective date.
(p) Accounting method changes.
(1) In general.
(2) Scope limitations.
(3) Section 481(a) adjustment.

§ 1.263(a)–5 Amounts paid or incurred to facilitate an acquisition of a trade or business, a change in the capital structure of a business entity, and certain other transactions.

(a) General rule.
(b) Scope of facilitate.
(1) In general.
(2) Ordering rules.
(c) Special rules for certain costs.
(1) Borrowing costs.
(2) Costs of asset sales.
(3) Mandatory stock distributions.
(4) Bankruptcy reorganization costs.
(5) Stock issuance costs of open-end regulated investment companies.
(6) Integration costs.
(7) Registrar and transfer agent fees for the maintenance of capital stock records.
(8) Termination payments and amounts paid to facilitate mutually exclusive transactions.
(d) Simplifying conventions.
(1) In general.
(2) Employee compensation.
(i) In general.
(ii) Certain amounts treated as employee compensation.
(3) *De minimis* costs.
(i) In general.
(ii) Treatment of commissions.
(4) Election to capitalize.
(e) Certain acquisitive transactions.
(1) In general.
(2) Exception for inherently facilitative amounts.
(3) Covered transactions.
(f) Documentation of success-based fees.
(g) Treatment of capitalized costs.
(1) Tax-free acquisitive transactions [Reserved].
(2) Taxable acquisitive transactions.
(i) Acquirer.
(ii) Target.
(3) Stock issuance transactions [Reserved].
(4) Borrowings.
(5) Treatment of capitalized amounts by option writer.
(h) Application to accrual method taxpayers.
(i) [Reserved].
(j) Coordination with other provisions of the Internal Revenue Code.
(k) Treatment of indirect payments.
(l) Examples.
(m) Effective date.

(n) Accounting method changes.
(1) In general.
(2) Scope limitations.
(3) Section 481(a) adjustment.

■ **Par. 4.** Sections 1.263(a)–4 and 1.263(a)–5 are added to read as follows:

§ 1.263((A)–4 Amounts paid to acquire or create intangibles.

(a) *Overview.* This section provides rules for applying section 263(a) to amounts paid to acquire or create intangibles. Except to the extent provided in paragraph (d)(8) of this section, the rules provided by this section do not apply to amounts paid to acquire or create tangible assets. Paragraph (b) of this section provides a general principle of capitalization. Paragraphs (c) and (d) of this section identify intangibles for which capitalization is specifically required under the general principle. Paragraph (e) of this section provides rules for determining the extent to which taxpayers must capitalize transaction costs. Paragraph (f) of this section provides a 12-month rule intended to simplify the application of the general principle to certain payments that create benefits of a brief duration. Additional rules and examples relating to these provisions are provided in paragraphs (g) through (n) of this section. The applicability date of the rules in this section is provided in paragraph (o) of this section. Paragraph (p) of this section provides rules applicable to changes in methods of accounting made to comply with this section.

(b) *Capitalization with respect to intangibles*—(1) *In general.* Except as otherwise provided in this section, a taxpayer must capitalize—

(i) An amount paid to acquire an intangible (see paragraph (c) of this section);

(ii) An amount paid to create an intangible described in paragraph (d) of this section;

(iii) An amount paid to create or enhance a separate and distinct intangible asset within the meaning of paragraph (b)(3) of this section;

(iv) An amount paid to create or enhance a future benefit identified in published guidance in the **Federal Register** or in the Internal Revenue Bulletin (*see* § 601.601(d)(2)(ii) of this chapter) as an intangible for which capitalization is required under this section; and

(v) An amount paid to facilitate (within the meaning of paragraph (e)(1) of this section) an acquisition or creation of an intangible described in paragraph (b)(1)(i), (ii), (iii) or (iv) of this section.

(2) *Published guidance.* Any published guidance identifying a future benefit as an intangible for which capitalization is required under paragraph (b)(1)(iv) of this section applies only to amounts paid on or after the date of publication of the guidance.

(3) *Separate and distinct intangible asset*—(i) *Definition.* The term *separate and distinct intangible asset* means a property interest of ascertainable and measurable value in money's worth that is subject to protection under applicable State, Federal or foreign law and the possession and control of which is intrinsically capable of being sold, transferred or pledged (ignoring any restrictions imposed on assignability) separate and apart from a trade or business. In addition, for purposes of this section, a fund (or similar account) is treated as a separate and distinct intangible asset of the taxpayer if amounts in the fund (or account) may revert to the taxpayer. The determination of whether a payment creates a separate and distinct intangible asset is made based on all of the facts and circumstances existing during the taxable year in which the payment is made.

(ii) *Creation or termination of contract rights.* Amounts paid to another party to create, originate, enter into, renew or renegotiate an agreement with that party that produces rights or benefits for the taxpayer (and amounts paid to facilitate the creation, origination, enhancement, renewal or renegotiation of such an agreement) are treated as amounts that do not create (or facilitate the creation of) a separate and distinct intangible asset within the meaning of this paragraph (b)(3). Further, amounts paid to another party to terminate (or facilitate the termination of) an agreement with that party are treated as amounts that do not create a separate and distinct intangible asset within the meaning of this paragraph (b)(3). *See* paragraphs (d)(2), (d)(6), and (d)(7) of this section for rules that specifically require capitalization of amounts paid to create or terminate certain agreements.

(iii) *Amounts paid in performing services.* Amounts paid in performing services under an agreement are treated as amounts that do not create a separate and distinct intangible asset within the meaning of this paragraph (b)(3), regardless of whether the amounts result in the creation of an income stream under the agreement.

(iv) *Creation of computer software.* Except as otherwise provided in the Internal Revenue Code, the regulations thereunder, or other published guidance in the **Federal Register** or in the Internal Revenue Bulletin (*see* § 601.601(d)(2)(ii) of this chapter), amounts paid to develop computer software are treated as amounts that do not create a separate and distinct intangible asset within the meaning of this paragraph (b)(3).

(v) *Creation of package design.* Amounts paid to develop a package design are treated as amounts that do not create a separate and distinct intangible asset within the meaning of this paragraph (b)(3). For purposes of this section, the term *package design* means the specific graphic arrangement or design of shapes, colors, words, pictures, lettering, and other elements on a given product package, or the design of a container with respect to its shape or function.

(4) *Coordination with other provisions of the Internal Revenue Code*—(i) *In general.* Nothing in this section changes the treatment of an amount that is specifically provided for under any other provision of the Internal Revenue Code (other than section 162(a) or 212) or the regulations thereunder.

(ii) *Example.* The following example illustrates the rule of this paragraph (b)(4):

Example. On January 1, 2004, G enters into an interest rate swap agreement with unrelated counterparty H under which, for a term of five years, G is obligated to make annual payments at 11% and H is obligated to make annual payments at LIBOR on a notional principal amount of $100 million. At the time G and H enter into this swap agreement, the rate for similar on-market swaps is LIBOR to 10%. To compensate for this difference, on January 1, 2004, H pays G a yield adjustment fee of $3,790,786. This yield adjustment fee constitutes an amount paid to create an intangible and would be capitalized under paragraph (d)(2) of this section. However, because the yield adjustment fee is a nonperiodic payment on a notional principal contract as defined in § 1.446–3(c), the treatment of this fee is governed by § 1.446–3 and not this section.

(c) *Acquired intangibles*—(1) *In general.* A taxpayer must capitalize amounts paid to another party to acquire any intangible from that party in a purchase or similar transaction. Examples of intangibles within the scope of this paragraph (c) include, but are not limited to, the following (if acquired from another party in a purchase or similar transaction):

(i) An ownership interest in a corporation, partnership, trust, estate, limited liability company, or other entity.

(ii) A debt instrument, deposit, stripped bond, stripped coupon (including a servicing right treated for federal income tax purposes as a stripped coupon), regular interest in a REMIC or FASIT, or any other

intangible treated as debt for federal income tax purposes.

(iii) A financial instrument, such as—

(A) A notional principal contract;

(B) A foreign currency contract;

(C) A futures contract;

(D) A forward contract (including an agreement under which the taxpayer has the right and obligation to provide or to acquire property (or to be compensated for such property, regardless of whether the taxpayer provides or acquires the property));

(E) An option (including an agreement under which the taxpayer has the right to provide or to acquire property (or to be compensated for such property, regardless of whether the taxpayer provides or acquires the property)); and

(F) Any other financial derivative.

(iv) An endowment contract, annuity contract, or insurance contract.

(v) Non-functional currency.

(vi) A lease.

(vii) A patent or copyright.

(viii) A franchise, trademark or tradename (as defined in § 1.197–2(b)(10)).

(ix) An assembled workforce (as defined in § 1.197–2(b)(3)).

(x) Goodwill (as defined in § 1.197–2(b)(1)) or going concern value (as defined in § 1.197–2(b)(2)).

(xi) A customer list.

(xii) A servicing right (for example, a mortgage servicing right that is not treated for Federal income tax purposes as a stripped coupon).

(xiii) A customer-based intangible (as defined in § 1.197–2(b)(6)) or supplier-based intangible (as defined in § 1.197–2(b)(7)).

(xiv) Computer software.

(xv) An agreement providing either party the right to use, possess or sell an intangible described in paragraphs (c)(1)(i) through (v) of this section.

(2) *Readily available software.* An amount paid to obtain a nonexclusive license for software that is (or has been) readily available to the general public on similar terms and has not been substantially modified (within the meaning of § 1.197–2(c)(4)) is treated for purposes of this paragraph (c) as an amount paid to another party to acquire an intangible from that party in a purchase or similar transaction.

(3) *Intangibles acquired from an employee.* Amounts paid to an employee to acquire an intangible from that employee are not required to be capitalized under this section if the amounts are includible in the employee's income in connection with the performance of services under section 61 or 83. For purposes of this section, whether an individual is an employee is determined in accordance with the rules contained in section 3401(c) and the regulations thereunder.

(4) *Examples.* The following examples illustrate the rules of this paragraph (c):

Example 1. Debt instrument. X corporation, a commercial bank, purchases a portfolio of existing loans from Y corporation, another financial institution. X pays Y $2,000,000 in exchange for the portfolio. The $2,000,000 paid to Y constitutes an amount paid to acquire an intangible from Y and must be capitalized.

Example 2. Option. W corporation owns all of the outstanding stock of X corporation. Y corporation holds a call option entitling it to purchase from W all of the outstanding stock of X at a certain price per share. Z corporation acquires the call option from Y in exchange for $5,000,000. The $5,000,000 paid to Y constitutes an amount paid to acquire an intangible from Y and must be capitalized.

Example 3. Ownership interest in a corporation. Same as *Example 2*, but assume Z exercises its option and purchases from W all of the outstanding stock of X in exchange for $100,000,000. The $100,000,000 paid to W constitutes an amount paid to acquire an intangible from W and must be capitalized.

Example 4. Customer list. N corporation, a retailer, sells its products through its catalog and mail order system. N purchases a customer list from R corporation. N pays R $100,000 in exchange for the customer list. The $100,000 paid to R constitutes an amount paid to acquire an intangible from R and must be capitalized.

Example 5. Goodwill. Z corporation pays W corporation $10,000,000 to purchase all of the assets of W in a transaction that constitutes an applicable asset acquisition under section 1060(c). Of the $10,000,000 consideration paid in the transaction, $9,000,000 is allocable to tangible assets purchased from W and $1,000,000 is allocable to goodwill. The $1,000,000 allocable to goodwill constitutes an amount paid to W to acquire an intangible from W and must be capitalized.

(d) *Created intangibles—(1) In general.* Except as provided in paragraph (f) of this section (relating to the 12-month rule), a taxpayer must capitalize amounts paid to create an intangible described in this paragraph (d). The determination of whether an amount is paid to create an intangible described in this paragraph (d) is to be made based on all of the facts and circumstances, disregarding distinctions between the labels used in this paragraph (d) to describe the intangible and the labels used by the taxpayer and other parties to the transaction.

(2) *Financial interests*—(i) In general. A taxpayer must capitalize amounts paid to another party to create, originate, enter into, renew or renegotiate with that party any of the following financial interests, whether or not the interest is regularly traded on an established market:

(A) An ownership interest in a corporation, partnership, trust, estate, limited liability company, or other entity.

(B) A debt instrument, deposit, stripped bond, stripped coupon (including a servicing right treated for federal income tax purposes as a stripped coupon), regular interest in a REMIC or FASIT, or any other intangible treated as debt for Federal income tax purposes.

(C) A financial instrument, such as—

(*1*) A letter of credit;

(*2*) A credit card agreement;

(*3*) A notional principal contract;

(*4*) A foreign currency contract;

(*5*) A futures contract;

(*6*) A forward contract (including an agreement under which the taxpayer has the right and obligation to provide or to acquire property (or to be compensated for such property, regardless of whether the taxpayer provides or acquires the property));

(*7*) An option (including an agreement under which the taxpayer has the right to provide or to acquire property (or to be compensated for such property, regardless of whether the taxpayer provides or acquires the property)); and

(*8*) Any other financial derivative.

(D) An endowment contract, annuity contract, or insurance contract that has or may have cash value.

(E) Non-functional currency.

(F) An agreement providing either party the right to use, possess or sell a financial interest described in this paragraph (d)(2).

(ii) *Amounts paid to create, originate, enter into, renew or renegotiate.* An amount paid to another party is not paid to create, originate, enter into, renew or renegotiate a financial interest with that party if the payment is made with the mere hope or expectation of developing or maintaining a business relationship with that party and is not contingent on the origination, renewal or renegotiation of a financial interest with that party.

(iii) *Renegotiate.* A taxpayer is treated as renegotiating a financial interest if the terms of the financial interest are modified. A taxpayer also is treated as renegotiating a financial interest if the taxpayer enters into a new financial interest with the same party (or substantially the same parties) to a terminated financial interest, the taxpayer could not cancel the terminated financial interest without the consent of the other party (or parties), and the other party (or parties) would not have consented to the cancellation unless the taxpayer entered into the new financial interest. A taxpayer is treated as unable to cancel a financial interest without the consent of the other party

(or parties) if, under the terms of the financial interest, the taxpayer is subject to a termination penalty and the other party (or parties) to the financial interest modifies the terms of the penalty.

(iv) *Coordination with other provisions of this paragraph (d).* An amount described in this paragraph (d)(2) that is also described elsewhere in paragraph (d) of this section is treated as described only in this paragraph (d)(2).

(v) *Coordination with § 1.263(a)–5. See* § 1.263(a)–5 for the treatment of borrowing costs and the treatment of amounts paid by an option writer.

(vi) *Examples.* The following examples illustrate the rules of this paragraph (d)(2):

Example 1. Loan. X corporation, a commercial bank, makes a loan to A in the principal amount of $250,000. The $250,000 principal amount of the loan paid to A constitutes an amount paid to another party to create a debt instrument with that party under paragraph (d)(2)(i)(B) of this section and must be capitalized.

Example 2. Option. W corporation owns all of the outstanding stock of X corporation. Y corporation pays W $1,000,000 in exchange for W's grant of a 3-year call option to Y permitting Y to purchase all of the outstanding stock of X at a certain price per share. Y's payment of $1,000,000 to W constitutes an amount paid to another party to create an option with that party under paragraph (d)(2)(i)(C)(*7*) of this section and must be capitalized.

Example 3. Partnership interest. Z corporation pays $10,000 to P, a partnership, in exchange for an ownership interest in P. Z's payment of $10,000 to P constitutes an amount paid to another party to create an ownership interest in a partnership with that party under paragraph (d)(2)(i)(A) of this section and must be capitalized.

Example 4. Take or pay contract. Q corporation, a producer of natural gas, pays $1,000,000 to R during 2005 to induce R corporation to enter into a 5-year "take or pay" gas purchase contract. Under the contract, R is liable to pay for a specified minimum amount of gas, whether or not R takes such gas. Q's payment of $1,000,000 is an amount paid to another party to induce that party to enter into an agreement providing Q the right and obligation to provide property or be compensated for such property (regardless of whether the property is provided) under paragraph (d)(2)(i)(C)(*6*) of this section and must be capitalized.

Example 5.. Agreement to provide property. P corporation pays R corporation $1,000,000 in exchange for R's agreement to purchase 1,000 units of P's product at any time within the three succeeding calendar years. The agreement describes P's $1,000,000 as a sales discount. P's $1,000,000 payment is an amount paid to induce R to enter into an agreement providing P the right and obligation to provide property under paragraph (d)(2)(i)(C)(*6*) of this section and must be capitalized.

Example 6. Customer incentive payment. S corporation, a computer manufacturer, seeks to develop a business relationship with V corporation, a computer retailer. As an incentive to encourage V to purchase computers from S, S enters into an agreement with V under which S agrees that, if V purchases $20,000,000 of computers from S within 3 years from the date of the agreement, S will pay V $2,000,000 on the date that V reaches the $20,000,000 threshold. V reaches the $20,000,000 threshold during the third year of the agreement, and S pays V $2,000,000. S is not required to capitalize its payment to V under this paragraph (d)(2) because the payment does not provide S the right or obligation to provide property and does not create a separate and distinct intangible asset for S within the meaning of paragraph (b)(3)(i) of this section.

(3) *Prepaid expenses*—(i) In general. A taxpayer must capitalize prepaid expenses.

(ii) *Examples.* The following examples illustrate the rules of this paragraph (d)(3):

Example 1. Prepaid insurance. N corporation, an accrual method taxpayer, pays $10,000 to an insurer to obtain three years of coverage under a property and casualty insurance policy. The $10,000 is a prepaid expense and must be capitalized under this paragraph (d)(3). Paragraph (d)(2) of this section does not apply to the payment because the policy has no cash value.

Example 2. Prepaid rent. X corporation, a cash method taxpayer, enters into a 24-month lease of office space. At the time of the lease signing, X prepays $240,000. No other amounts are due under the lease. The $240,000 is a prepaid expense and must be capitalized under this paragraph (d)(3).

(4) *Certain memberships and privileges*—(i) *In general.* A taxpayer must capitalize amounts paid to an organization to obtain, renew, renegotiate, or upgrade a membership or privilege from that organization. A taxpayer is not required to capitalize under this paragraph (d)(4) an amount paid to obtain, renew, renegotiate or upgrade certification of the taxpayer's products, services, or business processes.

(ii) *Examples.* The following examples illustrate the rules of this paragraph (d)(4):

Example 1. Hospital privilege. B, a physician, pays $10,000 to Y corporation to obtain lifetime staff privileges at a hospital operated by Y. B must capitalize the $10,000 payment under this paragraph (d)(4).

Example 2. Initiation fee. X corporation pays a $50,000 initiation fee to obtain membership in a trade association. X must capitalize the $50,000 payment under this paragraph (d)(4).

Example 3. Product rating. V corporation, an automobile manufacturer, pays W corporation, a national quality ratings association, $100,000 to conduct a study and provide a rating of the quality and safety of a line of V's automobiles. V's payment is an amount paid to obtain a certification of V's product and is not required to be capitalized under this paragraph (d)(4).

Example 4. Business process certification. Z corporation, a manufacturer, seeks to obtain a certification that its quality control standards meet a series of international standards known as ISO 9000. Z pays $50,000 to an independent registrar to obtain a certification from the registrar that Z's quality management system conforms to the ISO 9000 standard. Z's payment is an amount paid to obtain a certification of Z's business processes and is not required to be capitalized under this paragraph (d)(4).

(5) *Certain rights obtained from a governmental agency*—(i) *In general.* A taxpayer must capitalize amounts paid to a governmental agency to obtain, renew, renegotiate, or upgrade its rights under a trademark, trade name, copyright, license, permit, franchise, or other similar right granted by that governmental agency.

(ii) *Examples.* The following examples illustrate the rules of this paragraph (d)(5):

Example 1. Business license. X corporation pays $15,000 to state Y to obtain a business license that is valid indefinitely. Under this paragraph (d)(5), the amount paid to state Y is an amount paid to a government agency for a right granted by that agency. Accordingly, X must capitalize the $15,000 payment.

Example 2. Bar admission. A, an individual, pays $1,000 to an agency of state Z to obtain a license to practice law in state Z that is valid indefinitely, provided A adheres to the requirements governing the practice of law in state Z. Under this paragraph (d)(5), the amount paid to state Z is an amount paid to a government agency for a right granted by that agency. Accordingly, A must capitalize the $1,000 payment.

(6) *Certain contract rights*—(i) *In general.* Except as otherwise provided in this paragraph (d)(6), a taxpayer must capitalize amounts paid to another party to create, originate, enter into, renew or renegotiate with that party—

(A) An agreement providing the taxpayer the right to use tangible or intangible property or the right to be compensated for the use of tangible or intangible property;

(B) An agreement providing the taxpayer the right to provide or to receive services (or the right to be compensated for services regardless of whether the taxpayer provides such services);

(C) A covenant not to compete or an agreement having substantially the same effect as a covenant not to compete (except, in the case of an agreement that requires the performance of services, to the extent that the amount represents reasonable compensation for services actually rendered);

(D) An agreement not to acquire additional ownership interests in the taxpayer; or

(E) An agreement providing the taxpayer (as the covered party) with an annuity, an endowment, or insurance coverage.

(ii) *Amounts paid to create, originate, enter into, renew or renegotiate.* An amount paid to another party is not paid to create, originate, enter into, renew or renegotiate an agreement with that party if the payment is made with the mere hope or expectation of developing or maintaining a business relationship with that party and is not contingent on the origination, renewal or renegotiation of an agreement with that party.

(iii) *Renegotiate.* A taxpayer is treated as renegotiating an agreement if the terms of the agreement are modified. A taxpayer also is treated as renegotiating an agreement if the taxpayer enters into a new agreement with the same party (or substantially the same parties) to a terminated agreement, the taxpayer could not cancel the terminated agreement without the consent of the other party (or parties), and the other party (or parties) would not have consented to the cancellation unless the taxpayer entered into the new agreement. A taxpayer is treated as unable to cancel an agreement without the consent of the other party (or parties) if, under the terms of the agreement, the taxpayer is subject to a termination penalty and the other party (or parties) to the agreement modifies the terms of the penalty.

(iv) *Right.* An agreement does not provide the taxpayer a right to use property or to provide or receive services if the agreement may be terminated at will by the other party (or parties) to the agreement before the end of the period prescribed by paragraph (f)(1) of this section. An agreement is not terminable at will if the other party (or parties) to the agreement is economically compelled not to terminate the agreement until the end of the period prescribed by paragraph (f)(1) of this section. All of the facts and circumstances will be considered in determining whether the other party (or parties) to an agreement is economically compelled not to terminate the agreement. An agreement also does not provide the taxpayer the right to provide services if the agreement merely provides that the taxpayer will stand ready to provide services if requested, but places no obligation on another person to request or pay for the taxpayer's services.

(v) *De minimis amounts.* A taxpayer is not required to capitalize amounts paid to another party (or parties) to create, originate, enter into, renew or renegotiate with that party (or those parties) an agreement described in paragraph (d)(6)(i) of this section if the aggregate of all amounts paid to that party (or those parties) with respect to the agreement does not exceed $5,000. If the aggregate of all amounts paid to the other party (or parties) with respect to that agreement exceeds $5,000, then all amounts must be capitalized. For purposes of this paragraph (d)(6), an amount paid in the form of property is valued at its fair market value at the time of the payment. In general, a taxpayer must determine whether the rules of this paragraph (d)(6)(v) apply by accounting for the specific amounts paid with respect to each agreement. However, a taxpayer that reasonably expects to create, originate, enter into, renew or renegotiate at least 25 similar agreements during the taxable year may establish a pool of agreements for purposes of determining the amounts paid with respect to the agreements in the pool. Under this pooling method, the amount paid with respect to each agreement included in the pool is equal to the average amount paid with respect to all agreements included in the pool. A taxpayer computes the average amount paid with respect to all agreements included in the pool by dividing the sum of all amounts paid with respect to all agreements included in the pool by the number of agreements included in the pool. See paragraph (h) of this section for additional rules relating to pooling.

(vi) *Exception for lessee construction allowances.* Paragraph (d)(6)(i) of this section does not apply to amounts paid by a lessor to a lessee as a construction allowance to the extent the lessee expends the amount for the tangible property that is owned by the lessor for Federal income tax purposes (*see,* for example, section 110).

(vii) *Examples.* The following examples illustrate the rules of this paragraph (d)(6):

Example 1. New lease agreement. V seeks to lease commercial property in a prominent downtown location of city R. V pays Z, the owner of the commercial property, $50,000 in exchange for Z entering into a 10-year lease with V. V's payment is an amount paid to another party to enter into an agreement providing V the right to use tangible property. Because the $50,000 payment exceeds $5,000, no portion of the amount paid to Z is *de minimis* for purposes of paragraph (d)(6)(v) of this section. Under paragraph (d)(6)(i)(A) of this section, V must capitalize the entire $50,000 payment.

Example 2. Modification of lease agreement. Partnership Y leases a piece of equipment for use in its business from Z corporation. When the lease has a remaining term of 3 years, Y requests that Z modify the existing lease by extending the remaining term by 5 years. Y pays $50,000 to Z in exchange for Z's agreement to modify the existing lease. Y's payment of $50,000 is an amount paid to another party to renegotiate an agreement providing Y the right to use property. Because the $50,000 payment exceeds $5,000, no portion of the amount paid to Z is *de minimis* for purposes of paragraph (d)(6)(v) of this section. Under paragraph (d)(6)(i)(A) of this section, Y must capitalize the entire $50,000 payment.

Example 3. Modification of lease agreement. In 2004, R enters into a 5-year, non-cancelable lease of a mainframe computer for use in its business. R subsequently determines that the mainframe computer that R is leasing is no longer adequate for its needs. In 2006, R and P corporation (the lessor) agree to terminate the 2004 lease and to enter into a new 5-year lease for a different and more powerful mainframe computer. R pays P a $75,000 early termination fee. P would not have agreed to terminate the 2004 lease unless R agreed to enter into the 2006 lease. R's payment of $75,000 is an amount paid to another party to renegotiate an agreement providing R the right to use property. Because the $75,000 payment exceeds $5,000, no portion of the amount paid to P is *de minimis* for purposes of paragraph (d)(6)(v) of this section. Under paragraph (d)(6)(i)(A) of this section, R must capitalize the entire $75,000 payment.

Example 4. Modification of lease agreement. Same as *Example 3,* except the 2004 lease agreement allows R to terminate the lease at any time subject to a $75,000 early termination fee. Because R can terminate the lease without P's approval, R's payment of $75,000 is not an amount paid to another party to renegotiate an agreement. Accordingly, R is not required to capitalize the $75,000 payment under this paragraph (d)(6).

Example 5. Modification of lease agreement. Same as *Example 4,* except P agreed to reduce the early termination fee to $60,000. Because R did not pay an amount to renegotiate the early termination fee, R's payment of $60,000 is not an amount paid to another party to renegotiate an agreement. Accordingly, R is not required to capitalize the $60,000 payment under this paragraph (d)(6).

Example 6. Covenant not to compete. R corporation enters into an agreement with A, an individual, that prohibits A from competing with R for a period of three years. To encourage A to enter into the agreement, R agrees to pay A $100,000 upon the signing of the agreement. R's payment is an amount paid to another party to enter into a covenant not to compete. Because the $100,000 payment exceeds $5,000, no portion of the amount paid to A is *de minimis* for purposes of paragraph (d)(6)(v) of this section. Under paragraph (d)(6)(i)(C) of this section, R must capitalize the entire $100,000 payment.

Example 7. Standstill agreement. During 2004 through 2005, X corporation acquires a large minority interest in the stock of Z corporation. To ensure that X does not take control of Z, Z pays X $5,000,000 for a

standstill agreement under which X agrees not to acquire any more stock in Z for a period of 10 years. Z's payment is an amount paid to another party to enter into an agreement not to acquire additional ownership interests in Z. Because the $5,000,000 payment exceeds $5,000, no portion of the amount paid to X is *de minimis* for purposes of paragraph (d)(6)(v) of this section. Under paragraph (d)(6)(i)(D) of this section, Z must capitalize the entire $5,000,000 payment.

Example 8. Signing bonus. Employer B pays a $25,000 signing bonus to employee C to induce C to come to work for B. C can leave B's employment at any time to work for a competitor of B and is not required to repay the $25,000 bonus to B. Because C is not economically compelled to continue his employment with B, B's payment does not provide B the right to receive services from C. Accordingly, B is not required to capitalize the $25,000 payment.

Example 9. Renewal. In 2000, M corporation and N corporation enter into a 5-year agreement that gives M the right to manage N's investment portfolio. In 2005, N has the option of renewing the agreement for another three years. During 2004, M pays $10,000 to send several employees of N to an investment seminar. M pays the $10,000 to help develop and maintain its business relationship with N with the expectation that N will renew its agreement with M in 2005. Because M's payment is not contingent on N agreeing to renew the agreement, M's payment is not an amount paid to renew an agreement under paragraph (d)(6)(ii) of this section and is not required to be capitalized.

Example 10. De minimis payments. X corporation is engaged in the business of providing wireless telecommunications services to customers. To induce customer B to enter into a 3-year non-cancelable telecommunications contract, X provides B with a free wireless telephone. The fair market value of the wireless telephone is $300 at the time it is provided to B. X's provision of a wireless telephone to B is an amount paid to B to induce B to enter into an agreement providing X the right to provide services, as described in paragraph (d)(6)(i)(B) of this section. Because the amount of the inducement is $300, the amount of the inducement is *de minimis* under paragraph (d)(6)(v) of this section. Accordingly, X is not required to capitalize the amount of the inducement provided to B.

(7) *Certain contract terminations*—(i) *In general.* A taxpayer must capitalize amounts paid to another party to terminate—

(A) A lease of real or tangible personal property between the taxpayer (as lessor) and that party (as lessee);

(B) An agreement that grants that party the exclusive right to acquire or use the taxpayer's property or services or to conduct the taxpayer's business (other than an intangible described in paragraph (c)(1)(i) through (iv) of this section or a financial interest described in paragraph (d)(2) of this section); or

(C) An agreement that prohibits the taxpayer from competing with that party or from acquiring property or services from a competitor of that party.

(ii) *Certain break-up fees.* Paragraph (d)(7)(i) of this section does not apply to the termination of a transaction described in § 1.263(a)–5(a) (relating to an acquisition of a trade or business, a change in the capital structure of a business entity, and certain other transactions). *See* § 1.263(a)–5(c)(8) for rules governing the treatment of amounts paid to terminate a transaction to which that section applies.

(iii) *Examples.* The following examples illustrate the rules of this paragraph (d)(7):

Example 1. Termination of exclusive license agreement. On July 1, 2005, N enters into a license agreement with R corporation under which N grants R the exclusive right to manufacture and distribute goods using N's design and trademarks for a period of 10 years. On June 30, 2007, N pays R $5,000,000 in exchange for R's agreement to terminate the exclusive license agreement. N's payment to terminate its license agreement with R constitutes a payment to terminate an exclusive license to use the taxpayer's property, as described in paragraph (d)(7)(i)(B) of this section. Accordingly, N must capitalize its $5,000,000 payment to R.

Example 2. Termination of exclusive distribution agreement. On March 1, 2005, L, a manufacturer, enters into an agreement with M granting M the right to be the sole distributor of L's products in state X for 10 years. On July 1, 2008, L pays M $50,000 in exchange for M's agreement to terminate the distribution agreement. L's payment to terminate its agreement with M constitutes a payment to terminate an exclusive right to acquire L's property, as described in paragraph (d)(7)(i)(B) of this section. Accordingly, L must capitalize its $50,000 payment to M.

Example 3. Termination of covenant not to compete. On February 1, 2005, Y corporation enters into a covenant not to compete with Z corporation that prohibits Y from competing with Z in city V for a period of 5 years. On January 31, 2007, Y pays Z $1,000,000 in exchange for Z's agreement to terminate the covenant not to compete. Y's payment to terminate the covenant not to compete with Z constitutes a payment to terminate an agreement that prohibits Y from competing with Z, as described in paragraph (d)(7)(i)(C) of this section. Accordingly, Y must capitalize its $1,000,000 payment to Z.

Example 4. Termination of merger agreement. N corporation and U corporation enter into an agreement under which N agrees to merge into U. Subsequently, N pays U $10,000,000 to terminate the merger agreement. As provided in paragraph (d)(7)(ii) of this section, N's $10,000,000 payment to terminate the merger agreement with U is not required to be capitalized under this paragraph (d)(7). In addition, N's $10,000,000 does not create a separate and distinct intangible asset for N within the meaning of paragraph (b)(3)(i) of this section. (*See* § 1.263(a)–5 for additional rules regarding termination of merger agreements).

(8) *Certain benefits arising from the provision, production, or improvement of real property*—(i) *In general.* A taxpayer must capitalize amounts paid for real property if the taxpayer transfers ownership of the real property to another person (except to the extent the real property is sold for fair market value) and if the real property can reasonably be expected to produce significant economic benefits to the taxpayer after the transfer. A taxpayer also must capitalize amounts paid to produce or improve real property owned by another (except to the extent the taxpayer is selling services at fair market value to produce or improve the real property) if the real property can reasonably be expected to produce significant economic benefits for the taxpayer.

(ii) *Exclusions.* A taxpayer is not required to capitalize an amount under paragraph (d)(8)(i) of this section if the taxpayer transfers real property or pays an amount to produce or improve real property owned by another in exchange for services, the purchase or use of property, or the creation of an intangible described in paragraph (d) of this section (other than in this paragraph (d)(8)). The preceding sentence does not apply to the extent the taxpayer does not receive fair market value consideration for the real property that is relinquished or for the amounts that are paid by the taxpayer to produce or improve real property owned by another.

(iii) *Real property.* For purposes of this paragraph (d)(8), real property includes property that is affixed to real property and that will ordinarily remain affixed for an indefinite period of time, such as roads, bridges, tunnels, pavements, wharves and docks, breakwaters and sea walls, elevators, power generation and transmission facilities, and pollution control facilities.

(iv) *Impact fees and dedicated improvements.* Paragraph (d)(8)(i) of this section does not apply to amounts paid to satisfy one-time charges imposed by a State or local government against new development (or expansion of existing development) to finance specific offsite capital improvements for general public use that are necessitated by the new or expanded development. In addition, paragraph (d)(8)(i) of this section does not apply to amounts paid for real property or improvements to real property constructed by the taxpayer where the real property or improvements benefit new development or expansion of existing development, are immediately transferred to a State or local government for dedication to the

general public use, and are maintained by the State or local government. See section 263A and the regulations thereunder for capitalization rules that apply to amounts referred to in this paragraph (d)(8)(iv).

(v) *Examples.* The following examples illustrate the rules of this paragraph (d)(8):

Example 1. Amount paid to produce real property owned by another. W corporation operates a quarry on the east side of a river in city Z and a crusher on the west side of the river. City Z's existing bridges are of insufficient capacity to be traveled by trucks in transferring stone from W's quarry to its crusher. As a result, the efficiency of W's operations is greatly reduced. W contributes $1,000,000 to city Z to defray in part the cost of constructing a publicly owned bridge capable of accommodating W's trucks. W's payment to city Z is an amount paid to produce or improve real property (within the meaning of paragraph (d)(8)(iii) of this section) that can reasonably be expected to produce significant economic benefits for W. Under paragraph (d)(8)(i) of this section, W must capitalize the $1,000,000 paid to city Z.

Example 2. Transfer of real property to another. K corporation, a shipping company, uses smaller vessels to unload its ocean-going vessels at port X. There is no natural harbor at port X, and during stormy weather the transfer of freight between K's ocean vessels and port X is extremely difficult and sometimes impossible, which can be very costly to K. Consequently, K constructs a short breakwater at a cost of $50,000. The short breakwater, however, is inadequate, so K persuades the port authority to build a larger breakwater that will allow K to unload its vessels at any time of the year and during all kinds of weather. K contributes the short breakwater and pays $200,000 to the port authority for use in building the larger breakwater. Because the transfer of the small breakwater and $200,000 is reasonably expected to produce significant economic benefits for K, K must capitalize both the adjusted basis of the small breakwater (determined at the time the small breakwater is contributed) and the $200,000 payment under this paragraph (d)(8).

Example 3. Dedicated improvements. X corporation is engaged in the development and sale of residential real estate. In connection with a residential real estate project under construction by X in city Z, X is required by city Z to construct ingress and egress roads to and from its project and immediately transfer the roads to city Z for dedication to general public use. The roads will be maintained by city Z. X pays its subcontractor $100,000 to construct the ingress and egress roads. X's payment is a dedicated improvement within the meaning of paragraph (d)(8)(iv) of this section. Accordingly, X is not required to capitalize the $100,000 payment under this paragraph (d)(8). See section 263A and the regulations thereunder for capitalization rules that apply to amounts referred to in paragraph (d)(8)(iv) of this section.

(9) *Defense or perfection of title to intangible property*—(i) *In general.* A taxpayer must capitalize amounts paid to another party to defend or perfect title to intangible property if that other party challenges the taxpayer's title to the intangible property.

(ii) *Certain break-up fees.* Paragraph (d)(9)(i) of this section does not apply to the termination of a transaction described in § 1.263(a)–5(a) (relating to an acquisition of a trade or business, a change in the capital structure of a business entity, and certain other transactions). *See* § 1.263(a)–5 for rules governing the treatment of amounts paid to terminate a transaction to which that section applies. Paragraph (d)(9)(i) of this section also does not apply to an amount paid to another party to terminate an agreement that grants that party the right to purchase the taxpayer's intangible property.

(iii) *Example.* The following example illustrates the rules of this paragraph (d)(9):

Example. Defense of title. R corporation claims to own an exclusive patent on a particular technology. U corporation brings a lawsuit against R, claiming that U is the true owner of the patent and that R stole the technology from U. The sole issue in the suit involves the validity of R's patent. R chooses to settle the suit by paying U $100,000 in exchange for U's release of all future claim to the patent. R's payment to U is an amount paid to defend or perfect title to intangible property under paragraph (d)(9) of this section and must be capitalized.

(e) *Transaction costs*—(1) *Scope of facilitate*—(i) *In general.* Except as otherwise provided in this section, an amount is paid to facilitate the acquisition or creation of an intangible (the transaction) if the amount is paid in the process of investigating or otherwise pursuing the transaction. Whether an amount is paid in the process of investigating or otherwise pursuing the transaction is determined based on all of the facts and circumstances. In determining whether an amount is paid to facilitate a transaction, the fact that the amount would (or would not) have been paid but for the transaction is relevant, but is not determinative. An amount paid to determine the value or price of an intangible is an amount paid in the process of investigating or otherwise pursuing the transaction.

(ii) *Treatment of termination payments.* An amount paid to terminate (or acilitate the termination of) an existing agreement does not facilitate the acquisition or creation of another agreement under this section. See paragraph (d)(6)(iii) of this section for the treatment of termination fees paid to the other party (or parties) of a renegotiated agreement.

(iii) *Special rule for contracts.* An amount is treated as not paid in the process of investigating or otherwise pursuing the creation of an agreement described in paragraph (d)(2) or (d)(6) of this section if the amount relates to activities performed before the earlier of the date the taxpayer begins preparing its bid for the agreement or the date the taxpayer begins discussing or negotiating the agreement with another party to the agreement.

(iv) *Borrowing costs.* An amount paid to facilitate a borrowing does not facilitate an acquisition or creation of an intangible described in paragraphs (b)(1)(i) through (iv) of this section. *See* §§ 1.263(a)–5 and 1.446–5 for the treatment of an amount paid to facilitate a borrowing.

(v) *Special rule for stock redemption costs of open-end regulated investment companies.* An amount paid by an open-end regulated investment company (within the meaning of section 851) to facilitate a redemption of its stock is treated as an amount that does not facilitate the acquisition of an intangible under this section.

(2) *Coordination with paragraph (d) of this section.* In the case of an amount paid to facilitate the creation of an intangible described in paragraph (d) of this section, the provisions of this paragraph (e) apply regardless of whether a payment described in paragraph (d) is made.

(3) *Transaction.* For purposes of this section, the term *transaction* means all of the factual elements comprising an acquisition or creation of an intangible and includes a series of steps carried out as part of a single plan. Thus, a transaction can involve more than one invoice and more than one intangible. For example, a purchase of intangibles under one purchase agreement constitutes a single transaction, notwithstanding the fact that the acquisition involves multiple intangibles and the amounts paid to facilitate the acquisition are capable of being allocated among the various intangibles acquired.

(4) *Simplifying conventions*—(i) *In general.* For purposes of this section, employee compensation (within the meaning of paragraph (e)(4)(ii) of this section), overhead, and *de minimis* costs (within the meaning of paragraph (e)(4)(iii) of this section) are treated as amounts that do not facilitate the acquisition or creation of an intangible.

(ii) *Employee compensation*—(A) *In general.* The term *employee compensation* means compensation (including salary, bonuses and commissions) paid to an employee of the taxpayer. For purposes of this

section, whether an individual is an employee is determined in accordance with the rules contained in section 3401(c) and the regulations thereunder.

(B) *Certain amounts treated as employee compensation.* For purposes of this section, a guaranteed payment to a partner in a partnership is treated as employee compensation. For purposes of this section, annual compensation paid to a director of a corporation is treated as employee compensation. For example, an amount paid to a director of a corporation for attendance at a regular meeting of the board of directors (or committee thereof) is treated as employee compensation for purposes of this section. However, an amount paid to a director for attendance at a special meeting of the board of directors (or committee thereof) is not treated as employee compensation. An amount paid to a person that is not an employee of the taxpayer (including the employer of the individual who performs the services) is treated as employee compensation for purposes of this section only if the amount is paid for secretarial, clerical, or similar administrative support services. In the case of an affiliated group of corporations filing a consolidated Federal income tax return, a payment by one member of the group to a second member of the group for services performed by an employee of the second member is treated as employee compensation if the services provided by the employee are provided at a time during which both members are affiliated.

(iii) *De minimis costs*—(A) *In general.* Except as provided in paragraph (e)(4)(iii)(B) of this section, the term *de minimis costs* means amounts (other than employee compensation and overhead) paid in the process of investigating or otherwise pursuing a transaction if, in the aggregate, the amounts do not exceed $5,000 (or such greater amount as may be set forth in published guidance). If the amounts exceed $5,000 (or such greater amount as may be set forth in published guidance), none of the amounts are *de minimis* costs within the meaning of this paragraph (e)(4)(iii)(A). For purposes of this paragraph (e)(4)(iii), an amount paid in the form of property is valued at its fair market value at the time of the payment. In determining the amount of transaction costs paid in the process of investigating or otherwise pursuing a transaction, a taxpayer generally must account for the specific costs paid with respect to each transaction. However, a taxpayer that reasonably expects to enter into at least 25 similar transactions during the taxable year may establish a pool of similar transactions for purposes of determining the amount of transaction costs paid in the process of investigating or otherwise pursuing the transactions in the pool. Under this pooling method, the amount of transaction costs paid in the process of investigating or otherwise pursuing each transaction included in the pool is equal to the average transaction costs paid in the process of investigating or otherwise pursuing all transactions included in the pool. A taxpayer computes the average transaction costs paid in the process of investigating or otherwise pursuing all transactions included in the pool by dividing the sum of all transaction costs paid in the process of investigating or otherwise pursuing all transactions included in the pool by the number of transactions included in the pool. *See* paragraph (h) of this section for additional rules relating to pooling.

(B) *Treatment of commissions.* The term *de minimis costs* does not include commissions paid to facilitate the acquisition of an intangible described in paragraphs (c)(1)(i) through (v) of this section or to facilitate the creation, origination, entrance into, renewal or renegotiation of an intangible described in paragraph (d)(2)(i) of this section.

(iv) *Election to capitalize.* A taxpayer may elect to treat employee compensation, overhead, or *de minimis* costs paid in the process of investigating or otherwise pursuing a transaction as amounts that facilitate the transaction. The election is made separately for each transaction and applies to employee compensation, overhead, or *de minimis* costs, or to any combination thereof. For example, a taxpayer may elect to treat overhead and *de minimis* costs, but not employee compensation, as amounts that facilitate the transaction. A taxpayer makes the election by treating the amounts to which the election applies as amounts that facilitate the transaction in the taxpayer's timely filed original Federal income tax return (including extensions) for the taxable year during which the amounts are paid. In the case of an affiliated group of corporations filing a consolidated return, the election is made separately with respect to each member of the group, and not with respect to the group as a whole. In the case of an S corporation or partnership, the election is made by the S corporation or by the partnership, and not by the shareholders or partners. An election made under this paragraph (e)(4)(iv) is revocable with respect to each taxable year for which made only with the consent of the Commissioner.

(5) *Examples.* The following examples illustrate the rules of this paragraph (e):

Example 1. Costs to facilitate. In December 2005, R corporation, a calendar year taxpayer, enters into negotiations with X corporation to lease commercial property from X for a period of 25 years. R pays A, its outside legal counsel, $4,000 in December 2005 for services rendered by A during December in assisting with negotiations with X. In January 2006, R and X finalize the terms of the lease and execute the lease agreement. R pays B, another of its outside legal counsel, $2,000 in January 2006 for services rendered by B during January in drafting the lease agreement. The agreement between R and X is an agreement providing R the right to use property, as described in paragraph (d)(6)(i)(A) of this section. R's payments to its outside counsel are amounts paid to facilitate the creation of the agreement. As provided in paragraph (e)(4)(iii)(A) of this section, R must aggregate its transaction costs for purposes of determining whether the transaction costs are *de minimis.* Because R's aggregate transaction costs exceed $5,000, R's transaction costs are not *de minimis* costs within the meaning of paragraph (e)(4)(iii)(A) of this section. Accordingly, R must capitalize the $4,000 paid to A and the $2,000 paid to B under paragraph (b)(1)(v) of this section.

Example 2. Costs to facilitate. Partnership X leases its manufacturing equipment from Y corporation under a 10-year lease. During 2005, when the lease has a remaining term of 4 years, X enters into a written agreement with Z corporation, a competitor of Y, under which X agrees to lease its manufacturing equipment from Z, subject to the condition that X first successfully terminates its lease with Y. X pays Y $50,000 in exchange for Y's agreement to terminate the equipment lease. Under paragraph (e)(1)(ii), X's $50,000 payment does not facilitate the creation of the new lease with Z. In addition, X's $50,000 payment does not terminate an agreement described in paragraph (d)(7) of this section. Accordingly, X is not required to capitalize the $50,000 termination payment under this section.

Example 3. Costs to facilitate. W corporation enters into a lease agreement with X corporation under which W agrees to lease property to X for a period of 5 years. W pays its outside counsel $7,000 for legal services rendered in drafting the lease agreement and negotiating with X. The agreement between W and X is an agreement providing W the right to be compensated for the use of property, as described in paragraph (d)(6)(i)(A) of this section. Under paragraph (e)(1)(i) of this section, W's payment to its outside counsel is an amount paid to facilitate the creation of that agreement. As provided by paragraph (e)(2) of this section, W must capitalize its $7,000 payment to outside counsel notwithstanding the fact that W made no payment described in paragraph (d)(6)(i) of this section.

Example 4. Costs to facilitate. U corporation, which owns a majority of the common stock of T corporation, votes its controlling interest in favor of a perpetual extension of T's charter. M, a minority shareholder in T, votes against the extension. Under applicable state law, U is required to

purchase the stock of T held by M. When U and M are unable to agree on the value of M's shares, U brings an action in state court to appraise the value of M's stock interest. U pays attorney, accountant and appraisal fees of $25,000 for services rendered in connection with the negotiation and litigation with M. Because U's attorney, accountant and appraisal costs help establish the purchase price of M's stock, U's $25,000 payment facilitates the acquisition of stock. Accordingly, U must capitalize the $25,000 payment under paragraph (b)(1)(v) of this section.

Example 5. Costs to facilitate. For several years, H corporation has provided services to J corporation whenever requested by J. H wants to enter into a multiple-year contract with J that would give H the right to provide services to J. On June 10, 2004, H starts to prepare a bid to provide services to J and pays a consultant $15,000 to research potential competitors. On August 10, 2004, H raises the possibility of a multi-year contract with J. On October 10, 2004, H and J enter into a contract giving H the right to provide services to J for five years. During 2004, H pays $7,000 to travel to the city in which J's offices are located to continue providing services to J under their prior arrangement and pays $6,000 for travel to the city in which J's offices are located to further develop H's business relationship with J (for example, to introduce new employees, update J on current developments and take J's executives to dinner). H also pays $8,000 for travel costs to meet with J to discuss and negotiate the contract. Because the contract gives H the right to provide services to J, H must capitalize amounts paid to facilitate the creation of the contract. The $7,000 of travel expenses paid to provide services to J under their prior arrangement does not facilitate the creation of the contract and is not required to be capitalized, regardless of when the travel occurs. The $6,000 of travel expenses paid to further develop H's business relationship with J is paid in the process of pursuing the contract (and therefore must be capitalized) only to the extent the expenses relate to travel on or after June 10, 2004 (the date H begins to prepare a bid) and before October 11, 2004 (the date after H and J enter into the contract). The $8,000 of travel expenses paid to meet with J to discuss and negotiate the contract is paid in the process of pursuing the contact and must be capitalized. The $15,000 of consultant fees is paid to investigate the contract and also must be capitalized.

Example 6. Costs that do not facilitate. X corporation brings a legal action against Y corporation to recover lost profits resulting from Y's alleged infringement of X's copyright. Y does not challenge X's copyright, but argues that it did not infringe upon X's copyright. X pays its outside counsel $25,000 for legal services rendered in pursuing the suit against Y. Because X's title to its copyright is not in question, X's action against Y does not involve X's defense or perfection of title to intangible property. Thus, the amount paid to outside counsel does not facilitate the creation of an intangible described in paragraph (d)(9) of this section. Accordingly, X is not required to capitalize its $25,000 payment under this section.

Example 7. De minimis rule. W corporation, a commercial bank, acquires a portfolio containing 100 loans from Y corporation. As part of the acquisition, W pays an independent appraiser a fee of $10,000 to appraise the portfolio. The fee is an amount paid to facilitate W's acquisition of an intangible. The acquisition of the loan portfolio is a single transaction within the meaning of paragraph (e)(3) of this section. Because the amount paid to facilitate the transaction exceeds $5,000, the amount is not *de minimis* as defined in paragraph (e)(4)(iii)(A) of this section. Accordingly, W must capitalize the $10,000 fee under paragraph (b)(1)(v) of this section.

Example 8. Compensation and overhead. P corporation, a commercial bank, maintains a loan acquisition department whose sole function is to acquire loans from other financial institutions. As provided in paragraph (e)(4)(i) of this section, P is not required to capitalize any portion of the compensation paid to the employees in its loan acquisition department or any portion of its overhead allocable to the loan acquisition department.

(f) *12-month rule*—(1) *In general.* Except as otherwise provided in this paragraph (f), a taxpayer is not required to capitalize under this section amounts paid to create (or to facilitate the creation of) any right or benefit for the taxpayer that does not extend beyond the earlier of—

(i) 12 months after the first date on which the taxpayer realizes the right or benefit; or

(ii) The end of the taxable year following the taxable year in which the payment is made.

(2) *Duration of benefit for contract terminations.* For purposes of this paragraph (f), amounts paid to terminate a contract or other agreement described in paragraph (d)(7)(i) of this section prior to its expiration date (or amounts paid to facilitate such termination) create a benefit for the taxpayer that lasts for the unexpired term of the agreement immediately before the date of the termination. If the terms of a contract or other agreement described in paragraph (d)(7)(i) of this section permit the taxpayer to terminate the contract or agreement after a notice period, amounts paid by the taxpayer to terminate the contract or agreement before the end of the notice period create a benefit for the taxpayer that lasts for the amount of time by which the notice period is shortened.

(3) *Inapplicability to created financial interests and self-created amortizable section 197 intangibles.* Paragraph (f)(1) of this section does not apply to amounts paid to create (or facilitate the creation of) an intangible described in paragraph (d)(2) of this section (relating to amounts paid to create financial interests) or to amounts paid to create (or facilitate the creation of) an intangible that constitutes an amortizable section 197 intangible within the meaning of section 197(c).

(4) *Inapplicability to rights of indefinite duration.* Paragraph (f)(1) of this section does not apply to amounts paid to create (or facilitate the creation of) an intangible of indefinite duration. A right has an indefinite duration if it has no period of duration fixed by agreement or by law, or if it is not based on a period of time, such as a right attributable to an agreement to provide or receive a fixed amount of goods or services. For example, a license granted by a governmental agency that permits the taxpayer to operate a business conveys a right of indefinite duration if the license may be revoked only upon the taxpayer's violation of the terms of the license.

(5) *Rights subject to renewal*—(i) *In general.* For purposes of paragraph (f)(1) of this section, the duration of a right includes any renewal period if all of the facts and circumstances in existence during the taxable year in which the right is created indicate a reasonable expectancy of renewal.

(ii) *Reasonable expectancy of renewal.* The following factors are significant in determining whether there exists a reasonable expectancy of renewal:

(A) *Renewal history.* The fact that similar rights are historically renewed is evidence of a reasonable expectancy of renewal. On the other hand, the fact that similar rights are rarely renewed is evidence of a lack of a reasonable expectancy of renewal. Where the taxpayer has no experience with similar rights, or where the taxpayer holds similar rights only occasionally, this factor is less indicative of a reasonable expectancy of renewal.

(B) *Economics of the transaction.* The fact that renewal is necessary for the taxpayer to earn back its investment in the right is evidence of a reasonable expectancy of renewal. For example, if a taxpayer pays $14,000 to enter into a renewable contract with an initial 9-month term that is expected to generate income to the taxpayer of $1,000 per month, the fact that renewal is necessary for the taxpayer to earn back its $14,000 payment is evidence of a reasonable expectancy of renewal.

(C) *Likelihood of renewal by other party.* Evidence that indicates a likelihood of renewal by the other party to a right, such as a bargain renewal option or similar arrangement, is evidence of a reasonable expectancy of renewal. However, the mere fact that the other party will have the opportunity to renew on the same terms as are

available to others is not evidence of a reasonable expectancy of renewal.

(D) *Terms of renewal.* The fact that material terms of the right are subject to renegotiation at the end of the initial term is evidence of a lack of a reasonable expectancy of renewal. For example, if the parties to an agreement must renegotiate price or amount, the renegotiation requirement is evidence of a lack of a reasonable expectancy of renewal.

(E) *Terminations.* The fact that similar rights are typically terminated prior to renewal is evidence of a lack of a reasonably expectancy of renewal.

(iii) *Safe harbor pooling method.* In lieu of applying the reasonable expectancy of renewal test described in paragraph (f)(5)(ii) of this section to each separate right created during a taxable year, a taxpayer that reasonably expects to enter into at least 25 similar rights during the taxable year may establish a pool of similar rights for which the initial term does not extend beyond the period prescribed in paragraph (f)(1) of this section and may elect to apply the reasonable expectancy of renewal test to that pool. *See* paragraph (h) of this section for additional rules relating to pooling. The application of paragraph (f)(1) of this section to each pool is determined in the following manner:

(A) All amounts (except *de minimis* costs described in paragraph (d)(6)(v) of this section) paid to create the rights included in the pool and all amounts paid to facilitate the creation of the rights included in the pool are aggregated.

(B) If less than 20 percent of the rights in the pool are reasonably expected to be renewed beyond the period prescribed in paragraph (f)(1) of this section, all rights in the pool are treated as having a duration that does not extend beyond the period prescribed in paragraph (f)(1) of this section, and the taxpayer is not required to capitalize under this section any portion of the aggregate amount described in paragraph (f)(5)(iii)(A) of this section.

(C) If more than 80 percent of the rights in the pool are reasonably expected to be renewed beyond the period prescribed in paragraph (f)(1) of this section, all rights in the pool are treated as having a duration that extends beyond the period prescribed in paragraph (f)(1) of this section, and the taxpayer is required to capitalize under this section the aggregate amount described in paragraph (f)(5)(iii)(A) of this section.

(D) If 20 percent or more, but 80 percent or less, of the rights in the pool are reasonably expected to be renewed beyond the period prescribed in paragraph (f)(1) of this section, the aggregate amount described in paragraph (f)(5)(iii)(A) of this section is multiplied by the percentage of the rights in the pool that are reasonably expected to be renewed beyond the period prescribed in paragraph (f)(1) of this section and the taxpayer must capitalize the resulting amount under this section by treating such amount as creating a separate intangible. The amount determined by multiplying the aggregate amount described in paragraph (f)(5)(iii)(A) of this section by the percentage of rights in the pool that are not reasonably expected to be renewed beyond the period prescribed in paragraph (f)(1) of this section is not required to be capitalized under this section.

(6) *Coordination with section 461.* In the case of a taxpayer using an accrual method of accounting, the rules of this paragraph (f) do not affect the determination of whether a liability is incurred during the taxable year, including the determination of whether economic performance has occurred with respect to the liability. See § 1.461–4 for rules relating to economic performance.

(7) *Election to capitalize.* A taxpayer may elect not to apply the rule contained in paragraph (f)(1) of this section. An election made under this paragraph (f)(7) applies to all similar transactions during the taxable year to which paragraph (f)(1) of this section would apply (but for the election under this paragraph (f)(7)). For example, a taxpayer may elect under this paragraph (f)(7) to capitalize its costs of prepaying insurance contracts for 12 months, but may continue to apply the rule in paragraph (f)(1) to its costs of entering into non-renewable, 12-month service contracts. A taxpayer makes the election by treating the amounts as capital expenditures in its timely filed original federal income tax return (including extensions) for the taxable year during which the amounts are paid. In the case of an affiliated group of corporations filing a consolidated return, the election is made separately with respect to each member of the group, and not with respect to the group as a whole. In the case of an S corporation or partnership, the election is made by the S corporation or by the partnership, and not by the shareholders or partners. An election made under this paragraph (f)(7) is revocable with respect to each taxable year for which made only with the consent of the Commissioner.

(8) *Examples.* The rules of this paragraph (f) are illustrated by the following examples, in which it is assumed (unless otherwise stated) that the taxpayer is a calendar year, accrual method taxpayer that does not have a short taxable year in any taxable year and has not made an election under paragraph (f)(7) of this section:

Example 1. Prepaid expenses. On December 1, 2005, N corporation pays a $10,000 insurance premium to obtain a property insurance policy (with no cash value) with a 1-year term that begins on February 1, 2006. The amount paid by N is a prepaid expense described in paragraph (d)(3) of this section and not paragraph (d)(2) of this section. Because the right or benefit attributable to the $10,000 payment extends beyond the end of the taxable year following the taxable year in which the payment is made, the 12-month rule provided by this paragraph (f) does not apply. N must capitalize the $10,000 payment.

Example 2. Prepaid expenses. (i) Assume the same facts as in *Example 1*, except that the policy has a term beginning on December 15, 2005. The 12-month rule of this paragraph (f) applies to the $10,000 payment because the right or benefit attributable to the payment neither extends more than 12 months beyond December 15, 2005 (the first date the benefit is realized by the taxpayer) nor beyond the end of the taxable year following the taxable year in which the payment is made. Accordingly, N is not required to capitalize the $10,000 payment.

(ii) Alternatively, assume N capitalizes prepaid expenses for financial accounting and reporting purposes and elects under paragraph (f)(7) of this section not to apply the 12-month rule contained in paragraph (f)(1) of this section. N must capitalize the $10,000 payment for Federal income tax purposes.

Example 3. Financial interests. On October 1, 2005, X corporation makes a 9-month loan to B in the principal amount of $250,000. The principal amount of the loan to B constitutes an amount paid to create or originate a financial interest under paragraph (d)(2)(i)(B) of this section. The 9-month term of the loan does not extend beyond the period prescribed by paragraph (f)(1) of this section. However, as provided by paragraph (f)(3) of this section, the rules of this paragraph (f) do not apply to intangibles described in paragraph (d)(2) of this section. Accordingly, X must capitalize the $250,000 loan amount.

Example 4. Financial interests. X corporation owns all of the outstanding stock of Z corporation. On December 1, 2005, Y corporation pays X $1,000,000 in exchange for X's grant of a 9-month call option to Y permitting Y to purchase all of the outstanding stock of Z. Y's payment to X constitutes an amount paid to create or originate an option with X under paragraph (d)(2)(i)(C)(*7*) of this section. The 9-month term of the option does not extend beyond the period prescribed by paragraph (f)(1) of this section. However, as provided by paragraph (f)(3) of this section, the rules of this paragraph (f) do not apply to intangibles described in paragraph (d)(2) of this section. Accordingly, Y must capitalize the $1,000,000 payment.

Example 5. License. (i) On July 1, 2005, R corporation pays $10,000 to state X to obtain

a license to operate a business in state X for a period of 5 years. The terms of the license require R to pay state X an annual fee of $500 due on July 1, 2005, and each of the succeeding four years. R pays the $500 fee on July 1 as required by the license.

(ii) R's payment of $10,000 is an amount paid to a governmental agency for a license granted by that agency to which paragraph (d)(5) of this section applies. Because R's payment creates rights or benefits for R that extend beyond 12 months after the first date on which R realizes the rights or benefits attributable to the payment and beyond the end of 2006 (the taxable year following the taxable year in which the payment is made), the rules of this paragraph (f) do not apply to R's payment. Accordingly, R must capitalize the $10,000 payment.

(iii) R's payment of each $500 annual fee is a prepaid expense described in paragraph (d)(3) of this section. R is not required to capitalize the $500 fee in each taxable year. The rules of this paragraph (f) apply to each such payment because each payment provides a right or benefit to R that does not extend beyond 12 months after the first date on which R realizes the rights or benefits attributable to the payment and does not extend beyond the end of the taxable year following the taxable year in which the payment is made.

Example 6. Lease. On December 1, 2005, W corporation enters into a lease agreement with X corporation under which W agrees to lease property to X for a period of 9 months, beginning on December 1, 2005. W pays its outside counsel $7,000 for legal services rendered in drafting the lease agreement and negotiating with X. The agreement between W and X is an agreement providing W the right to be compensated for the use of property, as described in paragraph (d)(6)(i)(A) of this section. W's $7,000 payment to its outside counsel is an amount paid to facilitate W's creation of the lease as described in paragraph (e)(1)(i) of this section. The 12-month rule of this paragraph (f) applies to the $7,000 payment because the right or benefit that the $7,000 payment facilitates the creation of neither extends more than 12 months beyond December 1, 2005 (the first date the benefit is realized by the taxpayer) nor beyond the end of the taxable year following the taxable year in which the payment is made. Accordingly, W is not required to capitalize its payment to its outside counsel.

Example 7. Certain contract terminations. V corporation owns real property that it has leased to A for a period of 15 years. When the lease has a remaining unexpired term of 5 years, V and A agree to terminate the lease, enabling V to use the property in its trade or business. V pays A $100,000 in exchange for A's agreement to terminate the lease. V's payment to A to terminate the lease is described in paragraph (d)(7)(i)(A) of this section. Under paragraph (f)(2) of this section, V's payment creates a benefit for V with a duration of 5 years, the remaining unexpired term of the lease as of the date of the termination. Because the benefit attributable to the expenditure extends beyond 12 months after the first date on which V realizes the rights or benefits attributable to the payment and beyond the end of the taxable year following the taxable year in which the payment is made, the rules of this paragraph (f) do not apply to the payment. V must capitalize the $100,000 payment.

Example 8. Certain contract terminations. Assume the same facts as in *Example 7*, except that the lease is terminated when it has a remaining unexpired term of 10 months. Under paragraph (f)(2) of this section, V's payment creates a benefit for V with a duration of 10 months. The 12-month rule of this paragraph (f) applies to the payment because the benefit attributable to the payment neither extends more than 12 months beyond the date of termination (the first date the benefit is realized by V) nor beyond the end of the taxable year following the taxable year in which the payment is made. Accordingly, V is not required to capitalize the $100,000 payment.

Example 9. Certain contract terminations. Assume the same facts as in *Example 7*, except that either party can terminate the lease upon 12 months notice. When the lease has a remaining unexpired term of 5 years, V wants to terminate the lease, however, V does not want to wait another 12 months. V pays A $50,000 for the ability to terminate the lease with one month's notice. V's payment to A to terminate the lease is described in paragraph (d)(7)(i)(A) of this section. Under paragraph (f)(2) of this section, V's payment creates a benefit for V with a duration of 11 months, the time by which the notice period is shortened. The 12-month rule of this paragraph (f) applies to V's $50,000 payment because the benefit attributable to the payment neither extends more than 12 months beyond the date of termination (the first date the benefit is realized by V) nor beyond the end of the taxable year following the taxable year in which the payment is made. Accordingly, V is not required to capitalize the $50,000 payment.

Example 10. Coordination with section 461. (i) U corporation leases office space from W corporation at a monthly rental rate of $2,000. On August 1, 2005, U prepays its office rent expense for the first six months of 2006 in the amount of $12,000. For purposes of this example, it is assumed that the recurring item exception provided by § 1.461–5 does not apply and that the lease between W and U is not a section 467 rental agreement as defined in section 467(d).

(ii) Under § 1.461–4(d)(3), U's prepayment of rent is a payment for the use of property by U for which economic performance occurs ratably over the period of time U is entitled to use the property. Accordingly, because economic performance with respect to U's prepayment of rent does not occur until 2006, U's prepaid rent is not incurred in 2005 and therefore is not properly taken into account through capitalization, deduction, or otherwise in 2005. Thus, the rules of this paragraph (f) do not apply to U's prepayment of its rent.

(iii) Alternatively, assume that U uses the cash method of accounting and the economic performance rules in § 1.461–4 therefore do not apply to U. The 12-month rule of this paragraph (f) applies to the $12,000 payment because the rights or benefits attributable to U's prepayment of its rent do not extend beyond December 31, 2006. Accordingly, U is not required to capitalize its prepaid rent.

Example 11. Coordination with section 461. N corporation pays R corporation, an advertising and marketing firm, $40,000 on August 1, 2005, for advertising and marketing services to be provided to N throughout calendar year 2006. For purposes of this example, it is assumed that the recurring item exception provided by § 1.461–5 does not apply. Under § 1.461–4(d)(2), N's payment arises out of the provision of services to N by R for which economic performance occurs as the services are provided. Accordingly, because economic performance with respect to N's prepaid advertising expense does not occur until 2006, N's prepaid advertising expense is not incurred in 2005 and therefore is not properly taken into account through capitalization, deduction, or otherwise in 2005. Thus, the rules of this paragraph (f) do not apply to N's payment.

(g) *Treatment of capitalized costs*—(1) *In general.* An amount required to be capitalized by this section is not currently deductible under section 162. Instead, the amount generally is added to the basis of the intangible acquired or created. See section 1012.

(2) *Financial instruments.* In the case of a financial instrument described in paragraph (c)(1)(iii) or (d)(2)(i)(C) of this section, notwithstanding paragraph (g)(1) of this section, if under other provisions of law the amount required to be capitalized is not required to be added to the basis of the intangible acquired or created, then the other provisions of law will govern the tax treatment of the amount.

(h) *Special rules applicable to pooling*—(1) *In general.* Except as otherwise provided, the rules of this paragraph (h) apply to the pooling methods described in paragraph (d)(6)(v) of this section (relating to *de minimis* rules applicable to certain contract rights), paragraph (e)(4)(iii)(A) of this section (relating to *de minimis* rules applicable to transaction costs), and paragraph (f)(5)(iii) of this section (relating to the application of the 12-month rule to renewable rights).

(2) *Method of accounting.* A pooling method authorized by this section constitutes a method of accounting for purposes of section 446. A taxpayer that adopts or changes to a pooling method authorized by this section must use the method for the year of adoption and for all subsequent taxable years during which the taxpayer qualifies to use the pooling method unless a change to another method is required by the Commissioner in order to clearly reflect income, or unless permission to change to another method is granted by the

Commissioner as provided in § 1.446–1(e).

(3) *Adopting or changing to a pooling method.* A taxpayer adopts (or changes to) a pooling method authorized by this section for any taxable year by establishing one or more pools for the taxable year in accordance with the rules governing the particular pooling method and the rules prescribed by this paragraph (h), and by using the pooling method to compute its taxable income for the year of adoption (or change).

(4) *Definition of pool.* A taxpayer may use any reasonable method of defining a pool of similar transactions, agreements or rights, including a method based on the type of customer or the type of product or service provided under a contract. However, a taxpayer that pools similar transactions, agreements or rights must include in the pool all similar transactions, agreements or rights created during the taxable year. For purposes of the pooling methods described in paragraph (d)(6)(v) of this section (relating to *de minimis* rules applicable to certain contract rights) and paragraph (e)(4)(iii)(A) of this section (relating to *de minimis* rules applicable to transaction costs), an agreement (or a transaction) is treated as not similar to other agreements (or transactions) included in the pool if the amount at issue with respect to that agreement (or transaction) is reasonably expected to differ significantly from the average amount at issue with respect to the other agreements (or transactions) properly included in the pool.

(5) *Consistency requirement.* A taxpayer that uses the pooling method described in paragraph (f)(5)(iii) of this section for purposes of applying the 12-month rule to a right or benefit—

(i) Must use the pooling methods described in paragraph (d)(6)(v) of this section (relating to *de minimis* rules applicable to certain contract rights) and paragraph (e)(4)(iii)(A) of this section (relating to *de minimis* rules applicable to transaction costs) for purposes of determining the amount paid to create, or facilitate the creation of, the right or benefit; and

(ii) Must use the same pool for purposes of paragraph (d)(6)(v) of this section and paragraph (e)(4)(iii)(A) of this section as is used for purposes of paragraph (f)(5)(iii) of this section.

(6) *Additional guidance pertaining to pooling.* The Internal Revenue Service may publish guidance in the Internal Revenue Bulletin (*see* § 601.601(d)(2) of this chapter) prescribing additional rules for applying the pooling methods authorized by this section to specific industries or to specific types of transactions.

(7) *Example.* The following example illustrates the rules of this paragraph (h):

Example. Pooling. (i) In the course of its business, W corporation enters into 3-year non-cancelable contracts that provide W the right to provide services to its customers. W generally pays certain amounts in the process of pursuing an agreement with a customer, including amounts paid to credit reporting agencies to verify the credit history of the potential customer and commissions paid to the independent sales agent who secures the agreement with the customer. In the case of agreements that W enters into with customers who are individuals, the agreements contain substantially similar terms and conditions and W typically pays between $100 and $200 in the process of pursuing each transaction. During 2005, W enters into agreements with 300 individuals. Also during 2005, W enters into an agreement with X corporation containing terms and conditions that are substantially similar to those contained in the agreements W enters into with its customers who are individuals. W pays certain amounts in the process of pursuing the agreement with X that W would not typically incur in the process of pursuing an agreement with its customers who are individuals. For example, W pays amounts to prepare and submit a bid for the agreement with X and amounts to travel to X's headquarters to make a sales presentation to X's management. In the aggregate, W pays $11,000 in the process of obtaining the agreement with X.

(ii) The agreements between W and its customers are agreements providing W the right to provide services, as described in paragraph (d)(6)(i)(B) of this section. Under paragraph (b)(1)(v) of this section, W must capitalize transaction costs paid to facilitate the creation of these agreements. Because W enters into at least 25 similar transactions during 2005, W may pool its transactions for purposes of determining whether its transaction costs are *de minimis* within the meaning of paragraph (e)(4)(iii)(A) of this section. W adopts a pooling method by establishing one or more pools of similar transactions and by using the pooling method to compute its taxable income beginning in its 2005 taxable year. If W adopts a pooling method, W must include all similar transactions in the pool. Under paragraph (h)(4) of this section, the transaction with X is not similar to the transactions W enters into with its customers who are individuals. While the agreement with X contains terms and conditions that are substantially similar to those contained in the agreements W enters into with its customers who are individuals, the transaction costs paid in the process of pursuing the agreement with X are reasonably expected to differ significantly from the average transaction costs attributable to transactions with its customers who are individuals. Accordingly, W may not include the transaction with X in the pool of transactions with customers who are individuals.

(i) [Reserved]

(j) *Application to accrual method taxpayers.* For purposes of this section, the terms *amount paid* and *payment* mean, in the case of a taxpayer using an accrual method of accounting, a liability incurred (within the meaning of § 1.446–1(c)(1)(ii)). A liability may not be taken into account under this section prior to the taxable year during which the liability is incurred.

(k) *Treatment of related parties and indirect payments.* For purposes of this section, references to a party other than the taxpayer include persons related to that party and persons acting for or on behalf of that party (including persons to whom the taxpayer becomes obligated as a result of assuming a liability of that party). For this purpose, persons are related only if their relationship is described in section 267(b) or 707(b) or they are engaged in trades or businesses under common control within the meaning of section 41(f)(1). References to an amount paid to or by a party include an amount paid on behalf of that party.

(l) *Examples.* The rules of this section are illustrated by the following examples in which it is assumed that the Internal Revenue Service has not published guidance that requires capitalization under paragraph (b)(1)(iv) of this section (relating to amounts paid to create or enhance a future benefit that is identified in published guidance as an intangible for which capitalization is required):

Example 1. License granted by a governmental unit. (i) X corporation pays $25,000 to state R to obtain a license to sell alcoholic beverages in its restaurant. The license is valid indefinitely, provided X complies with all applicable laws regarding the sale of alcoholic beverages in state R. X pays its outside counsel $4,000 for legal services rendered in preparing the license application and otherwise representing X during the licensing process. In addition, X determines that $2,000 of salaries paid to its employees is allocable to services rendered by the employees in obtaining the license.

(ii) X's payment of $25,000 is an amount paid to a governmental unit to obtain a license granted by that agency, as described in paragraph (d)(5)(i) of this section. The right has an indefinite duration and constitutes an amortizable section 197 intangible. Accordingly, as provided in paragraph (f)(3) of this section, the provisions of paragraph (f) of this section (relating to the 12-month rule) do not apply to X's payment. X must capitalize its $25,000 payment to obtain the license from state R.

(iii) As provided in paragraph (e)(4) of this section, X is not required to capitalize employee compensation because such amounts are treated as amounts that do not facilitate the acquisition or creation of an intangible. Thus, X is not required to capitalize the $2,000 of employee compensation allocable to the transaction.

(iv) X's payment of $4,000 to its outside counsel is an amount paid to facilitate the

creation of an intangible, as described in paragraph (e)(1)(i) of this section. Because X's transaction costs do not exceed $5,000, X's transaction costs are *de minimis* within the meaning of paragraph (e)(4)(iii)(A) of this section. Accordingly, X is not required to capitalize the $4,000 payment to its outside counsel under this section.

Example 2. Franchise agreement. (i) R corporation is a franchisor of income tax return preparation outlets. V corporation negotiates with R to obtain the right to operate an income tax return preparation outlet under a franchise from R. V pays an initial $100,000 franchise fee to R in exchange for the franchise agreement. In addition, V pays its outside counsel $4,000 to represent V during the negotiations with R. V also pays $2,000 to an industry consultant to advise V during the negotiations with R.

(ii) Under paragraph (d)(6)(i)(A) of this section, V's payment of $100,000 is an amount paid to another party to enter into an agreement with that party providing V the right to use tangible or intangible property. Accordingly, V must capitalize its $100,000 payment to R. The franchise agreement is a self-created amortizable section 197 intangible within the meaning of section 197(c). Accordingly, as provided in paragraph (f)(3) of this section, the 12-month rule contained in paragraph (f)(1) of this section does not apply.

(iii) V's payment of $4,000 to its outside counsel and $2,000 to the industry consultant are amounts paid to facilitate the creation of an intangible, as described in paragraph (e)(1)(i) of this section. Because V's aggregate transaction costs exceed $5,000, V's transaction costs are not *de minimis* within the meaning of paragraph (e)(4)(iii)(A) of this section. Accordingly, V must capitalize the $4,000 payment to its outside counsel and the $2,000 payment to the industry consultant under this section into the basis of the franchise, as provided in paragraph (g) of this section.

Example 3. Covenant not to compete. (i) On December 1, 2005, N corporation, a calendar year taxpayer, enters into a covenant not to compete with B, a key employee that is leaving the employ of N. The covenant not to compete is not entered into in connection with the acquisition of an interest in a trade or business. The covenant not to compete prohibits B from competing with N for a period of 9 months, beginning December 1, 2005. N pays B $25,000 in full consideration for B's agreement not to compete. In addition, N pays its outside counsel $6,000 to facilitate the creation of the covenant not to compete with B. N does not have a short taxable year in 2005 or 2006.

(ii) Under paragraph (d)(6)(i)(C) of this section, N's payment of $25,000 is an amount paid to another party to induce that party to enter into a covenant not to compete with N. However, because the covenant not to compete has a duration that does not extend beyond 12 months after the first date on which N realizes the rights attributable to its payment (*i.e.*, December 1, 2005) or beyond the end of the taxable year following the taxable year in which payment is made, the 12-month rule contained in paragraph (f)(1) of this section applies. Accordingly, N is not required to capitalize its $25,000 payment to B or its $6,000 payment to facilitate the creation of the covenant not to compete.

Example 4. Demand-side management. (i) X corporation, a public utility engaged in generating and distributing electrical energy, provides programs to its customers to promote energy conservation and energy efficiency. These programs are aimed at reducing electrical costs to X's customers, building goodwill with X's customers, and reducing X's future operating and capital costs. X provides these programs without obligating any of its customers participating in the programs to purchase power from X in the future. Under these programs, X pays a consultant to help industrial customers design energy-efficient manufacturing processes, to conduct "energy efficiency audits" that serve to identify for customers inefficiencies in their energy usage patterns, and to provide cash allowances to encourage residential customers to replace existing appliances with more energy efficient appliances.

(ii) The amounts paid by X to the consultant are not amounts to acquire or create an intangible under paragraph (c) or (d) of this section or to facilitate such an acquisition or creation. In addition, the amounts do not create a separate and distinct intangible asset within the meaning of paragraph (b)(3) of this section. Accordingly, the amounts paid to the consultant are not required to be capitalized under this section. While the amounts may serve to reduce future operating and capital costs and create goodwill with customers, these benefits, without more, are not intangibles for which capitalization is required under this section.

Example 5. Business process re-engineering. (i) V corporation manufactures its products using a batch production system. Under this system, V continuously produces component parts of its various products and stockpiles these parts until they are needed in V's final assembly line. Finished goods are stockpiled awaiting orders from customers. V discovers that this process ties up significant amounts of V's capital in work-in-process and finished goods inventories. V hires B, a consultant, to advise V on improving the efficiency of its manufacturing operations. B recommends a complete re-engineering of V's manufacturing process to a process known as just-in-time manufacturing. Just-in-time manufacturing involves reconfiguring a manufacturing plant to a configuration of "cells" where each team in a cell performs the entire manufacturing process for a particular customer order, thus reducing inventory stockpiles.

(ii) V incurred three categories of costs to convert its manufacturing process to a just-in-time system. First, V paid B, a consultant, $250,000 in professional fees to implement the conversion of V's plant to a just-in-time system. Second, V paid C, a contractor, $100,000 to relocate and reconfigure V's manufacturing equipment from an assembly line layout to a configuration of cells. Third, V paid D, a consultant, $50,000 to train V's employees in the just-in-time manufacturing process.

(iii) The amounts paid by V to B, C, and D are not amounts to acquire or create an intangible under paragraph (c) or (d) of this section or to facilitate such an acquisition or creation. In addition, the amounts do not create a separate and distinct intangible asset within the meaning of paragraph (b)(3) of this section. Accordingly, the amounts paid to B, C, and D are not required to be capitalized under this section. While the amounts produce long term benefits to V in the form of reduced inventory stockpiles, improved product quality, and increased efficiency, these benefits, without more, are not intangibles for which capitalization is required under this section.

Example 6. Defense of business reputation. (i) X, an investment adviser, serves as the fund manager of a money market investment fund. X, like its competitors in the industry, strives to maintain a constant net asset value for its money market fund of $1.00 per share. During 2005, in the course of managing the fund assets, X incorrectly predicts the direction of market interest rates, resulting in significant investment losses to the fund. Due to these significant losses, X is faced with the prospect of reporting a net asset value that is less than $1.00 per share. X is not aware of any investment adviser in its industry that has ever reported a net asset value for its money market fund of less than $1.00 per share. X is concerned that reporting a net asset value of less than $1.00 per share will significantly harm its reputation as an investment adviser, and could lead to litigation by shareholders. X decides to contribute $2,000,000 to the fund in order to raise the net asset value of the fund to $1.00 per share. This contribution is not a loan to the fund and does not give X any ownership interest in the fund.

(ii) The $2,000,000 contribution is not an amount paid to acquire or create an intangible under paragraph (c) or (d) of this section or to facilitate such an acquisition or creation. In addition, the amount does not create a separate and distinct intangible asset within the meaning of paragraph (b)(3) of this section. Accordingly, the amount contributed to the fund is not required to be capitalized under this section. While the amount serves to protect the business reputation of the taxpayer and may protect the taxpayer from litigation by shareholders, these benefits, without more, are not intangibles for which capitalization is required under this section.

Example 7. Product launch costs. (i) R corporation, a manufacturer of pharmaceutical products, is required by law to obtain regulatory approval before selling its products. While awaiting regulatory approval on Product A, R pays to develop and implement a marketing strategy and an advertising campaign to raise consumer awareness of the purported need for Product A. R also pays to train health care professionals and other distributors in the proper use of Product A.

(ii) The amounts paid by R are not amounts paid to acquire or create an intangible under paragraph (c) or (d) of this section or to facilitate such an acquisition or creation. In addition, the amounts do not create a separate and distinct intangible asset within the meaning of paragraph (b)(3) of this section. Accordingly, R is not required to capitalize these amounts under this section.

While the amounts may benefit R by creating consumer demand for Product A and increasing awareness of Product A among distributors, these benefits, without more, are not intangibles for which capitalization is required under this section.

Example 8. Stocklifting costs. (i) N corporation is a wholesale distributor of Brand A aftermarket automobile replacement parts. In an effort to induce a retail automobile parts supply store to stock only Brand A parts, N offers to replace all of the store's inventory of other branded parts with Brand A parts, and to credit the store for its cost of other branded parts. The store is under no obligation to continue stocking Brand A parts or to purchase a minimum volume of Brand A parts from N in the future.

(ii) The amount paid by N as a credit to the store for the cost of other branded parts is not an amount paid to acquire or create an intangible under paragraph (c) or (d) of this section or to facilitate such an acquisition or creation. In addition, the amount does not create a separate and distinct intangible asset within the meaning of paragraph (b)(3) of this section. Accordingly, N is not required to capitalize the amount under this section. While the amount may create a hope or expectation by N that the store will continue to stock Brand A parts, this benefit, without more, is not an intangible for which capitalization is required under this section.

(iii) Alternatively, assume that N agrees to credit the store for its cost of other branded parts in exchange for the store's agreement to purchase all of its inventory requirements for such parts from N for a period of at least 3 years. The amount paid by N as a credit to the store for the cost of other branded parts is an amount paid to induce the store to enter into an agreement providing R the right to provide property. Accordingly, R must capitalize its payment.

Example 9. Package design costs. (i) Z corporation manufactures and markets personal care products. Z pays $100,000 to a consultant to develop a package design for Z's newest product, Product A. Z also pays a fee to a government agency to obtain trademark and copyright protection on certain elements of the package design. Z pays its outside legal counsel $10,000 for services rendered in preparing and filing the trademark and copyright applications and for other services rendered in securing the trademark and copyright protection.

(ii) The $100,000 paid by Z to the consultant for development of the package design is not an amount paid to acquire or create an intangible under paragraph (c) or (d) of this section or to facilitate such an acquisition or creation. In addition, as provided in paragraph (b)(3)(v) of this section, amounts paid to develop a package design are treated as amounts that do not create a separate and distinct intangible asset. Accordingly, Z is not required to capitalize the $100,000 payment under this section.

(iii) The amounts paid by Z to the government agency to obtain trademark and copyright protection are amounts paid to a government agency for a right granted by that agency. Accordingly, Z must capitalize the payment. In addition, the $10,000 paid by Z to its outside counsel is an amount paid to facilitate the creation of the trademark and copyright. Because the aggregate amounts paid to facilitate the transaction exceed $5,000, the amounts are not *de minimis* as defined in paragraph (e)(4)(iii)(A) of this section. Accordingly, Z must capitalize the $10,000 payment to its outside counsel under paragraph (b)(1)(v) of this section.

(iv) Alternatively, assume that Z acquires an existing package design for Product A as part of an acquisition of a trade or business that constitutes an applicable asset acquisition within the meaning of section 1060(c). Assume further that $100,000 of the consideration paid by N in the acquisition is properly allocable to the package design for Product A. Under paragraph (c)(1) of this section, Z must capitalize the $100,000 payment.

Example 10. Contract to provide services. (i) Q corporation, a financial planning firm, provides financial advisory services on a fee-only basis. During 2005, Q and several other financial planning firms submit separate bids to R corporation for a contract to become one of three providers of financial advisory services to R's employees. Q pays $2,000 to a printing company to develop and produce materials for its sales presentation to R's management. Q also pays $6,000 to travel to R's corporate headquarters to make the sales presentation, and $20,000 of salaries to its employees for services performed in preparing the bid and making the presentation to R's management. Q's bid is successful and Q enters into an agreement with R in 2005 under which Q agrees to provide financial advisory services to R's employees, and R agrees to pay Q's fee on behalf of each employee who chooses to utilize such services. R enters into similar agreements with two other financial planning firms, and R's employees may choose to use the services of any one of the three firms. Based on its past experience, Q reasonably expects to provide services to at least 5 percent of R's employees.

(ii) Q's agreement with R is not an agreement providing Q the right to provide services, as described in paragraph (d)(6)(i)(B) of this section. Under paragraph (d)(6)(iv) the agreement places no obligation on another person to request or pay for Q's services. Accordingly, Q is not required to capitalize any of the amounts paid in the process of pursuing the agreement with R.

Example 11. Mutual fund distributor. (i) D incurs costs to enter into a distribution agreement with M, a mutual fund. The initial term of the distribution agreement is two years, and afterwards must be approved annually by M. The distribution agreement can be terminated by either party on 60 days notice. Although distribution agreements are rarely terminated in the mutual fund industry, M is not economically compelled to continue D's distribution agreement. Under the distribution agreement, D has the exclusive right to sell shares of M and agrees to use its best efforts to solicit orders for the sale of shares of M. D sells shares in M directly to the general public as well as through brokers. When an investor places an order for M shares with a broker, D pays the broker a commission for selling the shares to the investor. Under the distribution agreement, D receives compensation from M in the form of 12b–1 fees (which equal a percentage of M's net asset value attributable to investors that have held their shares for up to 6 years) and contingent deferred sales charges (which are paid if the investor redeems the purchased shares within 6 years).

(ii) The distribution agreement is not an agreement providing D with the right to provide services, as described in paragraph (d)(6)(i)(B) of this section, because the distribution agreement can be terminated by M at will upon 60 days notice and M is not economically compelled to continue the distribution agreement. Accordingly, D is not required to capitalize the costs of creating (or facilitating the creation of) the distribution agreement under paragraphs (b)(1)(ii) or (v) of this section. In addition, as provided in paragraph (b)(3)(ii) of this section, amounts paid to create an agreement are treated as amounts that do not create a separate and distinct intangible asset. Accordingly, D also is not required to capitalize the costs of creating (or facilitating the creation of) the distribution agreement under paragraph (b)(1)(iii) or (v) of this section.

(iii) Under paragraph (b)(3)(iii), the broker commissions paid by D in performing services under the distribution agreement do not create (or facilitate the creation of) a separate and distinct intangible asset. In addition, the broker commissions do not create an intangible described in paragraph (d) of this section. Accordingly, D is not required to capitalize the broker commissions under this section.

(m) *Amortization.* For rules relating to amortization of certain intangibles, see § 1.167(a)–3.

(n) *Intangible interests in land.* [Reserved].

(o) *Effective date.* This section applies to amounts paid or incurred on or after December 31, 2003.

(p) *Accounting method changes*—(1) *In general.* A taxpayer seeking to change a method of accounting to comply with this section must secure the consent of the Commissioner in accordance with the requirements of § 1.446–1(e). For the taxpayer's first taxable year ending on or after December 31, 2003, the taxpayer is granted the consent of the Commissioner to change its method of accounting to comply with this section, provided the taxpayer follows the administrative procedures issued under § 1.446–1(e)(3)(ii) for obtaining the Commissioner's automatic consent to a change in accounting method (for further guidance, for example, see Rev. Proc. 2002–9 (2002–1 C.B. 327) and § 601.601(d)(2)(ii)(*b*) of this chapter).

(2) *Scope limitations.* Any limitations on obtaining the automatic consent of the Commissioner do not apply to a taxpayer seeking to change to a method of accounting to comply with this section for its first taxable year ending on or after December 31, 2003.

(3) *Section 481(a) adjustment.* With the exception of a change to a pooling method authorized by this section, the section 481(a) adjustment for a change in method of accounting to comply with this section for a taxpayer's first taxable year ending on or after December 31, 2003 is determined by taking into account only amounts paid or incurred in taxable years ending on or after January 24, 2002. A taxpayer seeking to change to a pooling method authorized by this section on or after the effective date of these regulations must change to the method using a cut-off method.

§ 1.263(a)–5 Amounts paid or incurred to facilitate an acquisition of a trade or business, a change in the capital structure of a business entity, and certain other transactions.

(a) *General rule.* A taxpayer must capitalize an amount paid to facilitate (within the meaning of paragraph (b) of this section) each of the following transactions, without regard to whether the transaction is comprised of a single step or a series of steps carried out as part of a single plan and without regard to whether gain or loss is recognized in the transaction:

(1) An acquisition of assets that constitute a trade or business (whether the taxpayer is the acquirer in the acquisition or the target of the acquisition).

(2) An acquisition by the taxpayer of an ownership interest in a business entity if, immediately after the acquisition, the taxpayer and the business entity are related within the meaning of section 267(b) or 707(b) (*see* § 1.263(a)–4 for rules requiring capitalization of amounts paid by the taxpayer to acquire an ownership interest in a business entity, or to facilitate the acquisition of an ownership interest in a business entity, where the taxpayer and the business entity are not related within the meaning of section 267(b) or 707(b) immediately after the acquisition).

(3) An acquisition of an ownership interest in the taxpayer (other than an acquisition by the taxpayer of an ownership interest in the taxpayer, whether by redemption or otherwise).

(4) A restructuring, recapitalization, or reorganization of the capital structure of a business entity (including reorganizations described in section 368 and distributions of stock by the taxpayer as described in section 355).

(5) A transfer described in section 351 or section 721 (whether the taxpayer is the transferor or transferee).

(6) A formation or organization of a disregarded entity.

(7) An acquisition of capital.

(8) A stock issuance.

(9) A borrowing. For purposes of this section, a borrowing means any issuance of debt, including an issuance of debt in an acquisition of capital or in a recapitalization. A borrowing also includes debt issued in a debt for debt exchange under § 1.1001–3.

(10) Writing an option.

(b) *Scope of facilitate*—(1) *In general.* Except as otherwise provided in this section, an amount is paid to facilitate a transaction described in paragraph (a) of this section if the amount is paid in the process of investigating or otherwise pursuing the transaction. Whether an amount is paid in the process of investigating or otherwise pursuing the transaction is determined based on all of the facts and circumstances. In determining whether an amount is paid to facilitate a transaction, the fact that the amount would (or would not) have been paid but for the transaction is relevant, but is not determinative. An amount paid to determine the value or price of a transaction is an amount paid in the process of investigating or otherwise pursuing the transaction. An amount paid to another party in exchange for tangible or intangible property is not an amount paid to facilitate the exchange. For example, the purchase price paid to the target of an asset acquisition in exchange for its assets is not an amount paid to facilitate the acquisition. Similarly, the purchase price paid by an acquirer to the target's shareholders in exchange for their stock in a stock acquisition is not an amount paid to facilitate the acquisition of the stock. See § 1.263(a)–1, § 1.263(a)–2, and § 1.263(a)–4 for rules requiring capitalization of the purchase price paid to acquire property.

(2) *Ordering rules.* An amount paid in the process of investigating or otherwise pursuing both a transaction described in paragraph (a) of this section and an acquisition or creation of an intangible described in § 1.263(a)–4 is subject to the rules contained in this section, and not to the rules contained in § 1.263(a)–4. In addition, an amount required to be capitalized by § 1.263(a)–1, § 1.263(a)–2, or § 1.263(a)–4 does not facilitate a transaction described in paragraph (a) of this section.

(c) *Special rules for certain costs*—(1) *Borrowing costs.* An amount paid to facilitate a borrowing does not facilitate another transaction (other than the borrowing) described in paragraph (a) of this section.

(2) *Costs of asset sales.* An amount paid by a taxpayer to facilitate a sale of its assets does not facilitate another transaction (other than the sale) described in paragraph (a) of this section. For example, where a target corporation, in preparation for a merger with an acquiring corporation, sells assets that are not desired by the acquiring corporation, amounts paid to facilitate the sale of the unwanted assets are not required to be capitalized as amounts paid to facilitate the merger.

(3) *Mandatory stock distributions.* An amount paid in the process of investigating or otherwise pursuing a distribution of stock by a taxpayer to its shareholders does not facilitate a transaction described in paragraph (a) of this section if the divestiture of the stock (or of properties transferred to an entity whose stock is distributed) is required by law, regulatory mandate, or court order. A taxpayer is not required to capitalize (under this section or § 1.263(a)–4) an amount paid to organize (or facilitate the organization of) an entity if the entity is organized solely to receive properties that the taxpayer is required to divest by law, regulatory mandate, or court order and if the taxpayer distributes the stock of the entity to its shareholders. A taxpayer also is not required to capitalize (under this section or § 1.263(a)–4) an amount paid to transfer property to an entity if the taxpayer is required to divest itself of that property by law, regulatory mandate, or court order and if the stock of the recipient entity is distributed to the taxpayer's shareholders.

(4) *Bankruptcy reorganization costs.* An amount paid to institute or administer a proceeding under Chapter 11 of the Bankruptcy Code by a taxpayer that is the debtor under the proceeding constitutes an amount paid to facilitate a reorganization within the meaning of paragraph (a)(4) of this section, regardless of the purpose for which the proceeding is instituted. For example, an amount paid to prepare and file a petition under Chapter 11, to obtain an extension of the exclusivity period under Chapter 11, to formulate plans of reorganization under Chapter 11, to analyze plans of reorganization formulated by another party in interest, or to contest or obtain approval of a plan of reorganization under Chapter 11 facilitates a reorganization within the meaning of this section. However, amounts specifically paid to formulate, analyze, contest or obtain approval of the portion of a plan of reorganization under Chapter 11 that resolves tort liabilities of the taxpayer do not facilitate a reorganization within the meaning of paragraph (a)(4) of this section if the amounts would have been treated as ordinary and necessary business expenses under section 162 had the bankruptcy proceeding not been instituted. In addition, an amount paid

by the taxpayer to defend against the commencement of an involuntary bankruptcy proceeding against the taxpayer does not facilitate a reorganization within the meaning of paragraph (a)(4) of this section. An amount paid by the debtor to operate its business during a Chapter 11 bankruptcy proceeding is not an amount paid to institute or administer the bankruptcy proceeding and does not facilitate a reorganization. Such amount is treated in the same manner as it would have been treated had the bankruptcy proceeding not been instituted.

(5) *Stock issuance costs of open-end regulated investment companies.* Amounts paid by an open-end regulated investment company (within the meaning of section 851) to facilitate an issuance of its stock are treated as amounts that do not facilitate a transaction described in paragraph (a) of this section unless the amounts are paid during the initial stock offering period.

(6) *Integration costs.* An amount paid to integrate the business operations of the taxpayer with the business operations of another does not facilitate a transaction described in paragraph (a) of this section, regardless of when the integration activities occur.

(7) *Registrar and transfer agent fees for the maintenance of capital stock records.* An amount paid by a taxpayer to a registrar or transfer agent in connection with the transfer of the taxpayer's capital stock does not facilitate a transaction described in paragraph (a) of this section unless the amount is paid with respect to a specific transaction described in paragraph (a). For example, a taxpayer is not required to capitalize periodic payments to a transfer agent for maintaining records of the names and addresses of shareholders who trade the taxpayer's shares on a national exchange. By comparison, a taxpayer is required to capitalize an amount paid to the transfer agent for distributing proxy statements requesting shareholder approval of a transaction described in paragraph (a) of this section.

(8) *Termination payments and amounts paid to facilitate mutually exclusive transactions.* An amount paid to terminate (or facilitate the termination of) an agreement to enter into a transaction described in paragraph (a) of this section constitutes an amount paid to facilitate a second transaction described in paragraph (a) of this section only if the transactions are mutually exclusive. An amount paid to facilitate a transaction described in paragraph (a) of this section is treated as an amount paid to facilitate a second transaction described in paragraph (a) of this section only if the transactions are mutually exclusive.

(d) *Simplifying conventions*—(1) *In general.* For purposes of this section, employee compensation (within the meaning of paragraph (d)(2) of this section), overhead, and *de minimis* costs (within the meaning of paragraph (d)(3) of this section) are treated as amounts that do not facilitate a transaction described in paragraph (a) of this section.

(2) *Employee compensation*—(i) *In general.* The term *employee compensation* means compensation (including salary, bonuses and commissions) paid to an employee of the taxpayer. For purposes of this section, whether an individual is an employee is determined in accordance with the rules contained in section 3401(c) and the regulations thereunder.

(ii) *Certain amounts treated as employee compensation.* For purposes of this section, a guaranteed payment to a partner in a partnership is treated as employee compensation. For purposes of this section, annual compensation paid to a director of a corporation is treated as employee compensation. For example, an amount paid to a director of a corporation for attendance at a regular meeting of the board of directors (or committee thereof) is treated as employee compensation for purposes of this section. However, an amount paid to the director for attendance at a special meeting of the board of directors (or committee thereof) is not treated as employee compensation. An amount paid to a person that is not an employee of the taxpayer (including the employer of the individual who performs the services) is treated as employee compensation for purposes of this section only if the amount is paid for secretarial, clerical, or similar administrative support services (other than services involving the preparation and distribution of proxy solicitations and other documents seeking shareholder approval of a transaction described in paragraph (a) of this section). In the case of an affiliated group of corporations filing a consolidated federal income tax return, a payment by one member of the group to a second member of the group for services performed by an employee of the second member is treated as employee compensation if the services provided by the employee are provided at a time during which both members are affiliated.

(3) *De minimis costs*—(i) *In general.* The term *de mininis costs* means amounts (other than employee compensation and overhead) paid in the process of investigating or otherwise pursuing a transaction described in paragraph (a) of this section if, in the aggregate, the amounts do not exceed $5,000 (or such greater amount as may be set forth in published guidance). If the amounts exceed $5,000 (or such greater amount as may be set forth in published guidance), none of the amounts are *de minimis costs* within the meaning of this paragraph (d)(3). For purposes of this paragraph (d)(3), an amount paid in the form of property is valued at its fair market value at the time of the payment.

(ii) *Treatment of commissions.* The term *de minimis costs* does not include commissions paid to facilitate a transaction described in paragraph (a) of this section.

(4) *Election to capitalize.* A taxpayer may elect to treat employee compensation, overhead, or *de minimis costs* paid in the process of investigating or otherwise pursuing a transaction described in paragraph (a) of this section as amounts that facilitate the transaction. The election is made separately for each transaction and applies to employee compensation, overhead, or *de minimis costs*, or to any combination thereof. For example, a taxpayer may elect to treat overhead and *de minimis costs*, but not employee compensation, as amounts that facilitate the transaction. A taxpayer makes the election by treating the amounts to which the election applies as amounts that facilitate the transaction in the taxpayer's timely filed original federal income tax return (including extensions) for the taxable year during which the amounts are paid. In the case of an affiliated group of corporations filing a consolidated return, the election is made separately with respect to each member of the group, and not with respect to the group as a whole. In the case of an S corporation or partnership, the election is made by the S corporation or by the partnership, and not by the shareholders or partners. An election made under this paragraph (d)(4) is revocable with respect to each taxable year for which made only with the consent of the Commissioner.

(e) *Certain acquisitive transactions*—(1) *In general.* Except as provided in paragraph (e)(2) of this section (relating to inherently facilitative amounts), an amount paid by the taxpayer in the process of investigating or otherwise pursuing a covered transaction (as described in paragraph (e)(3) of this section) facilitates the transaction within the meaning of this section only if the amount relates to activities performed on or after the earlier of—

(i) The date on which a letter of intent, exclusivity agreement, or similar written communication (other than a confidentiality agreement) is executed by representatives of the acquirer and the target; or

(ii) The date on which the material terms of the transaction (as tentatively agreed to by representatives of the acquirer and the target) are authorized or approved by the taxpayer's board of directors (or committee of the board of directors) or, in the case of a taxpayer that is not a corporation, the date on which the material terms of the transaction (as tentatively agreed to by representatives of the acquirer and the target) are authorized or approved by the appropriate governing officials of the taxpayer. In the case of a transaction that does not require authorization or approval of the taxpayer's board of directors (or appropriate governing officials in the case of a taxpayer that is not a corporation) the date determined under this paragraph (e)(1)(ii) is the date on which the acquirer and the target execute a binding written contract reflecting the terms of the transaction.

(2) *Exception for inherently facilitative amounts.* An amount paid in the process of investigating or otherwise pursuing a covered transaction facilitates that transaction if the amount is inherently facilitative, regardless of whether the amount is paid for activities performed prior to the date determined under paragraph (e)(1) of this section. An amount is inherently facilitative if the amount is paid for—

(i) Securing an appraisal, formal written evaluation, or fairness opinion related to the transaction;

(ii) Structuring the transaction, including negotiating the structure of the transaction and obtaining tax advice on the structure of the transaction (for example, obtaining tax advice on the application of section 368);

(iii) Preparing and reviewing the documents that effectuate the transaction (for example, a merger agreement or purchase agreement);

(iv) Obtaining regulatory approval of the transaction, including preparing and reviewing regulatory filings;

(v) Obtaining shareholder approval of the transaction (for example, proxy costs, solicitation costs, and costs to promote the transaction to shareholders); or

(vi) Conveying property between the parties to the transaction (for example, transfer taxes and title registration costs).

(3) *Covered transactions.* For purposes of this paragraph (e), the term *covered transaction* means the following transactions:

(i) A taxable acquisition by the taxpayer of assets that constitute a trade or business.

(ii) A taxable acquisition of an ownership interest in a business entity (whether the taxpayer is the acquirer in the acquisition or the target of the acquisition) if, immediately after the acquisition, the acquirer and the target are related within the meaning of section 267(b) or 707(b).

(iii) A reorganization described in section 368(a)(1)(A), (B), or (C) or a reorganization described in section 368(a)(1)(D) in which stock or securities of the corporation to which the assets are transferred are distributed in a transaction which qualifies under section 354 or 356 (whether the taxpayer is the acquirer or the target in the reorganization).

(f) *Documentation of success-based fees*—An amount paid that is contingent on the successful closing of a transaction described in paragraph (a) of this section is an amount paid to facilitate the transaction except to the extent the taxpayer maintains sufficient documentation to establish that a portion of the fee is allocable to activities that do not facilitate the transaction. This documentation must be completed on or before the due date of the taxpayer's timely filed original federal income tax return (including extensions) for the taxable year during which the transaction closes. For purposes of this paragraph (f), documentation must consist of more than merely an allocation between activities that facilitate the transaction and activities that do not facilitate the transaction, and must consist of supporting records (for example, time records, itemized invoices, or other records) that identify—

(1) The various activities performed by the service provider;

(2) The amount of the fee (or percentage of time) that is allocable to each of the various activities performed;

(3) Where the date the activity was performed is relevant to understanding whether the activity facilitated the transaction, the amount of the fee (or percentage of time) that is allocable to the performance of that activity before and after the relevant date; and

(4) The name, business address, and business telephone number of the service provider.

(g) *Treatment of capitalized costs*—(1) *Tax-free acquisitive transactions.* [Reserved]

(2) *Taxable acquisitive transactions*—(i) *Acquirer.* In the case of an acquisition, merger, or consolidation that is not described in section 368, an amount required to be capitalized under this section by the acquirer is added to the basis of the acquired assets (in the case of a transaction that is treated as an acquisition of the assets of the target for federal income tax purposes) or the acquired stock (in the case of a transaction that is treated as an acquisition of the stock of the target for federal income tax purposes).

(ii) *Target*—(A) *Asset acquisition.* In the case of an acquisition, merger, or consolidation that is not described in section 368 and that is treated as an acquisition of the assets of the target for federal income tax purposes, an amount required to be capitalized under this section by the target is treated as a reduction of the target's amount realized on the disposition of its assets.

(B) *Stock acquisition.* [Reserved]

(3) *Stock issuance transactions.* [Reserved]

(4) *Borrowings.* For the treatment of amounts required to be capitalized under this section with respect to a borrowing, see § 1.446–5.

(5) *Treatment of capitalized amounts by option writer.* An amount required to be capitalized by an option writer under paragraph (a)(10) of this section is not currently deductible under section 162 or 212. Instead, the amount required to be capitalized generally reduces the total premium received by the option writer. However, other provisions of law may limit the reduction of the premium by the capitalized amount (for example, if the capitalized amount is never deductible by the option writer).

(h) *Application to accrual method taxpayers.* For purposes of this section, the terms *amount paid* and *payment* mean, in the case of a taxpayer using an accrual method of accounting, a liability incurred (within the meaning of § 1.446–1(c)(1)(ii)). A liability may not be taken into account under this section prior to the taxable year during which the liability is incurred.

(i) [Reserved]

(j) *Coordination with other provisions of the Internal Revenue Code.* Nothing in this section changes the treatment of an amount that is specifically provided for under any other provision of the Internal Revenue Code (other than section 162(a) or 212) or regulations thereunder.

(k) *Treatment of indirect payments.* For purposes of this section, references to an amount paid to or by a party include an amount paid on behalf of that party.

(l) *Examples.* The following examples illustrate the rules of this section:

Example 1. Costs to facilitate. Q corporation pays its outside counsel $20,000 to assist Q in registering its stock with the Securities and Exchange Commission. Q is

not a regulated investment company within the meaning of section 851. Q's payments to its outside counsel are amounts paid to facilitate the issuance of stock. Accordingly. Q must capitalize its $20,000 payment under paragraph (a)(8) of this section (whether incurred before or after the issuance of the stock and whether or not the registration is productive of equity capital).

Example 2. Costs to facilitate. Q corporation seeks to acquire all of the outstanding stock of Y corporation. To finance the acquisition. Q must issue new debt. Q pays an investment banker $25,000 to market the debt to the public and pays its outside counsel $10,000 to prepare the offering documents for the debt. Q's payment of $35,000 facilitates a borrowing and must be capitalized under paragraph (a)(9) of this section. As provided in paragraph (c)(1) of this section, Q's payment does not facilitate the acquisition of Y, notwithstanding the fact that Q incurred the new debt to finance its acquisition of Y. See § 1.446–5 for the treatment of Q's capitalized payment.

Example 3. Costs to facilitate. (i) Z agrees to pay investment banker B $1,000,000 for B's services in evaluating four alternative transactions ($250,000 for each alternative): An initial public offering; a borrowing of funds; an acquisition by Z of a competitor; and an acquisition of Z by a competitor. Z eventually decides to pursue a borrowing and abandons the other options.

(ii) The $250,000 payment to evaluate the possibility of a borrowing is an amount paid in the process of investigating or otherwise pursuing a transaction described in paragraph (a)(9) of this section. Accordingly Z must capitalize that $250,000 payment to B. See § 1.446–5 for the treatment of Z's capitalized payment.

(iii) The $250,000 payment to evaluate the possibility of an initial public offering is an amount paid in the process of investigating or otherwise pursuing a transaction described in paragraph (a)(8) of this section. Accordingly, Z must capitalize that $250,000 payment to B under this section. Because the borrowing and the initial public offering are not mutually exclusive transactions, the $250,000 is not treated as an amount paid to facilitate the borrowing. When Z abandons the initial public offering, Z may recover under section 165 the $250,000 paid to facilitate the initial public offering.

(iv) The $500,000 paid by Z to evaluate the possibilities of an acquisition of Z by a competitor and an acquisition of a competitor by Z are amounts paid in the process of investigating or otherwise pursuing transactions described in paragraphs (a) and (e)(3) of this section. Accordingly, Z is only required to capitalize under this section the portion of the $500,000 payment that relates to inherently facilitative activities under paragraph (e)(2) of this section or to activities performed on or after the date determined under paragraph (e)(1) of this section. Because the borrowing and the possible acquisitions are not mutually exclusive transactions, no portion of the $500,000 is treated as an amount paid to facilitate the borrowing. When Z abandons the acquisition transactions, Z may recover under section 165 any portion of the $500,000 that was paid to facilitate the acquisitions.

Example 4. Corporate acquisition. (i) On February 1, 2005, R corporation decides to investigate the acquisition of three potential targets: T corporation, U corporation, and V corporation. R's consideration of T, U, and V represents the consideration of three distinct transactions, any or all of which R might consummate and has the financial ability to consummate. On March 1, 2005, R enters into an exclusivity agreement with T and stops pursuing U and V. On July 1, 2005, R acquires all of the stock of T in a transaction described in section 368. R pays $1,000,000 to an investment banker and $50,000 to its outside counsel to conduct due diligence on T, U, and V; determine the value of T, U, and V; negotiate and structure the transaction with T; draft the merger agreement; secure shareholder approval; prepare SEC filings; and obtain the necessary regulatory approvals.

(ii) Under paragraph (e)(1) of this section, the amounts paid to conduct due diligence on T, U and V prior to March 1, 2005 (the date of the exclusivity agreement) are not amounts paid to facilitate the acquisition of the stock of T, U or V and are not required to be capitalized under this section. However, the amounts paid to conduct due diligence on T on and after March 1, 2005, are amounts paid to facilitate the acquisition of the stock of T and must be capitalized under paragraph (a)(2) of this section.

(iii) Under paragraph (e)(2) of this section, the amounts paid to determine the value of T, negotiate and structure the transaction with T, draft the merger agreement, secure shareholder approval, prepare SEC filings, and obtain necessary regulatory approvals are inherently facilitative amounts paid to facilitate the acquisition of the stock of T and must be capitalized, regardless of whether those activities occur prior to, on, or after March 1, 2005.

(iv) Under paragraph (e)(2) of this section, the amounts paid to determine the value of U and V are inherently facilitative amounts paid to facilitate the acquisition of U or V and must be capitalized. Because the acquisition of U, V, and T are not mutually exclusive transactions, the costs that facilitate the acquisition of U and V do not facilitate the acquisition of T. Accordingly, the amounts paid to determine the value of U and V may be recovered under section 165 in the taxable year that R abandons the planned mergers with U and V.

Example 5. Corporate acquisition; employee bonus. Assume the same facts as in *Example 4*, except R pays a bonus of $10,000 to one of its corporate officers who negotiated the acquisition of T. As provided by paragraph (d)(1) of this section, Y is not required to capitalize any portion of the bonus paid to the corporate officer.

Example 6. Corporate acquisition; integration costs. Assume the same facts as in *Example 4*, except that, before and after the acquisition is consummated, R incurs costs to relocate personnel and equipment, provide severance benefits to terminated employees, integrate records and information systems, prepare new financial statements for the combined entity, and reduce redundancies in the combined business operations. Under paragraph (c)(6) of this section, these costs do not facilitate the acquisition of T. Accordingly, R is not required to capitalize any of these costs under this section.

Example 7. Corporate acquisition; compensation to target's employees. Assume the same facts as in *Example 4*, except that, prior to the acquisition, certain employees of T held unexercised options issued pursuant to T's stock option plan. These options granted the employees the right to purchase T stock at a fixed option price. The options did not have a readily ascertainable value (within the meaning of § 1.83–7(b)), and thus no amount was included in the employees' income when the options were granted. As a condition of the acquisition, T is required to terminate its stock option plan. T therefore agrees to pay its employees who hold unexercised stock options the difference between the option price and the current value of T's stock in consideration of their agreement to cancel their unexercised options. Under paragraph (d)(1) of this section, T is not required to capitalize the amounts paid to its employees. See section 83 for the treatment of amounts received in cancellation of stock options.

Example 8. Asset acquisition; employee compensation. N corporation owns tangible and intangible assets that constitute a trade or business. M corporation purchases all the assets of N in a taxable transaction. Under paragraph (a)(1) of this section, M must capitalize amounts paid to facilitate the acquisition of the assets of N. Under paragraph (d)(1) of this section, no portion of the salaries of M's employees who work on the acquisition are treated as facilitating the transaction.

Example 9. Corporate acquisition; retainer. Y corporation's outside counsel charges Y $60,000 for services rendered in facilitating the friendly acquisition of the stock of Y corporation by X corporation. Y has an agreement with its outside counsel under which Y pays an annual retainer of $50,000. Y's outside counsel has the right to offset amounts billed for any legal services rendered against the annual retainer. Pursuant to this agreement, Y's outside counsel offsets $50,000 of the legal fees from the acquisition against the retainer and bills Y for the balance of $10,000. The $60,000 legal fee is an amount paid to facilitate the acquisition of an ownership interest in Y as described in paragraph (a)(3) of this section. Y must capitalize the full amount of the $60,000 legal fee.

Example 10. Corporate acquisition; antitrust defense costs. On March 1, 2005, V corporation enters into an agreement with X corporation to acquire all of the outstanding stock of X. On April 1, 2005, federal and state regulators file suit against V to prevent the acquisition of X on the ground that the acquisition violates antitrust laws. V enters into a consent agreement with regulators on May 1, 2005, that allows the acquisition to proceed, but requires V to hold separate the business operations of X pending the outcome of the antitrust suit and subjects V to possible divestiture. V acquires title to all of the outstanding stock of X on June 1, 2005. After June 1, 2005, the regulators pursue antitrust litigation against V seeking

rescission of the acquisition. V pays $50,000 to its outside counsel for services rendered after June 1, 2005, to defend against the antitrust litigation. V ultimately prevails in the antitrust litigation. V's costs to defend the antitrust litigation are costs to facilitate its acquisition of the stock of X under paragraph (a)(2) of this section and must be capitalized. Although title to the shares of X passed to V prior to the date V incurred costs to defend the antitrust litigation, the amounts paid by V are paid in the process of pursuing the acquisition of the stock of X because the acquisition was not complete until the antitrust litigation was ultimately resolved. V must capitalize the $50,000 in legal fees.

Example 11. Corporate acquisition; defensive measures. (i) On January 15, 2005, Y corporation, a publicly traded corporation, becomes the target of a hostile takeover attempt by Z corporation. In an effort to defend against the takeover, Y pays legal fees to seek an injunction against the takeover and investment banking fees to locate a potential "white knight" acquirer. Y also pays amounts to complete a defensive recapitalization, and pays $50,000 to an investment banker for a fairness opinion regarding Z's initial offer. Y's efforts to enjoin the takeover and locate a white knight acquirer are unsuccessful, and on March 15, 2005, Y's board of directors decides to abandon its defense against the takeover and negotiate with Z in an effort to obtain the highest possible price for its shareholders. After Y abandons its defense against the takeover, Y pays an investment banker $1,000,000 for a second fairness opinion and for services rendered in negotiating with Z.

(ii) The legal fees paid by Y to seek an injunction against the takeover are not amounts paid in the process of investigating or otherwise pursuing the transaction with Z. Accordingly, these legal fees are not required to be capitalized under this section.

(iii) The investment banking fees paid to search for a white knight acquirer do not facilitate an acquisition of Y by a white knight because none of Y's costs with respect to a white knight were inherently facilitative amounts and because Y did not reach the date described in paragraph (e)(1) of this section with respect to a white knight. Accordingly, these amounts are not required to be capitalized under this section.

(iv) The amounts paid by Y to investigate and complete the recapitalization must be capitalized under paragraph (a)(4) of this section.

(v) The $50,000 paid to the investment bankers for a fairness opinion during Y's defense against the takeover and the $1,000,000 paid to the investment bankers after Y abandons its defense against the takeover are inherently facilitative amounts with respect to the transaction with Z and must be capitalized under paragraph (a)(3) of this section.

Example 12. Corporate acquisition; acquisition by white knight. (i) Assume the same facts as in *Example 11,* except that Y's investment bankers identify three potential white knight acquirers: U corporation, V corporation, and W corporation. Y pays its investment bankers to conduct due diligence on the three potential white knight acquirers. On March 15, 2005, Y's board of directors approves a tentative acquisition agreement under which W agrees to acquire all of the stock of Y, and the investment bankers stop due diligence on U and V. On June 15, 2005, W acquires all of the stock of Y.

(ii) Under paragraph (e)(1) of this section, the amounts paid to conduct due diligence on U, V, and W prior to March 15, 2005 (the date of board of directors' approval) are not amounts paid to facilitate the acquisition of the stock of Y and are not required to be capitalized under this section. However, the amounts paid to conduct due diligence on W on and after March 15, 2005, facilitate the acquisition of the stock of Y and are required to be capitalized.

EXAMPLE 13. Corporate acquisition; mutually exclusive costs. (i) Assume the same facts as in *Example 11,* except that Y's investment banker finds W, a white knight. Y and W execute a letter of intent on March 10, 2005. Under the terms of the letter of intent, Y must pay W a $10,000,000 break-up fee if the merger with W does not occur. On April 1, 2005, Z significantly increases the amount of its offer, and Y decides to accept Z's offer instead of merging with W. Y pays its investment banker $500,000 for inherently facilitative costs with respect to the potential merger with W. Y also pays its investment banker $2,000,000 for due diligence costs with respect to the potential merger with W, $1,000,000 of which relates to services performed on or after March 10, 2005.

(ii) Y's $500,000 payment for inherently facilitative costs and Y's $1,000,000 payment for due diligence activities performed on or after March 10, 2005 (the date the letter of intent with W is entered into) facilitate the potential merger with W. Because Y could not merge with both W and Z, under paragraph (c)(8) of this section the $500,000 and $1,000,000 payments also facilitate the transaction between Y and Z. Accordingly, Y must capitalize the $500,000 and $1,000,000 payments as amounts that facilitate the transaction with Z.

(iii) Similarly, because Y could not merge with both W and Z, under paragraph (c)(8) of this section the $10,000,000 termination payment facilitates the transaction between Y and Z. Accordingly, Y must capitalize the $10,000,000 termination payment as an amount that facilitates the transaction with Z.

Example 14. Break-up fee; transactions not mutually exclusive. N corporation and U corporation enter into an agreement under which U would acquire all the stock or all the assets of N in exchange for U stock. Under the terms of the agreement, if either party terminates the agreement, the terminating party must pay the other party $10,000,000. U decides to terminate the agreement and pays N $10,000,000. Shortly thereafter, U acquires all the stock of V corporation, a competitor of N. U had the financial resources to have acquired both N and V. U's $10,000,000 payment does not facilitate U's acquisition of V. Accordingly, U is not required to capitalize the $10,000,000 payment under this section.

Example 15. Corporate reorganization; initial public offering. Y corporation is a closely held corporation. Y's board of directors authorizes an initial public offering of Y's stock to fund future growth. Y pays $5,000,000 in professional fees for investment banking services related to the determination of the offering price and legal services related to the development of the offering prospectus and the registration and issuance of stock. The investment banking and legal services are performed both before and after board authorization. Under paragraph (a)(8) of this section, the $5,000,000 is an amount paid to facilitate a stock issuance.

Example 16. Auction. (i) N corporation seeks to dispose of all of the stock of its wholly owned subsidiary, P corporation, through an auction process and requests that each bidder submit a non-binding purchase offer in the form of a draft agreement. Q corporation hires an investment banker to assist in the preparation of Q's bid to acquire P and to conduct a due diligence investigation of P. On July 1, 2005, Q submits its draft agreement. On August 1, 2005, N informs Q that it has accepted Q's offer, and presents Q with a signed letter of intent to sell all of the stock of P to Q. On August 5, 2005, Q's board of directors approves the terms of the transaction and authorizes Q to execute the letter of intent. Q executes a binding letter of intent with N on August 6, 2005.

(ii) Under paragraph (e)(1) of this section, the amounts paid by Q to its investment banker that are not inherently facilitative and that are paid for activities performed prior to August 5, 2005 (the date Q's board of directors approves the transaction) are not amounts paid to facilitate the acquisition of P. Amounts paid by Q to its investment banker for activities performed on or after August 5, 2005, and amounts paid by Q to its investment banker that are inherently facilitative amounts within the meaning of paragraph (e)(2) of this section are required to be capitalized under this section.

Example 17. Stock distribution. Z corporation distributes natural gas throughout state Y. The federal government brings an antitrust action against Z seeking divestiture of certain of Z's natural gas distribution assets. As a result of a court ordered divestiture, Z and the federal government agree to a plan of divestiture that requires Z to organize a subsidiary to receive the divested assets and to distribute the stock of the subsidiary to its shareholders. During 2005, Z pays $300,000 to various independent contractors for the following services: studying customer demand in the area to be served by the divested assets, identifying assets to be transferred to the subsidiary, organizing the subsidiary, structuring the transfer of assets to the subsidiary to qualify as a tax-free transaction to Z, and distributing the stock of the subsidiary to the stockholders. Under paragraph (c)(3) of this section, Z is not required to capitalize any portion of the $300,000 payments.

Example 18. Bankruptcy reorganization. (i) X corporation is the defendant in numerous lawsuits alleging tort liability based on X's role in manufacturing certain defective products. X files a petition for reorganization under Chapter 11 of the Bankruptcy Code in

an effort to manage all of the lawsuits in a single proceeding. X pays its outside counsel to prepare the petition and plan of reorganization, to analyze adequate protection under the plan, to attend hearings before the Bankruptcy Court concerning the plan, and to defend against motions by creditors and tort claimants to strike the taxpayer's plan.

(ii) X's reorganization under Chapter 11 of the Bankruptcy Code is a reorganization within the meaning of paragraph (a)(4) of this section. Under paragraph (c)(4) of this section, amounts paid by X to its outside counsel to prepare, analyze or obtain approval of the portion of X's plan of reorganization that resolves X's tort liability do not facilitate the reorganization and are not required to be capitalized, provided that such amounts would have been treated as ordinary and necessary business expenses under section 162 had the bankruptcy proceeding not been instituted. All other amounts paid by X to its outside counsel for the services described above (including all amounts paid to prepare the bankruptcy petition) facilitate the reorganization and must be capitalized.

(m) *Effective date.* This section applies to amounts paid or incurred on or after December 31, 2003.

(n) *Accounting method changes*—(1) *In general.* A taxpayer seeking to change a method of accounting to comply with this section must secure the consent of the Commissioner in accordance with the requirements of § 1.446–1(e). For the taxpayer's first taxable year ending on or after December 31, 2003, the taxpayer is granted the consent of the Commissioner to change its method of accounting to comply with this section, provided the taxpayer follows the administrative procedures issued under § 1.446–1(e)(3)(ii) for obtaining the Commissioner's automatic consent to a change in accounting method (for further guidance, for example, see Rev. Proc. 2002–9 (2002–1 C.B. 327) and § 601.601(d)(2)(ii)(*b*) of this chapter).

(2) *Scope limitations.* Any limitations on obtaining the automatic consent of the Commissioner do not apply to a taxpayer seeking to change to a method of accounting to comply with this section for its first taxable year ending on or after December 31, 2003.

(3) *Section 481(a) adjustment.* The section 481(a) adjustment for a change in method of accounting to comply with this section for a taxpayer's first taxable year ending on or after December 31, 2003 is determined by taking into account only amounts paid or incurred in taxable years ending on or after January 24, 2002.

■ **Par. 5.** Section 1.446–5 is added to read as follows:

§ 1.446–5 Debt issuance costs.

(a) *In general.* This section provides rules for allocating debt issuance costs over the term of the debt. For purposes of this section, the term *debt issuance costs* means those transaction costs incurred by an issuer of debt (that is, a borrower) that are required to be capitalized under § 1.263(a)–5. If these costs are otherwise deductible, they are deductible by the issuer over the term of the debt as determined under paragraph (b) of this section.

(b) *Method of allocating debt issuance costs*—(1) *In general.* Solely for purposes of determining the amount of debt issuance costs that may be deducted in any period, these costs are treated as if they adjusted the yield on the debt. To effect this, the issuer treats the costs as if they decreased the issue price of the debt. See § 1.1273–2 to determine issue price. Thus, debt issuance costs increase or create original issue discount and decrease or eliminate bond issuance premium.

(2) *Original issue discount.* Any resulting original issue discount is taken into account by the issuer under the rules in § 1.163–7, which generally require the use of a constant yield method (as described in § 1.1272–1) to compute how much original issue discount is deductible for a period. However, see § 1.163–7(b) for special rules that apply if the total original issue discount on the debt is *de minimis.*

(3) *Bond issuance premium.* Any remaining bond issuance premium is taken into account by the issuer under the rules of § 1.163–13, which generally require the use of a constant yield method for purposes of allocating bond issuance premium to accrual periods.

(c) *Examples.* The following examples illustrate the rules of this section:

Example 1. (i) On January 1, 2004, X borrows $10,000,000. The principal amount of the loan ($10,000,000) is repayable on December 31, 2008, and payments of interest in the amount of $500,000 are due on December 31 of each year the loan is outstanding. X incurs debt issuance costs of $130,000 to facilitate the borrowing.

(ii) Under § 1.1273–2, the issue price of the loan is $10,000,000. However, under paragraph (b) of this section, X reduces the issue price of the loan by the debt issuance costs of $130,000, resulting in an issue price of $9,870,000. As a result, X treats the loan as having original issue discount in the amount of $130,000 (stated redemption price at maturity of $10,000,000 minus the issue price of $9,870,000). Because this amount of original issue discount is more than the *de minimis* amount of original issue discount for the loan determined under § 1.1273–1(d) ($125,000 ($10,000,000 × .0025 × 5)), X must allocate the original issue discount to each year based on the constant yield method described in § 1.1272–1(b). See § 1.163–7(a). Based on this method and a yield of 5.30%, compounded annually, the original issue discount is allocable to each year as follows: $23,385 for 2004, $24,625 for 2005, $25,931 for 2006, $27,306 for 2007, and $28,753 for 2008.

Example 2. (i) Assume the same facts as in *Example 1*, except that X incurs debt issuance costs of $120,000 rather than $130,000.

(ii) Under § 1.1273–2, the issue price of the loan is $10,000,000. However, under paragraph (b) of this section, X reduces the issue price of the loan by the debt issuance costs of $120,000, resulting in an issue price of $9,880,000. As a result, X treats the loan as having original issue discount in the amount of $120,000 (stated redemption price at maturity of $10,000,000 minus the issue price of $9,880,000). Because this amount of original issue discount is less than the *de minimis* amount of original issue discount for the loan determined under § 1.1273–1(d) ($125,000), X does not have to use the constant yield method described in § 1.1272–1(b) to allocate the original issue discount to each year. Instead, under § 1.163–7(b)(2), X can choose to allocate the original issue discount to each year on a straight-line basis over the term of the loan or in proportion to the stated interest payments ($24,000 each year). X also could choose to deduct the original issue discount at maturity of the loan. X makes its choice by reporting the original issue discount in a manner consistent with the method chosen on X's timely filed federal income tax return for 2004. If X wanted to use the constant yield method, based on a yield of 5.279%, compounded annually, the original issue discount is allocable to each year as follows: $21,596 for 2004, $22,736 for 2005, $23,937 for 2006, $25,200 for 2007, and $26,531 for 2008.

(d) *Effective date.* This section applies to debt issuance costs paid or incurred for debt instruments issued on or after December 31, 2003.

(e) *Accounting method changes*—(1) *Consent to change.* An issuer required to change its method of accounting for debt issuance costs to comply with this section must secure the consent of the Commissioner in accordance with the requirements of § 1.446–1(e). Paragraph (e)(2) of this section provides the Commissioner's automatic consent for certain changes.

(2) *Automatic consent.* The Commissioner grants consent for an issuer to change its method of accounting for debt issuance costs incurred for debt instruments issued on or after December 31, 2003. Because this change is made on a cut-off basis, no items of income or deduction are omitted or duplicated and, therefore, no adjustment under section 481 is allowed. The consent granted by this paragraph (e)(2) applies provided—

(i) The change is made to comply with this section;

(ii) The change is made for the first taxable year for which the issuer must account for debt issuance costs under this section; and

(iii) The issuer attaches to its federal income tax return for the taxable year containing the change a statement that it has changed its method of accounting under this section.

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

■ **Par. 6.** The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 7.** In § 602.101, paragraph (b) is amended by adding an entry in numerical order for § 1.263(a)–5 to read as follows:

§ 602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * *	* *
1.263(a)–5	1545–1870
* * *	* *

Mark E. Matthews,

Deputy Commissioner for Services and Enforcement.

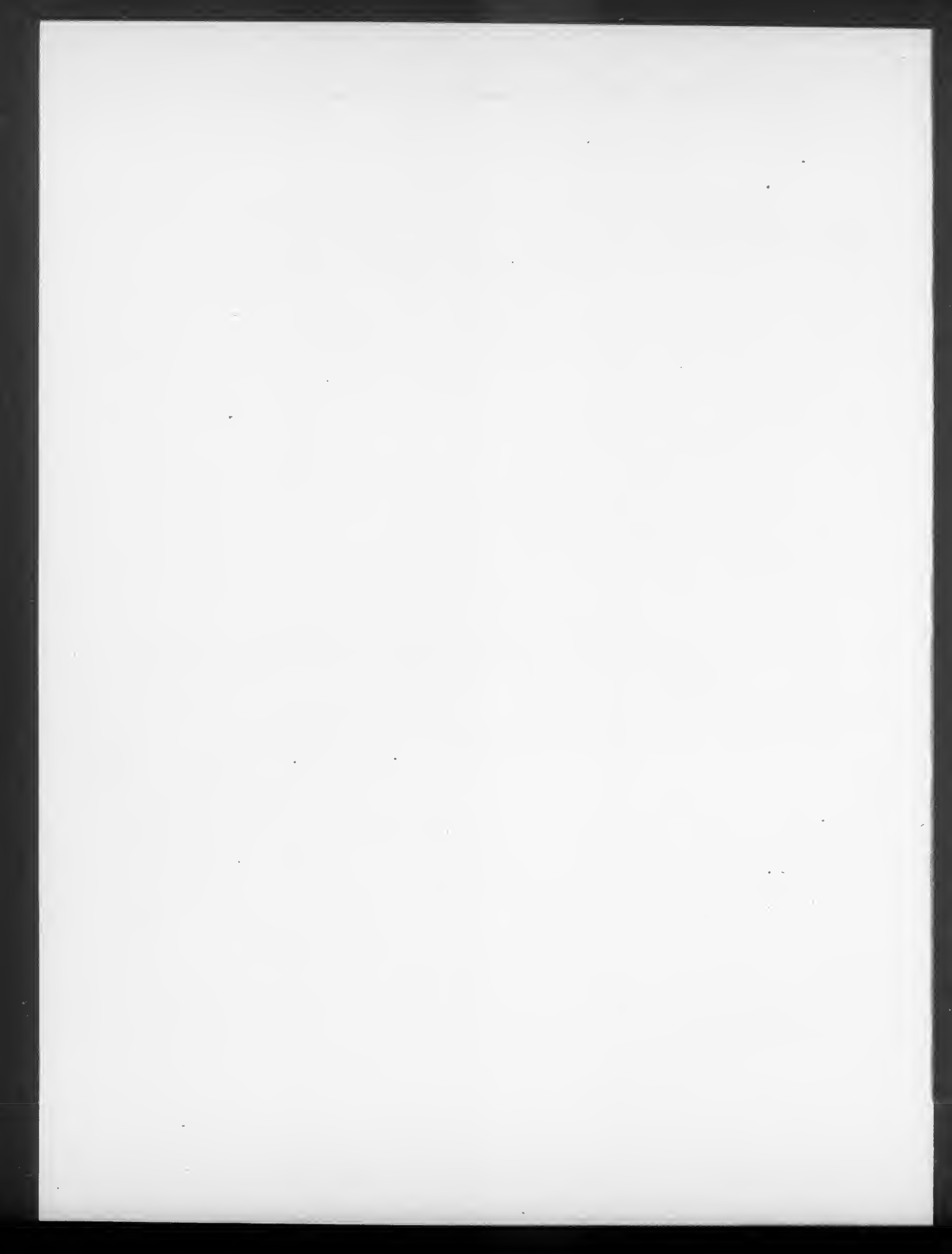
Approved: December 19, 2003.

Pamela F. Olson,

Assistant Secretary of the Treasury.

[FR Doc. 03–31823 Filed 12–31–03; 8:45 am]

BILLING CODE 4830–01–P



Monday,
January 5, 2004

Part IV

Department of Homeland Security

8 CFR Parts 214, 215 and 235

Implementation of the United States Visitor and Immigrant Status Indicator Technology Program ("US–VISIT"); Biometric Requirements; Notice to Nonimmigrant Aliens Subject To Be Enrolled in the United States Visitor and Immigrant Status Indicator Technology System; Interim Final Rule and Notice

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214, 215 and 235

[BTS 03–01]

RIN 1651–AA54

Implementation of the United States Visitor and Immigrant Status Indicator Technology Program ("US–VISIT"); Biometric Requirements

AGENCY: Border and Transportation Security Directorate, Department of Homeland Security.

ACTION: Interim final rule with request for comments.

SUMMARY: The Department of Homeland Security (Department or DHS) has established the United States Visitor and Immigrant Status Indicator Technology Program (US–VISIT) in accordance with several Congressional mandates requiring that the Department create an integrated, automated entry exit system that records the arrival and departure of aliens; that equipment be deployed at all ports of entry to allow for the verification of aliens' identities and the authentication of their travel documents through the comparison of biometric identifiers; and that the entry exit system record alien arrival and departure information from these biometrically authenticated documents. This rule provides that the Secretary of Homeland Security or his delegate may require aliens to provide fingerprints, photographs or other biometric identifiers upon arrival in or departure from the United States. The arrival and departure provisions are authorized by sections 214, 215 and 235 of the Immigration and Nationality Act (INA).

The Department will apply this rule's requirements only to aliens seeking to be admitted pursuant to a nonimmigrant visa who travel through designated air and sea ports. The rule exempts: aliens admitted on A–1, A–2, C–3 (except for attendants, servants or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5 or NATO–6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the rule; children under the age of 14; persons over the age of 79; classes of aliens the Secretary of Homeland Security and the Secretary of State jointly determine shall be exempt; and an individual alien the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines shall be exempt. A **Federal Register** notice identifying the air and sea ports where biometrics may be collected at time of entry and departure has been published simultaneously with this rule. This rule authorizes the Secretary to establish pilot programs for the collection of biometric information at time of departure and at a limited number of ports of entry, to be identified through notice in the **Federal Register**. The biometrics provided by the aliens will be entered into the automated identification system (IDENT) system, which will be integrated with the entry exit system component of US–VISIT. The alien's biometric and other information will be checked against law enforcement and intelligence data to determine whether the alien is a threat to national security or public safety, or is otherwise inadmissible. An alien's failure to comply with this rule's requirements may result in a finding that he or she is inadmissible to the United States, has violated the terms of his or her admission and maintenance of status, or is ineligible for future visas, admission or discretionary immigration benefits. Due to heightened security concerns related to a continued threat of terrorist acts in the United States, the Department has determined that immediate implementation of this rule is necessary with request for public comments.

DATES: Interim rule effective on January 5, 2004. Written comments must be submitted on or before February 4, 2004.

ADDRESSES: Written comments may be submitted to Patrice Ward, Chief Inspector, Air and Sea Exit Manager, US–VISIT, Border and Transportation Security; Department of Homeland Security; 1616 North Fort Myer Drive, 5th Floor, Arlington, VA 22209. Submitted comments may be inspected at 425 I St NW., Room 4034, Washington, DC 20536 during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling (202) 298–5200. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act, 5 U.S.C. 552.

FOR FURTHER INFORMATION CONTACT: For US–VISIT requirements under this rule: Patrice Ward, Chief Inspector, Air and Sea Exit Manager, US–VISIT, Border and Transportation Security; Department of Homeland Security; 1616 North Fort Myer Drive, 5th Floor, Arlington, VA 22209, at (202) 927–5200.

SUPPLEMENTARY INFORMATION:

What Is the US–VISIT Program?

The US–VISIT program is a high priority initiative of the Department that is designed to improve overall border management through the collection of arrival and departure information on foreign visitors and immigrants who travel through our nation's air, sea and land ports. The goals of US–VISIT are to enhance the security of the United States, its citizens, permanent residents and visitors; to expedite legitimate travel and trade; to ensure the integrity of the U.S. immigration system; and to safeguard the personal privacy of foreign visitors and residents. By recording more complete arrival and departure information, the US–VISIT program will not only meet various Congressional mandates for an integrated, interoperable, and automated entry exit system for aliens as discussed below, but it will also enhance the security and safety of citizens, residents and visitors by verifying foreign national travelers' identities through the comparison of biometric identifiers, by authenticating their travel documents, and by checking their data against appropriate law enforcement and intelligence systems. The terrorist attacks of September 11, 2001, highlighted the need to improve national security by returning integrity to the U.S. immigration system. This requires developing better methods for identifying aliens who are inadmissible to the country as well as those who overstay their lawful admission periods. At the same time, the country needs procedures and systems that facilitate legitimate travel, commerce, tourism, education, international communication, and other benefits that flow from welcoming law-abiding citizens of other countries into the United States. The US–VISIT Program was created to help DHS meet all of these law enforcement and service goals.

What Is the Statutory Authority for the Entry Exit System Component of the US–VISIT Program and for the Collection of Biometric Identifiers From Aliens?

The principal law that mandates the creation of an automated entry exit system that integrates electronic alien arrival and departure information is the *Immigration and Naturalization Service Data Management Improvement Act of 2000 (DMIA)*, Public Law 106–215 (2000), 114 Stat. 339, codified as amended at 8 U.S.C. 1365a. *DMIA* amended previous legislative requirements for an entry exit system that would record the arrival and departure of every alien who crosses the U.S. borders. *See* section 110 of the *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*,

Div. C, Public Law 104–208 (1996), 110 Stat. 3009–558, codified in scattered sections of 8 U.S.C. (later amended by *DMIA*). *DMIA* requires that the entry exit system consist of the integration of all authorized or required alien arrival and departure data that is maintained in electronic format in Department of Justice (DOJ) (now DHS) or Department of State (DOS) databases. 8 U.S.C. 1365a. This integrated entry exit system must be implemented at all air and sea ports of entry by December 31, 2003 using available air and sea alien arrival and departure data as described in the statute. *DMIA* also states that the system must be implemented at the 50 most highly trafficked land border ports of entry by December 31, 2004, and at all ports of entry by December 31, 2005 with all available electronic alien arrival and departure information. *DMIA* also requires DHS to use the entry exit system to match the available arrival and departure data on aliens and to prepare and submit to Congress various reports on the numbers of aliens who have overstayed their periods of admission and on implementation of the system. 8 U.S.C. 1365a(e). *DMIA* authorizes the Secretary of Homeland Security, in his discretion, to permit other Federal, State, and local law enforcement officials to have access to the entry exit system for law enforcement purposes. 8 U.S.C. 1365a(f).

In addition, section 217(h) of the *Visa Waiver Permanent Program Act* of 2000 (VWPPA), Public Law 106–396 (2000), 114 Stat. 1637, codified as amended at 8 U.S.C. 1187(h), requires the creation of a system that contains a record of the arrival and departure of every alien admitted under the Visa Waiver Program (VWP) who arrives and departs by air or sea. The requirements of *DMIA* effectively result in the integration of this VWP arrival/departure information into the primary entry exit system component of the US–VISIT program.

In late 2001 and 2002, Congress passed two additional laws affecting the development of the entry exit system, in part, in response to the events of September 11, 2001. Section 403(c) of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act)*, Public Law 107–56 (2001), 115 Stat. 353, codified as amended at 8 U.S.C. 1379, required the Attorney General and the Secretary of State jointly, through the National Institute of Standards and Technology (NIST), and in consultation with the Secretary of the Treasury and other appropriate Federal law enforcement and intelligence agencies, and in consultation with Congress, to develop and certify a technology standard, including appropriate biometric identifier standards, that can be used to verify the identity of visa applicants and persons seeking to enter the United States pursuant to a visa and to do background checks on such aliens. In developing the entry exit system required by *DMIA*, section 414(b) of the *USA PATRIOT Act* directed the Attorney General and the Secretary of State to "particularly focus on the utilization of biometric technology; and the development of tamper-resistant documents readable at ports of entry." 8 U.S.C. 1365a note.

The legislative requirements for biometric identifiers to be utilized in the context of the entry exit system were significantly strengthened with passage of the *Enhanced Border Security and Visa Entry Reform Act of 2002 ("Border Security Act" or EBSVERA)*, Public Law 107–173 (2002), 116 Stat. 553, codified in scattered sections of 8 U.S.C. 302(a)(1) of the Border Security Act states that the entry exit system must use the technology and biometric standards required to be certified by section 403(c) of the USA PATRIOT Act. Section 303(b)(1) requires that "[n]o later than October 26, 2004," only machine-readable, tamper-resistant visas and other travel and entry documents that use biometric identifiers may be issued to aliens by DHS and DOS. 8 U.S.C. 1732(b)(1). This section, however, does not invalidate unexpired travel documents that have been issued by the U.S. government that do not use biometrics. Section 303(b)(1) further states that the Secretaries of Homeland Security and State must jointly establish document authentication and biometric identifier standards for alien travel documents from among those recognized by domestic and international standards organizations. *Id.*

Section 303(b)(2) requires that "[n]o later than October 26, 2004," all ports of entry must have equipment and software installed "to allow biometric comparison and authentication of all United States visas and other travel and entry documents issued to aliens, and passports" that are required to be issued by VWP countries. 8 U.S.C. 1732(b)(2). The current statutory language also requires that by that same date, VWP countries must have a program in place to issue tamper-resistant, machine-readable, biometric passports that comply with biometric and document identifying standards established by the International Civil Aviation Organization (ICAO). 8 U.S.C. 1732(c)(1). The statute also states that on or after October 26, 2004, any alien applying for admission under the VWP must present a passport that is machine-readable, tamper-resistant and that uses ICAO-compliant biometric identifiers, unless the unexpired passport was issued prior to that date. 8 U.S.C. 1732(c)(2). The entry exit system must include a database that contains alien arrival and departure data from the machine-readable visas, passports, and other travel and entry documents. 8 U.S.C. 1731(a)(2). In developing the entry exit system, the Secretaries of Homeland Security and State must also make interoperable all security databases relevant to making determinations of alien admissibility. 8 U.S.C. 1731(a)(3).

In addition, the entry exit system component must share information with other systems required by the *Border Security Act*. Section 202 of the *Border Security Act* addresses requirements for an interoperable law enforcement and intelligence data system and requires the integration of all databases and data systems that process or contain information on aliens.

The US–VISIT program requirements that foreign nationals provide biometric identifiers when they seek admission to the United States are further supported by the Department's broad authority to inspect aliens contained in section 235 of the *INA*, 8 U.S.C. 1225. Pursuant to section 215(a) of the INA, the President also has the authority to regulate the departure of aliens, as well as their arrival. President Bush has issued Executive Order titled Assignment of Functions Relating to Arrivals In and Departures From the United States delegating his authority to promulgate regulations governing the departure of aliens from the United States. In accordance with section 215 and with this new Executive Order, the Secretary of Homeland Security, with the concurrence of the Secretary of State, has the authority to issue this rule which requires certain aliens to provide requested biometric identifiers and other relevant identifying information as they depart the United States. For nonimmigrant aliens, the Department may also make compliance with the departure procedures a condition of their admission and maintenance of status while in the country under INA, section 214.

Many other provisions within the INA also support the implementation of the US–VISIT program, such as the grounds of inadmissibility in section 212, the grounds of removability in section 237, the requirements for the VWP program in section 217, the electronic passenger manifest requirements in section 231,

and the authority for alternative inspection services in sections 286(q) and 235 of the INA and section 404 of the *Border Security Act*. These are but a few of the most significant provisions that support US–VISIT from among numerous other immigration and customs statutes.

Is DHS Meeting the December 31, 2003 *DMIA* Deadline for Implementing the Integrated Entry Exit System at the Air and Sea Ports of Entry?

Yes. By integrating all the available arrival and departure data on aliens who arrive through the air and sea ports of entry that currently exists in the electronic systems of DHS and DOS and deploying the integrated system at those ports of entry, the Department has met the first *DMIA* deadline of December 31, 2003. The Department is accomplishing this first phase through the integration of the arrival and departure data contained in the Advance Passenger Information System (APIS) and the Arrival Departure Information System (ADIS), as well as other systems related to air and sea inspections. APIS and ADIS include the information captured from electronic passenger manifest data received from carriers, information on VWP aliens, and information on visa applicants and recipients received through the DataShare program with DOS.

What Changes Does This Interim Rule Make?

Through an amendment to 8 CFR 235.1(d), the Department may require aliens who are arriving at United States air and sea ports of entry to provide fingerprints, photographs, or other biometric identifiers to the inspecting officer. The Department will collect fingerprints and photographs from aliens applying for admission pursuant to a nonimmigrant visa upon their arrival at air and sea ports of entry and upon departure if they exit through certain locations. Departure inspection will be conducted through pilot programs at a limited number of departure ports, identified by notice in the **Federal Register**. The rule exempts: (i) Aliens admitted on A–1, A–2, C–3 (except for attendants, servants or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5 or NATO–6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the rule, (ii) children under the age of 14, (iii) persons over the age of 79, (iv) classes of aliens the Secretary of Homeland Security and the Secretary of State jointly determine shall be exempt, and (v) an individual alien the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines shall be exempt. Although the biometric requirements in this rule will initially only apply to nonimmigrant visa-holders who travel through designated air and sea ports, the Department anticipates expanding the program, through separate rulemaking to include other groups of aliens and more ports in order to eventually have the capability to verify the identities of most foreign national travelers through biometric comparisons as envisioned by the *USA PATRIOT Act* and the *Border Security Act*.

At amended 8 CFR 235.1(d)(ii), the rule states that failure by an alien to provide the requested biometrics necessary to verify his or her identity and to authenticate travel documents may result in a determination that the alien is inadmissible under section 212(a)(7) of the INA for lack of proper documents, or other relevant grounds in section 212 of the Act.

New rule 8 CFR 215.8 states that the Secretary of Homeland Security may establish pilot programs at up to fifteen air or sea ports of entry, designated through notice in the **Federal Register**, through which the Secretary may require aliens who are departing from the United States from those ports to provide fingerprints, photographs, or other biometric identifiers, documentation, and such other such evidence as may be requested to determine an alien's identity and whether he or she has properly maintained his or her status while in the United States.

This rule also amends 8 CFR 214.1(a) to state that if a nonimmigrant alien is required under section 235.1(d) to provide biometric identifiers, the alien's admission is conditioned on compliance with any such requirements. Similarly, if the alien is required to provide biometrics and other information upon departure pursuant to 8 CFR 215.8, the nonimmigrant alien's failure to comply may constitute a failure of the alien to maintain the terms of his or her immigration status.

Finally, the rule makes clear by amending 8 CFR 235.1(f) that all nonimmigrant aliens will be issued the Form I–94, Arrival Departure Record regardless of whether they come through an air, sea or land port of entry, unless they are otherwise exempted from the I–94 requirement. This amendment clarifies that air and sea carrier passengers will continue to be issued I–94s which must be surrendered upon departure unless the I–94 was issued for multiple entries by the alien.

What Is a "Biometric Identifier?"

As used in this rule, a "biometric identifier" is a physical characteristic or other attribute unique to an individual that can be collected, stored, and used to verify the claimed identity of a person who presents himself or herself to a border inspector. To verify identity, a similar physical characteristic or attribute is taken from the person who presents himself or herself and it is compared against the previously collected identifier. Examples of biometric identifiers include, but are not limited to, the face (*i.e.*, captured in a photograph), fingerprints, hand geometry measurements, handwriting samples, iris scans, retina scans, voice patterns, and other unique characteristics.

Why Is This Interim Final Rule Necessary and Why Was It Not Issued as a Proposed Rule for Notice and Comment?

The Department has determined that the national security and public safety interests of the nation necessitate the implementation of this rule as an immediately effective interim rule with provision for public comment after the effective date. The collection of biometrics from foreign nationals seeking to enter or depart the United States will greatly enhance the Government's ability to identify persons who are a threat to the public and to national security. The longer the Department delays in collecting biometrics from visa-holders and eventually other foreign nationals, the greater chance that a person who has been previously identified as a threat to the public may not be timely identified through his fingerprints, photographs or other biometrics and may enter the United States without his true identity being detected.

The Department has further determined that this rule is necessary to give effect to the legislative mandates for utilization of biometric identifiers in the entry exit system component of the US–VISIT program as described in the *USA PATRIOT Act* and the *Border Security Act*, as previously discussed. Unless it collects biometric identifiers from the aliens who present themselves at inspection and on departure, the Department would be unable to compare the biometrics associated with the travel document presented (*e.g.*, a visa) against the bearer's characteristics or against DHS or DOS records of any previously taken biometrics associated with the alien's name. In other words,

the Department would not be able to verify the alien's identity fully or authenticate his documents as envisioned by Congress when it passed the two laws.

Congress has stated that "no later than October 26, 2004," biometrics must be utilized with all travel and entry documents that DHS and DOS issue to aliens and that machines capable of verifying the identities of foreign travelers and authenticating their documents through biometrics must be at all ports of entry. 8 U.S.C. 1732(b). The Secretary of Homeland Security has determined that waiting until the last minute (*i.e.*, October 26, 2004) to begin collecting biometrics and verifying the documents and identities of aliens who cross our borders would be highly detrimental to the security of the country. Moreover, the Department believes that it makes practical sense to implement the integrated entry exit system with air and sea arrival/departure data on foreign travelers at the same time as a biometric component is introduced to the system to provide the enhanced security benefits that biometrics will provide to verify identity. For these reasons, the Department has determined that it must immediately begin collecting biometrics from a limited group of aliens, *i.e.*, nonimmigrant visa holders who enter through the air and sea ports, and expand to other categories and locations as rapidly as possible.

The Department does encourage and welcome public comments on this rule and the manner in which it will be implemented. The Department will fully consider all comments submitted by the comment period as it prepares a final rule and before it expands the program to other categories of foreign nationals. See discussion of the "Good Cause Exceptions" below.

What Categories of Aliens Are Affected by This Rule?

This interim rule applies only to aliens applying for admission pursuant to a nonimmigrant visa who arrive in or depart from the United States through designated air and sea ports. The rule exempts: (i) Aliens admitted on A–1, A–2, C–3 (except for attendants, servants or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5 or NATO–6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the rule, (ii) children under the age of 14, (iii) persons over the age of 79, (iv) classes of aliens the Secretary of Homeland Security and the Secretary of State jointly determine shall be exempt, and (v) an individual alien the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines shall be exempt. However, as a routine matter, only nonimmigrant visa-holders will be affected by this rule.

What Biometrics Will Be Collected and Will They Ever Change?

The Department initially plans to take a digital photograph and two fingerprints from each nonimmigrant alien who presents a visa at designated air or sea ports of entry. The Department, however, reserves its right to expand the types of biometric identifiers required in the future where doing so will improve the border management, national security, and public safety purposes of the entry exit system. Additional biometric requirements will be implemented in compliance with section 403(c) of the *USA PATRIOT Act*.

How Did DHS Determine Which Biometric Identifiers Would Be Collected for US–VISIT Purposes?

The Department has chosen to collect two fingerprints and photographs, in part, because they currently are less intrusive than other forms of biometric collections and because the combination of these biometric identifiers are an effective means for verifying a person's identity. Also, historically fingerprints and photographs have been the biometrics of choice within the law enforcement communities and the travel industry. As the deployment of more comprehensive technologies becomes feasible, however, the Department may collect additional biometric data to improve its ability to verify the identity and determine the admissibility of nonimmigrant aliens.

As required by section 403(c) of the *USA PATRIOT Act* and section 302(a)(1) of the *Border Security Act*, the Department of Justice and the former Immigration and Naturalization Service (INS) worked closely with NIST. DOS, other agencies and Congress to study and select fingerprints and digital photographs as the biometric identifiers that will be used in conjunction with the entry exit system. A report on the biometric standards selected was delivered to Congress in January 2003. *See* "Use of Technology Standards and Interoperable Databases with Machine-Readable, Tamper-Resistant Travel Documents," Report to Congress from U.S. Department of Justice, U.S. Department of State, and the National Institute of Standards and Technology (January 2003).

How Will a Person's Fingerprints and Photographs Be Collected?

On arrival at air and sea ports of entry, inspectors will scan two fingerprints of the foreign national with an inkless device and will take a digital photograph of the person. This information, as well as other information that the person provides, will then be used to assist the border inspector in determining whether or not to admit the traveler. Upon exit from the United States at designated air and sea ports, the foreign national traveler will go to a work station or kiosk to scan his travel documents, have his photograph compared, and to provide his fingerprints on the same type of inkless device that is used at entry.

What If an Individual Cannot Provide Clear Fingerprints or Photographs or Is Disabled in Such a Way That He or She Is Unable To Provide the Biometric Information?

The Department will make reasonable efforts that are also consistent with the Government's need to verify an alien's identity to accommodate any person with disabilities which prevent him or her from complying with the requirements of this rule for fingerprinting, photographs or other biometric collections. We will follow all required procedures that are applicable to government action under the *Americans With Disabilities Act*, codified as amended at 42 U.S.C. 12101 *et seq.* and the *Federal Rehabilitation Act*, codified as amended at 29 U.S.C. 701 *et seq.* In cases where a satisfactory fingerprint, for example, cannot be taken, the inspecting officer may accept another biometric identifier that will reasonably identify the person or sufficient additional information from the alien from which the officer can determine the individual's identity. In some instances where the identity of a person with disabilities does not appear to be truly at issue, the requirement for fingerprints or other biometric identifier may be waived in the discretion of the inspecting officer. The Department will ensure that procedures for handling the collection of biometric information from persons with disabilities are covered in any internal field guidance it may issue to implement this rule. In addition, the Department welcomes public comment on methods for properly handling situations where persons with disabilities are not able to provide the requested biometrics, but that still permit the Department to make the necessary identity and admissibility determinations.

How Will the Biometric Information Be Used?

The fingerprints and photograph(s) of the alien will be entered initially into an existing system called IDENT The alien's fingerprints and photographs will be compared against the biometric information already stored in IDENT to determine whether there is any information that would indicate the alien is an imposter or otherwise inadmissible. In addition, IDENT and the other technology associated with US–VISIT will permit the inspecting officer to compare the alien's fingerprints and photographs with any such biometric information previously captured.

DOS is currently implementing a program on a phased-in basis for taking fingerprints of many categories of visa applicants who have been approved or denied and storing those fingerprints and photographs in IDENT. This DOS-collected biometric information may also be accessed through the Interagency Border Inspection System (IBIS) by inspectors at the ports of entry in the United States. The inspecting officer will be able to compare the biometrics associated with the person who applied for the visa at the consular office abroad against the biometrics of the person who is present at the port of entry. Once the machine readers are in place at the ports of entry, this process will be fully automated and the visas and certain other travel documents will be capable of being scanned and compared electronically. An alien's name, biometric information and other identifying information will also be checked against various law enforcement and intelligence data for information that may identify him or her as inadmissible to the United States or as a threat to national security or the public safety. In the air and sea context, much of the information on the alien is already collected via the electronic passenger manifest process required by section 402 of the *Border Security Act*, codified as amended at INA, section 231; 8 U.S.C. 1221. Customs and Border Protection (CBP) officers currently have access to the passenger's complete name, nationality, date of birth, citizenship, gender, passport number and country of issuance, U.S. visa number, if applicable, alien registration number, if applicable, country of residence, and complete address while in the United States. U.S. inspectors receive the information prior to the alien's arrival through the Advance Passenger Information System (APIS) and the Arrival Departure Information System (ADIS), and it is run against the IBIS which contains "lookouts" on individuals submitted by more than 20 law enforcement and intelligence agencies. Thus, by the time the person gets to an air or sea port of entry, inspectors have identified aliens that need to be scrutinized more closely as well as aliens who may be inadmissible and whether other law enforcement agencies should be notified of any individual's presence.

Are Travelers Who Come Under the Visa Waiver Program (VWP) Affected by This Rule?

At this time, travelers who seek to enter under the VWP are not affected by this rule. However, under current law, an alien will not be admitted under the VWP on or after October 26, 2004, without a machine-readable, tamper-resistant passport that meets ICAO biometric standards for photographs, unless his passport is unexpired and was issued prior to that date. 8 U.S.C. 1732(c)(2). The machines that DHS must have in place at all ports of entry by that same date will also be capable of reading the ICAO-compliant biometrics in any VWP alien's passport. 8 U.S.C. 1732(b)(2).

Will Canadian or Mexican Citizens Have To Provide Biometric Identifiers When They Travel To or From the United States?

This rule does not affect foreign nationals entering the U.S. through land ports of entry. Aliens entering through land ports of entry need only meet the current requirements in the law. However, the rule does apply to Canadian and Mexican citizens who enter through air and sea ports of entry as outlined below. At present, the Department will not apply the biometric collection requirements of this rule to those Canadian citizens who travel on temporary visits to the United States and who do not apply for admission pursuant to a nonimmigrant visa. As usual, Canadians who are lawful permanent residents of the United States must possess a Permanent Resident Card (PRC) or other evidence of their permanent resident status; they will not, however, be routinely fingerprinted or photographed. The Department, as it always has, reserves the right to require fingerprints or other identifying information from any individual whom it has reason to believe may not be who he or she claims.

Mexicans currently must present visas, Border Crossing Cards (BCC), or other appropriate evidence of their immigration status to enter the United States. Since October 1, 2002, the law has required that a biometric characteristic (*e.g.*, face, fingerprint) of a bearer of a BCC must be matched against the biometric on the BCC before the bearer may be admitted. *See* 8 CFR 212.1(c)(3). This requirement remains applicable at all ports of entry. Machines have been deployed at the ports of entry to allow for the automated comparison of the fingerprints of BCC bearers against their documents. Under this rule and the Department's first implementation phase for US–VISIT biometrics collection, nonimmigrant Mexican visa holders will be required to provide fingerprints and photographs if they enter or exit at the designated ports.

Which United States Ports of Entry Will Be Involved in the Collection of Biometrics and in Verifying the Identities of Aliens and Authenticating Their Documents?

The notice that is published elsewhere in this issue of the **Federal Register** identifies the airports and the seaports where nonimmigrants who apply for admission pursuant to a nonimmigrant visa will be required to provide biometric information at time of arrival and departure. The names of all the affected ports of entry will not be repeated here for the sake of brevity.

The Department intends to implement departure inspection through pilot programs at a limited number of departure ports. The Department has identified thirty departure ports as candidates at which it will next implement biometric collection. The Department anticipates that, within the next few months, it will implement departure biometric collection at approximately fifteen of those ports of entry. This rule therefore authorizes the Secretary to establish pilot programs for departure inspection at up to fifteen air and sea ports, to be identified through notice in the **Federal Register**.

Through those pilot programs, the Department will test different methods to collect the required information from nonimmigrant aliens as they depart the United States through the designated ports of entry. The Department is currently exploring several different methods and processes, including but not limited to self-serve kiosks and hand-held scanners. The pilot program will enable the Department to conduct a cost benefit analysis of the different processes. The Department welcomes comments on how to implement biometric collection at time of departure. After reviewing the reliability, efficiency, and cost of those pilot programs, and receiving comments from the public regarding the departure

inspection process, the Department will undertake new rulemaking to allow the Secretary to expand biometric collection to all departure ports.

Will Foreign Travelers' Biometrics Be Collected, Their Identities Verified, and Their Documents Authenticated on Departure From the United States?

Yes. Aliens subject to this rule who exit through designated air and sea ports where pilot programs are implemented will be required to "check out" at work stations in those air and sea ports and to provide requested information and biometrics. The information that a traveler provides on departure will be verified and matched against any available information that he or she provided upon inspection and that was stored in the systems that comprise US–VISIT. This information will also be used to identify persons who have overstayed their authorized periods of admission, to compile the overstay reports required by *DMIA*, and where applicable, considered in DOS and DHS determinations on whether the person is eligible for future visas, admission or other discretionary immigration benefits.

Will There Be Any Assistance for Travelers During the Exit Process?

The exit collection mechanism at special work stations or kiosks will be structured to include international instructional icons, illustrating how the alien will submit biometrics and travel documents for scanning. DHS or contract personnel will be available, at initial stages, to assist travelers covered by the first increment of US–VISIT in learning how the exit process works.

Is a Nonimmigrant Visa Holder Required To Enter or Exit Through One of the Ports Designated for Biometric Processing in the Federal Register Notice?

Certain individuals remain subject to the National Security Entry Exit Registration System (NSEERS) regulations to depart through specific ports and undergo special departure procedures. *See* 8 CFR 264.1(f)(8). The most recent **Federal Register** notice listing the NSEERS ports of departure can be found at 68 FR 8967. This rule does not alter or amend that list.

Nonimmigrant visa holders, except those subject to NSEERS, may continue to depart the United States through any port, even those locations where biometrics are not currently being collected on exit. The Department recommends that any alien whom the Secretary designates to be covered by this rule's departure requirements and who chooses to depart from a location where US–VISIT departure procedures are not in place may wish to preserve any evidence that he or she did indeed depart the United States. Such evidence could include a passport stamp of admission to another country or a used airline ticket showing the person left the United States in a timely manner. Such information may be useful to show to a consular or immigration officer in case there is ever any future question about whether the alien properly left the United States. Individuals who have an I–94 Arrival Departure Record that must be surrendered upon departure should be certain to return this form promptly to the appropriate DHS division as required on the form to ensure that the individual's departure will be entered into appropriate DHS systems. In addition, the departure of individuals who leave on air or sea carriers that submit electronic passenger departure manifests to DHS/CBP will be recorded in DHS systems and should help to prove when the alien departed. However, not all carriers are currently able to submit this information electronically. The Department recognizes that there may be some interim confusion about whether covered foreign nationals overstayed their last periods of admission where there is no evidence in the US–VISIT systems of their departure. The Department anticipates that as departure procedures are expanded to all air, sea and land border ports, such confusion and potential for inaccurate determinations that a person overstayed will be significantly reduced.

Are There Any Additional Fees Imposed Upon Travelers as a Result of This Rule?

No, there are no additional fees for travelers required by this interim rule. DOS and DHS may need to adjust the fees for visas and other immigration documents that utilize biometrics in the future, but the Departments will follow all required *Administrative Procedure Act (APA)* procedures for notice and comment and any other applicable legal requirements if the fees change.

How Much Will the Biometric Collection Procedures Cost DHS and What Is the Source of the Funding?

In FY 2003, the US–VISIT program spent $190 million for the biometrics portion of the program. For FY 2004, the cost of implementing the biometric collection and verification procedures at air and sea ports of entry and departure locations is anticipated to be approximately $103 million. The funds for the equipment and other requirements to support the biometric procedures come from the approximately $380 million that Congress appropriated in FY 2003 for development of the entry exit system component of US–VISIT and from the $330 million total appropriated for FY 2004.

What May Happen If an Alien Refuses To Provide the Required Biometric Identifiers at Time of Entry?

This rule provides that an alien who refuses to provide biometric identifiers when seeking admission to the United States in order to assist inspectors in verifying his or her identity and authenticating his or her travel documents may be deemed inadmissible under INA, section 212(a)(7) (failure to provide appropriate documents), or other applicable grounds of inadmissibility in INA, section 212. For example, the inspector may deny admission under INA, section 212(a)(7) if he or she is unable to determine whether the applicant is presenting a document that is truly his and the inspector is unable to collect a biometric that can be verified against the fingerprints and photographs associated with the document. The rule does not attempt to identify every ground of inadmissibility that may apply because each case may present different circumstances that skilled inspectors are trained to assess and adjudicate. The rule does not change any of the existing criteria for inadmissibility, but allows inspectors to consider a failure to provide requested biometric identifiers as a factor in their admissibility determinations. In some circumstances, such as an individual who cannot physically provide clear fingerprints, a failure to do so will not necessarily result in an inadmissibility determination, provided that the inspector is otherwise satisfied that the person is who he claims to be and has appropriate authorization to enter the country. This rule also amends 8 CFR 214.1(a) to state that if a nonimmigrant alien is required under 8 CFR 235.1(d) to provide biometric identifiers, the alien's admission is conditioned on compliance with any such requirements.

What May Happen If an Alien Fails To Provide the Required Biometric Identifiers at the Time of Departure From the United States?

An alien who fails to comply with the departure requirements may be found in violation of the terms of his or her admission, parole, or other immigration status. This rule states that an alien who is covered by the requirements to

provide biometrics on departure at new 8 CFR 215.8 may be found to have overstayed the period of his or her last admission if the available evidence indicates that he or she did not leave the United States when required to do so. A determination that the alien previously overstayed may result in a finding of inadmissibility for accruing prior unlawful presence in the United States under section 212(a)(9) of the INA, provided that the accrued unlawful time and other prerequisites of that statute are met, or that the alien is otherwise ineligible for a visa or other authorization to reenter the United States. An overstay finding could also trigger consequences for a nonimmigrant visa holder under section 222(g) of the INA. If the person is deemed to have overstayed his authorized period of admission, his visa (including a multiple entry visa) would be deemed void under section 222(g). Section 222(g) further states that where a visa is void because the alien overstayed, he or she is ineligible to be readmitted to the United States as a nonimmigrant except on another visa issued in the consular office located in the country of the alien's nationality, or where there is no DOS office in the country, in such other consular office as the Secretary of State shall specify. The requirement of obtaining a new visa from the consular office in the country of the alien's nationality may be waived where extraordinary circumstances are found. 8 U.S.C. 1202(g).

The Department intends to focus its enforcement of departure requirements in this rule on cases where the alien willfully and unreasonably fails to comply with this regulation. The rule provides that an alien's failure to follow the departure procedures may be considered by an immigration or consular officer in making a discretionary decision on whether to approve or deny the alien's application for a future immigration benefit. The rule does *not*, however, state that an alien's failure to comply with departure procedures in every instance will necessarily result in a denial of a future visa, admission or other immigration benefit. For example, no alien will be penalized for failing to provide biometrics on departure where the Department has not yet implemented the departure facilities or procedures at the specific port where the person chooses to depart. There may well be instances where a consular officer or inspector, in his or her discretion and after reviewing the totality of the circumstances, determines that an alien's previous failure to comply with the departure procedures does not result in a finding of inadmissibility or the denial of an immigration benefit.

Will Biometric Collection Create Inspection Delays at Ports of Entry and Departure?

The Department is aware of this concern and is taking all possible steps to prevent congestion and delays in immigration and customs processing at the ports of entry and the departure locations. On entry, the Department anticipates that an average of only 15 additional seconds per nonimmigrant visa holder will be needed to complete processing as a result of the added biometric procedures. The Department arrived at this estimate after piloting the process on a voluntary compliance basis at Atlanta's Hartsfield International Airport. Individuals who are not required to provide biometrics at this time (*e.g.*, U.S. citizens, permanent residents, persons not required to have visas) may be routed through separate processing lines at the air and seaports so as to further alleviate congestion. Individuals who require more in depth scrutiny will, as usual, be taken to secondary inspection areas so as not to delay primary inspection processing for other travelers. The Department does not believe that significant delays will occur at the air and sea ports as a result of the new biometric collection and verification procedures. The Department further believes that the limited departure processing at the air and sea ports can be accommodated within the pre-boarding time period that carriers currently recommend travelers allow before their scheduled departure and that their travel should not be delayed.

While the Department does not anticipate longer wait times at ports of entry due to US–VISIT processing, a number of mitigation strategies have been developed, not unlike those already available to CBP under other conditions which result in backups. However, as the US–VISIT program expands, the Department will continually reassess the issue of delays to reduce any negative effects.

Will Legitimate Travel, Commerce, and Tourism Be Negatively Affected by This Rule?

As noted above, the Department does not believe that immigration and customs processing will be significantly delayed at the ports of entry or the departure locations. The Department believes that over time, the US–VISIT system will facilitate travel for those with biometrically-enhanced travel documents and others for whom the system contains travel records. Public comments are invited on ways that delays and negative effects on travel, trade, commerce, tourism and other desired aspects of immigration can be alleviated or minimized.

Are United States Citizens and Lawful Permanent Residents Required To Provide Biometric Identifiers?

No, United States citizens and lawful permanent residents will not be required to provide biometric identifiers under this rule. U.S. citizens must continue to present passports as required by 22 CFR 53, unless an exception under that regulation applies. Lawful permanent residents must present documents evidencing their status as described in 8 CFR 211.

Will Other Countries Impose Similar Biometric Requirements on United States Citizens?

Each country maintains the right to establish its own procedures and requirements for entry by foreign visitors. The Department, in coordination with DOS, will work with other governments that wish to institute programs of biometric identification in order to ensure that they are fair, efficient, accurate and no more intrusive than necessary.

Will Any Visa-Holders Be Exempt From the Fingerprinting and Photographing Requirements of This Rule?

The rule exempts: (i) Aliens admitted on A–1, A–2, C–3 (except for attendants, servants or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5 or NATO–6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the rule, (ii) children under the age of 14, (iii) persons over the age of 79, (iv) classes of aliens the Secretary of Homeland Security and the Secretary of State jointly determine shall be exempt, and (v) an individual alien the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines shall be exempt. An immigration inspector retains discretion to collect an alien's biometrics if, in the inspector's discretion, such action is necessary to determine the exact age of the alien and whether he or she is exempt from the requirements of this rule.

Will Other Nonimmigrants for Whom Ten-Print Fingerprinting for Registration Purposes Has Been Waived by Existing Regulations be Required to Provide Two-Print Fingerprints and a Photograph Under This Rule Governing Identity Verification on Arrival and Departure From the United States?

The Department has determined that most nonimmigrant visa-holders for whom ten-print fingerprinting has been waived for registration purposes under 8 CFR 264.1(e)(1–2) must nevertheless comply with the requirements of this interim rule for the collection of biometrics (two fingerprints and a photograph) for purposes of entry and exit inspection. This includes nonimmigrants who are in the United States for less than one year, as well as nonimmigrants who are citizens of countries that do not fingerprint U.S. citizens who temporarily reside in their countries.

The ten-print fingerprinting that has been waived for these categories of nonimmigrants under 8 CFR 264.1(e)(1–2) is done for purposes of alien registration under INA, sections 262–266 and is *not* the same as the collection of two fingerprints and a photograph for identity verification and document authentication at arrival and departure inspection that is required under this interim rule. The biometric collections for arrival and departure inspection purposes are authorized instead by INA, section 235, 214, 215, and are further supported by the mandates for biometrics in section 303 of the *Border Security Act* and sections 403(c) and 414 of the *USA PATRIOT Act*.

DHS believes that the national security of the country, public safety and the integrity of the immigration system necessitate requiring most nonimmigrant visa holders to provide fingerprints and photographs for identity checks, law enforcement background checks, and determinations of admissibility.

Do the Requirements for the Collection of Biometric Identifiers Violate the Statutory "No New Documents or Data Collection" Prohibition in the DMIA?

No, the Department has determined that there is no conflict between this rule and *DMIA*. *DMIA* does state that "[n]othing in this section [codified at 8 U.S.C. 1365a] may be construed "to permit the [Secretary of Homeland Security] or the Secretary of State to impose any new documentary or data collection requirements on any person in order to satisfy the requirements of this section * * *." 8 U.S.C. 1365a(c)(1). However, the provision in *DMIA* that immediately follows that subsection states that "[n]othing in this section shall be construed to reduce or curtail any authority of the [Secretary of Homeland Security] or the Secretary of State under any other provision of law." 8 U.S.C. 1365a(c)(2)(emphasis added). The biometric requirements of this interim rule are supported by statutory authority outside of the four corners of *DMIA* and thus fall within *DMIA's* own "no reduction of authority" provision. Most importantly, Congress has expressly stated in sections 403(c) and 414 of the USA PATRIOT Act and sections 302–303 of the *Border Security Act*, laws passed after *DMIA* and after the terrorist attacks on September 11, 2001, that DHS and DOS should "particularly focus on the utilization of biometric technology" in developing the entry exit system; that alien identities be verified through biometric comparisons based on certified biometric standards developed through NIST; that travel and entry documents issued to aliens utilize biometrics; and that those documents be authenticated by machine-readers at ports of entry that will capture information on the aliens' arrival and departure for inclusion in the entry exit system. In addition, this rule is supported by other authority in sections 214, 215 and 235 of the INA, which has not been curtailed or reduced by *DMIA*. For these reasons, this rule does not violate the proscription against new documentary or data collections in *DMIA*.

What Persons or Entities Will Have Access to the Biometric and Other Information Collected on Aliens Under the US–VISIT Program?

The biometric and other information available in IDENT, APIS, ADIT and the other systems associated with the US–VISIT program will be available to CBP officers at ports of entry, special agents in the Bureau of Immigration and Customs Enforcement (ICE), adjudications staff at U.S. Citizenship and Immigration Services (USCIS), to DOS consular officers and other staff involved with the adjudication of visa applications at overseas posts, and to other DHS, BTS, ICE, CIS, CBP, appropriate officers of the United States Intelligence Community, and DOS personnel and attorneys when needed for the performance of their duties. Other employees and divisions of DHS, such as the Transportation Security Administration (TSA), may also have access to the biometric and other information on aliens. In addition, section 414(c) of the *USA PATRIOT Act* directs that the information in the entry exit system component of the US–VISIT program must be available to other federal law enforcement officers, such as agents of the Federal Bureau of Investigation (FBI), through system interfaces or other technology means for purposes of identifying and detaining individuals who are threats to United States national security. The Secretary of Homeland Security, in his discretion, may also make the information available to State and local law enforcement agencies, to assist them in carrying out their law enforcement responsibilities. *See* 8 U.S.C. 1365a(f); *see also* 8 U.S.C. 1722(a)(5). The Department will only share biometric information with other foreign governments where permitted by law and necessary for intelligence and law enforcement interests consistent with United States interests.

How Will DHS Protect the Biometric and Other Information Provided by Foreign Travelers and Ensure That Their Privacy Interests Are Not Violated?

US–VISIT records will be protected consistent with all applicable privacy laws and regulations. Personal information will be kept secure and confidential and will not be discussed with, nor disclosed to, any person within or outside the US–VISIT program other than as authorized by law and as required for the performance of official duties. In addition, careful safeguards, including appropriate security controls, will ensure that the data is not used or accessed improperly. The DHS Chief Privacy Officer will review pertinent aspects of the program to ensure that these proper safeguards and security controls are in place. The information will also be protected in accordance with the Department's published privacy policy for US–VISIT.

The Department's Privacy Office will exercise oversight of the US–VISIT program to ensure that the information collected and stored in IDENT and other systems associated with US–VISIT is being properly protected under the privacy laws and guidance. US–VISIT will also have its own Privacy Officer to handle specific inquiries and to provide additional oversight of the program.

Finally, the Department will maintain secure computer systems that will ensure that the confidentiality of individuals' personal information is maintained. In doing so, the Department and its information technology personnel will comply with all laws and regulations governing government systems, such as the *Federal Information Security Management Act of 2002*, Title X, Public Law 107–296, 116 Stat. 2259–2273 (2002) (codified in scattered sections of 6, 10, 15, 40, and

44 U.S.C.); *Information Management Technology Reform Act (Clinger-Cohen Act)*, Public Law 104–106, Div. E, codified at 40 U.S.C. 11101 *et seq.*; *Computer Security Act of 1987,* Public Law 100–235, 40 U.S.C. 1441 *et seq.* (as amended); *Government Paperwork Elimination Act,* Title XVII, Public Law 105–277, 112 Stat. 2681–749—2681–751 (1998) (codified, as amended, at 44 U.S.C. 101; 3504 note); and *Electronic Freedom of Information Act of 1996,* Public Law 104–231, 110 Stat. 3048 (1996) (codified, as amended, at 5 U.S.C. 552.)

How Is the US–VISIT Program Different From the National Security Entry Exit Registration System (NSEERS) Program and Are Any Aspects of NSEERS Continued Under US–VISIT?

Foreign nationals who are subject to the US–VISIT biometric collection requirements of this rule are only required to follow the specified procedures on entry and exit where the Department has implemented the procedures and publicly announced them, as it has with respect to nonimmigrant visa-holders who travel through designated air and sea ports. Certain aliens whose presence in the United States warrants monitoring for national security or law enforcement reasons remain subject to the NSEERS special registration procedures at 8 CFR 264.1(f) and its implementing notices. *See* 68 FR 67578. The special entry and exit registration procedures under NSEERS will meet the requirements of this US–VISIT rule for entry and exit inspection for persons who are also subject to NSEERS.

Under the original NSEERS program, special registrants had to comply with both arrival and departure requirements for biometrics collection and additional questioning, and also with a requirement to re-register after 30 days and on an annual basis. The mandatory 30-day and annual re-registrations were suspended on December 2, 2003. *See* 68 FR 67578. In addition, when the NSEERS program began, it included a requirement that foreign nationals from NSEERS-delineated countries already in the United States comply with a domestic or "call-up" registration. The "call-up" component has expired. Neither the re-registration or "call-up" registration is relevant to the US–VISIT program at this time.

However, nonimmigrants subject to NSEERS and to this US–VISIT rule who do not comply with the procedures for fingerprinting and photographing run similar risks that they could be deemed ineligible for future visas, admission or other discretionary immigration benefits. Compliance with this rule, as with the NSEERS regulations, is deemed a condition of a nonimmigrant's admission and maintenance of status for purposes of INA, section 214. The information that NSEERS aliens provide on arrival and departure is kept in IDENT and a special NSEERS system that will be integrated with all of the other foreign national arrival and departure data that are required to be kept in the entry exit system component of US–VISIT.

Will the Public Be Permitted To Comment on This Rule and Its Implementation?

Yes. The Department welcomes and encourages the public to comment on all aspects of this rule and its implementation, as well as other aspects of the US–VISIT program that may not be covered by the rule itself. We will consider all comments carefully and anticipate that many of them will help us to improve the program. The Department is particularly interested in comments on the clarity of this rule and how it may be made easier to understand; methods for meeting the US–VISIT program goals; means to communicate the procedures to the public, including any expansions in the application of this rule; ways to reduce any potentially negative effects of the rule on legitimate travel, trade and tourism; uses for the biometric information to be collected; privacy protections for the information; methods for ensuring accuracy of the information collected; procedures for situations where persons with disabilities cannot provide the requested biometric identifiers; and ways to enhance national security and public safety interests.

Members of the public may also wish to follow the activities and recommendations of the congressionally-mandated DMIA Task Force through its Web site at *http://uscis.gov/graphics/shared/lawenfor/bmgmt/inspect/dmia.htm.* The DMIA Task Force, which is comprised of 17 public and private representatives from government, industry, tourism, air and sea carriers, and other areas, makes regular reports on its recommendations for the entry exit system component of US–VISIT, and these reports are transmitted to Congress by the Secretary of Homeland Security in accordance with 8 U.S.C. 1365a(g). The DMIA Task Force also welcomes regular public comments. In addition, members of the public may keep up to date on the progress of the US–VISIT program through the DHS Web site at *www.dhs.gov/us-visit.*

Good Cause Exceptions for Implementation of Interim Final Rule

Implementation of this rule as an interim final rule with a request for post-effective date public comments is based upon the "good cause" exceptions found at 5 U.S.C. 553(b)(3)(B) and (d)(3). Pursuant to the provisions of 5 U.S.C. 553(b)(3)(B), the Department has determined that delaying implementation of this rule to await public notice and comment is unnecessary, as well as contrary to the public interest and the national security of the nation. It is in the public interest and furthers our national security to implement requirements immediately that will allow for the collection and comparison of biometrics of aliens seeking admission in to the United States. These requirements will greatly enhance the ability of the Department to confirm the identities of nonimmigrant aliens seeking admission into the United States, and will allow for improved biometrics-based searches of watch lists, including law enforcement and intelligence data bases containing information on known and suspected terrorists. Such tools will increase the border security of the United States by helping DHS officers to identify persons who pose a threat to the nation. Before further expansion of the rule's implementation to more categories of aliens, the Department anticipates that it will have sufficient opportunity to consider the public comments generated by this interim rule, as well as to publish a final rule. For the same reasons, pursuant to the provisions of 5 U.S.C. 553(d)(3), the Department finds that there is good cause for making the rule immediately effective. Therefore this rule is immediately effective upon publication in the **Federal Register**. Although the Department has determined that pre-effective date public notice and comment would be contrary to national security and public safety, the Department strongly encourages the public to comment on the provisions of this rule so that such comments may be carefully considered in the drafting of a final rule.

Executive Order 12866

Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993), requires a determination as to whether a regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) and to the requirements of the Executive Order. The Department has determined that this rule is a "significant regulatory action" under Executive Order 12866,

section 3(f) because there is significant public interest in security issues. Accordingly, this rule has been reviewed and approved by the OMB.

The Department has performed a preliminary analysis of the expected costs and benefits of this interim final rule. The anticipated benefits of the rule include: (1) Improved biometric identification of foreign national travelers who may present threats to public safety and the national security of the United States; (2) enhancement of the Government's ability to match an alien's fingerprints and photographs to other law enforcement or intelligence data associated with identical biometrics; (3) improved identification of individuals who may be inadmissible to the United States; (4) improved cooperation across international, Federal, State, and local agencies through better access to data on foreign nationals; (5) facilitation of legitimate travel and commerce by improving the timeliness and accuracy of the determination of a traveler's immigration status or his or her inadmissibility; (6) ensuring the integrity of the United States immigration system through enhanced enforcement of immigration laws, including collection of more complete arrival and departure data on aliens; and (7) reductions in fraud, undetected imposters and identity theft.

The costs associated with implementation of this rule for nonimmigrant visa holders at air and sea ports of entry include an increase of approximately 15 seconds in inspection processing time per nonimmigrant visa holder over the current approximately one minute. By December 31, 2004, approximately 24 million nonimmigrant visa holders are anticipated to be affected at air and sea ports. This number is comprised of approximately 19.3 million air travelers and approximately 4.5 million sea travelers. The limited 15 second time increase is not anticipated to delay significantly the overall processing of air and sea passengers because persons not required to provide biometrics (*e.g.*, U.S. citizens, lawful permanent residents, and visa-exempt nonimmigrants) may be routed through different inspection lines, thereby easing any impact of the biometrics collection process. While the Department does not anticipate longer wait times at ports of entry due to US–VISIT processing, a number of mitigation strategies have been developed, not unlike those already available to CBP under other conditions which result in backups. The additional costs to the Government and the taxpayers of implementing the requirements of this rule for the pilot period are estimated to be $28.5 million for FY 2004. These costs include operation and maintenance for the entry program for three months and the cost of developing ten to fifteen exit sites. The Department believes that the costs described above are outweighed by the benefits of the rule's biometric requirements for immigration enforcement and the potential reduction in threats to national security and public safety. The Department will continually assess its procedures to ensure that any negative effects on legitimate travel, commerce and law abiding foreign visitors and permanent residents will be minimized.

The Department conducted analyses for both the entry and exit components. Based on those analyses, the Department determined which alternatives were best suited for this initial increment of the program.

Entry

Benefits: The goals and benefits of this rule have been defined as:

- Enhance National Security by (1) preventing entry of high-threat or inadmissible nonimmigrant aliens through improved and/or advanced access to data prior to the nonimmigrant's arrival; (2) reducing threat of terrorist attack and illegal immigration through improved identification of national security threats and inadmissible aliens; and (3) improving cooperation across federal, state and local agencies through improved access to nonimmigrant alien data.
- Facilitate legitimate trade and travel through (1) improved facilitation of legitimate travel and commerce by improved timeliness and accuracy of determination of nonimmigrant traveler status; and (2) improved accuracy and timeliness of the determination of nonimmigrant alien's inadmissibility.
- Ensure integrity of our immigration system through (1) improved enforcement of immigration laws through improved data accuracy and completeness; (2) reduction in nonimmigrant aliens remaining in the country under unauthorized circumstances; and (3) utilization of existing IT systems (no new systems) and enhancing information exchanges with federal, state, and local law enforcement and intelligence communities.
- Deploy the Program in accordance with existing privacy laws and policies.

Impact

The impact this rule on the traveling public has been measured by (1) the number of foreign national travelers affected, (2) the expected average processing time, (3) travelers which are not affected, (4) the effects on the ability of airlines to off-load passengers and assist them through immigration processing, and (5) the additional costs to the traveling public. The number of foreign national travelers affected by implementation of this regulation will be approximately 3 million nonimmigrant visa travelers.

This rule will affect only all travelers who apply for admission or are admitted pursuant to a nonimmigrant visa, subject to the exemptions outlined in this preamble and the codified text of the rule. Additionally, where possible and practical, aliens subject to this rule will be routed through separate lines. Overall, the processing time for aliens subject to this rule will not impact significantly the processing time for the traveling public. There will be little effect on the airlines' abilities to off-load passengers and get these travelers processed through immigration resulting from implementation of this rule. Moreover, there will be no additional costs to the traveling public, airlines or airports resulting from the implementation of this rule.

The expected average processing time per person for whom biometrics will be taken is approximately one minute and fifteen seconds at entry. This compares to one minute for travelers not being processed through the biometric requirements of US–VISIT. The average processing time upon exit is approximately one minute. DHS does not anticipate significant delays in processing on arrival or departure for the traveling public.

Cost Benefit Analysis

Entry

A Cost Benefit Analysis (CBA) was completed in February 2003 and will be updated in February 2004. This update will incorporate lessons learned about any benefits recognized from the initial operating capability provided by Increment 1, implemented pursuant to this rule.

Increment 1, Full Air and Sea and Limited Land Performance with Biographic and Biometric Capabilities, delivers air and sea entry capabilities, constrained by budgetary resources, in accordance with the law and on time. Other alternatives that were examined were (1) Full Operating Capability with Unlimited Budgetary Resources, (2) Full Air and Sea with Biographic Capabilities Only, and (3) Air and Sea Entry and Exit Capabilities Constrained by Budgetary Resources. This

alternative was chosen, because it provides the best capabilities within the funding constraints. Additionally, it was selected because it:

1. Implements Increment 1 capability to air and sea POEs within the statutory timeframe;
2. Delivers biographic to all primary points of inspection and biometric data to all secondary POEs points of inspection;
3. Meets budgetary constraints; and
4. Is more desirable because the data collection includes both biographic and biometric data collection that provides for a more thorough identity review than biographic data alone.

Exit

The US–VISIT Program wishes to pilot alternative information collection systems at selected air and seaports in FY 2004. Three alternative systems have been:

• *Alternative 1*

Gate Solution: Staffing and equipment would be located at all international departure gates. The estimated costs include $43 million for implementation plus $72 million annually for system maintenance including 1,350 additional TSA employees.

• *Alternative 2*

Checkpoint Solution: Staffing and equipment located at airport security checkpoints (746 nationwide). The estimated costs include $62 million for implementation plus $109 million for system maintenance, including 1,800 TSA employees.

• *Alternative 3*

Workstation (Kiosk) Solution: Equipment and contractors to provide travelers assistance located in departure areas after the security checkpoint. The estimated costs include $22 million for implementation plus $37 million for system maintenance including contractor costs.

Alternative 3, Workstation (Kiosk) Solution, was selected as the initial pilot because it was significantly more cost effective than the other two, was less manpower intensive, and eliminated the major concerns of airlines and airport authorities about boarding processes and time issues at gates.

Quantitative Benefits

The intent of this rule is to address identified operational deficiencies and legislative mandates associated with management of the entry and exit of international travelers through the U.S. ports. Among its qualitative benefits, the US–VISIT System will improve the accuracy and consistency of detecting fraudulent travel documents, verifying traveler identity, determining traveler admissibility, and determining the status of aliens through the use of more complete and accurate data to include the use of biometric data.

The quantitative benefits are targeted as a more effective solution that will allow the most optimal level of throughput and security for travelers. Some of these benefits can be measured, but not in financial terms. We will begin to quantify these benefits as we develop our performance analysis system for delivery in February 2004.

Executive Order 13132 (Federalism)

Executive Order 13132 requires the Department to develop a process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include rules that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." The Department has analyzed this interim final rule in accordance with the principles and criteria in the Executive Order and has determined that it does not have federalism implications or a substantial direct effect on the States. This rule provides for the collection by the federal Government of biometric identifiers from nonimmigrant aliens with visas seeking to enter or depart the United States for purposes of improving the administration of federal immigration laws. States do not conduct activities with which this rule would interfere. For these reasons, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988 (Civil Justice Reform)

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988. That Executive Order requires agencies to conduct reviews on civil justice and litigation impact issues before proposing legislation or issuing proposed regulations. The order requires agencies to exert reasonable efforts to ensure that the regulation identifies clearly preemptive effects, effects on existing federal laws or regulations, identifies any retroactive effects of the regulation, and other matters. The Department has determined that this regulation meets the requirements of E.O. 12988 because it does not involve retroactive effects, preemptive effects, or the other matters addressed in the Executive Order.

Unfunded Mandates Reform Act of 1995

Section 202 of the *Unfunded Mandates Reform Act of 1995* (*UMRA*), 2 U.S.C. 1531–1538, requires Federal agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year (adjusted for inflation with 1995 base year). Before promulgating a rule for which a written statement is needed, section 205 of the *UMRA* generally requires DHS to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule. Section 205 allows the Department to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes an explanation with the final rule. This interim final rule will not result in the expenditure by State, local, or tribal governments, or by the private sector, of more than $100 million annually. Thus, the Department is not required to prepare a written assessment under the *UMRA*.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the *Small Business Regulatory Enforcement Fairness Act of 1996*, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Environmental Analysis

The Department has analyzed this interim final rule for purposes of compliance with the *National Environmental Policy Act* (*NEPA*), 42 U.S.C. 4321 *et seq*. The Department has prepared a nationwide environmental assessment for the implementation of this program at airports and has determined that it will not result in any significant environmental impacts. The

Department has also prepared a nationwide environmental assessment for seaports. The analysis of potential impacts at seaports indicated that the proposed action is not likely to result in significant environmental impacts. The Department is initially implementing this rule only at air and sea ports, as indicated in the first **Federal Register** notice that accompanies publication of this rule. The Department will comply with any applicable *NEPA* and any other applicable environmental requirements prior to the implementation of this rule at the land ports of entry.

Trade Impact Assessment

The *Trade Agreement Act of 1979,* 19 U.S.C. 2531–2533, prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The Department has determined that this rule will not create unnecessary obstacles to the foreign commerce of the United States and that any minimal impact on trade that may occur is legitimate in light of this rule's benefits for the national security and public safety interests of the United States.

Paperwork Reduction Act

This rule permits the Secretary of Homeland Security or his delegate to require that aliens who cross United States borders must provide fingerprints, photograph(s), and potentially other biometric identifiers upon their arrival in or departure from this country. These requirements constitute an information collection under the *Paperwork Reduction Act* (*PRA*), 44 U.S.C. 507 *et seq.*, and OMB's implementing regulations at 5 CFR 1320. Accordingly, the Department has submitted an information collection request to OMB for emergency review and clearance under the *PRA*. If granted, the emergency approval is only valid for 180 days. Under the *PRA*, 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 control number. The OMB control number for the biometric information that will be collected pursuant to this rule is OMB 1600–0006.

Overview of this information collection:

(1) *Type of information collection:* New.

(2) *Title of Form/Collection:* No form. Collection of biometrics will be in electronic or photographic format.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* No form number 1600–0006, Border and Transportation Security Directorate, DHS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individual aliens. The categories of aliens are identified in this rule. The first group of affected aliens is nonimmigrant visa holders who seek admission to the United States at the air and sea ports of entry, and certain departure locations, designated in the notice published elsewhere in this issue of the **Federal Register**. The biometric information to be collected is necessary for the Department to begin its compliance with the mandates in section 303 of the *Border Security Act,* 8 U.S.C. 1732 and sections 403(c) and 414(b) of the *USA PATRIOT Act,* 8 U.S.C. 1365a note and 1379, for biometric verification of the identities of alien travelers and authentication of their biometric travel documents through the use of machine readers installed at all ports of entry. The arrival and departure inspection procedures are authorized by 8 U.S.C. 1225 and 1185.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: From January 5, 2004 to January 5, 2005 the number of nonimmigrant visa-holders required to provide biometrics at the air and sea ports of entry is anticipated to be approximately 24 million, comprised of approximately 19.3 million air travelers and 4.5 million sea travelers. The expected average processing time per person for whom biometrics will be collected is approximately one minute and fifteen seconds at entry, with the fifteen seconds being the additional time added for biometric collection over and above the normal inspection processing time. The average additional processing time upon exit is estimated at one minute per person. There are no additional fees for the traveling aliens to pay.

(6) An estimate of the total of public burden (in hours) associated with the collection: Approximately 100,800 burden hours.

If additional information is required contact Steve Yonkers, Privacy Officer, US–VISIT, Border and Transportation Security, Department of Homeland Security; 1616 North Fort Myer Drive, 5th Floor, Arlington, VA 22209 at (202) 927–5200.

During the first 60 days of the period authorized by OMB for this information collection under emergency procedures, the Department will undertake a regular review of the collection pursuant to the *PRA*. Written comments from the public are encouraged and will be accepted until March 5, 2004. Your comments should address one or more of the following points: (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 operations, maintenance, and purchase of services to provide information. Comments should be directed to Steve Yonkers, Privacy Officer, US–VISIT, Border and Transportation Security, Department of Homeland Security; 1616 North Fort Myer Drive, 5th Floor, Arlington, VA 22209 at (202) 927–5200.

List of Subjects

8 CFR Part 214

Aliens, Immigration, Registration, Reporting and recordkeeping requirements.

8 CFR Part 215

Control of Aliens Departing from the United States.

8 CFR Part 235

Aliens, Immigration, Registration, Reporting and Recordkeeping Requirements.

Amendments to the Regulations

■ For the reasons set forth in the Supplementary Information section, parts 214, 215, and 235 of Title 8 of the Code of Federal Regulations are amended as set forth below:

PART 214—NONIMMIGRANT CLASSES

■ 1. The authority citation for part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1186a, 1187, 1221, 1281, 1282, 1301–1305; 1372; 1379; 1731–32; sec. 643, Pub. L. 104–208; 110 Stat. 3009–708; section 141 of the

Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901, note, and 1931, note, respectively.

■ 2. Part 214.1(a)(3) is revised to read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

(a) * * *

(3) *General requirements.* (i) Every nonimmigrant alien who applies for admission to, or an extension of stay in, the United States, must establish that he or she is admissible to the United States, or that any ground of inadmissibility has been waived under section 212(d)(3) of the Act. Upon application for admission, the alien must present a valid passport and valid visa unless either or both documents have been waived. A nonimmigrant alien's admission to the United States is conditioned on compliance with any inspection requirement in § 235.1(d) or of this chapter. The passport of an alien applying for admission must be valid for a minimum of six months from the expiration date of the contemplated period of stay, unless otherwise provided in this chapter, and the alien must agree to abide by the terms and conditions of his or her admission. An alien applying for extension of stay must present a passport only if requested to do so by the Department of Homeland Security. The passport of an alien applying for extension of stay must be valid at the time of application for extension, unless otherwise provided in this chapter, and the alien must agree to maintain the validity of his or her passport and to abide by all the terms and conditions of his extension.

(ii) At the time of admission or extension of stay, every nonimmigrant alien must also agree to depart the United States at the expiration of his or her authorized period of admission or extension of stay, or upon abandonment of his or her authorized nonimmigrant status, and to comply with the departure procedures at section 215.8 of this chapter if such procedures apply to the particular alien. The nonimmigrant alien's failure to comply with those departure requirements, including any requirement that the alien provide biometric identifiers, may constitute a failure of the alien to maintain the terms of his or her nonimmigrant status.

(iii) At the time a nonimmigrant alien applies for admission or extension of stay, he or she must post a bond on Form I–352 in the sum of not less than $500, to ensure the maintenance of his or her nonimmigrant status and departure from the United States, if required to do so by the Commissioner of CBP, the Director of U.S. Citizenship and Immigration Services, an immigration judge, or the Board of Immigration Appeals.

* * * * *

PART 215—CONTROLS OF ALIENS DEPARTING FROM THE UNITED STATES

■ 3. The authority citation for part 215 is revised to read as follows:

Authority: 8 U.S.C. 1104; 1184; 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1365a note, 1379, 1731–32.

■ 4. Part 215 is amended by adding new § 215.8, to read as follows:

§ 215.8 Requirements for biometric identifiers from aliens on departure from the United States.

(a)(1) The Secretary of Homeland Security may establish pilot programs at up to fifteen air or sea ports of entry, designated through notice in the **Federal Register**, through which the Secretary or his delegate may require an alien admitted pursuant to a nonimmigrant visa who departs the United States from a designated air or sea port of entry to provide fingerprints, photograph(s) or other specified biometric identifiers, documentation of his or her immigration status in the United States, and such other evidence as may be requested to determine the alien's identity and whether he or she has properly maintained his or her status while in the United States.

(2) The requirements of paragraph (a)(1) shall not apply to:

(i) Aliens younger than 14 or older than 79 on date of departure;

(ii) Aliens admitted on A–1, A–2, C–3 (except for attendants, servants or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5 or NATO–6 visas and maintaining such status at time of departure, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the requirements of paragraph (a)(1);

(iii) Classes of aliens to whom the Secretary of Homeland Security and the Secretary of State jointly determine it shall not apply; or

(iv) An individual alien to whom the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines it shall not apply.

(b) An alien who is required to provide biometric identifiers at departure pursuant to paragraph (a)(1) and who fails to comply with the departure requirements may be found in violation of the terms of his or her admission, parole, or other immigration status. In addition, failure of a covered alien to comply with the departure requirements could be a factor in support of a determination that the alien is ineligible to receive a future visa or other immigration status documentation, or to be admitted to the United States. In making this determination, the officer will consider the totality of the circumstances, including, but not limited to, all positive and negative factors related to the alien's ability to comply with the departure procedures.

(c) A covered alien who leaves the United States without complying with the departure requirements in this section may be found to have overstayed the period of his or her last admission where the available evidence clearly indicates that the alien did not depart the United States within the time period authorized at his or her last admission or extension of stay. A determination that the alien previously overstayed the terms of his admission may result in a finding of inadmissibility for accruing prior unlawful presence in the United States under section 212(a)(9) of the Immigration and Nationality Act or that the alien is otherwise ineligible for a visa or other authorization to reenter the United States, provided that all other requirements of section 212(a)(9) have been met. A determination that an alien who was admitted on the basis of a nonimmigrant visa has remained in the United States beyond his or her authorized period of stay may result in such visa being deemed void pursuant to section 222(g) of the Act (8 U.S.C. 1202(g)) where all other requirements of that section are also met.

PART 235—INSPECTION OF PERSONS APPLYING FOR ADMISSION

■ 5. The authority citation for part 235 is revised to read as follows:

Authority: 8 U.S.C. 1101 and note, 1103, 1183, 1185 (pursuant to E.O. 13323, published January 2, 2004), 1201, 1224, 1225, 1226, 1228, 1365a note, 1379, 1731–32.

■ 6. Section 235.1(d)(1) and (f)(1) introductory text are revised to read as follows:

§ 235.1 Scope of examination.

* * * * *

(d) *Alien applicants for admission.* (1) Each alien seeking admission at a United States port-of-entry must present whatever documents are required and must establish to the satisfaction of the

inspecting officer that the alien is not subject to removal under the immigration laws, Executive Orders, or Presidential Proclamations, and is entitled, under all of the applicable provisions of the immigration laws and this chapter, to enter the United States.

(i) A person claiming to have been lawfully admitted for permanent residence must establish that fact to the satisfaction of the inspecting officer and must present proper documents in accordance with § 211.1 of this chapter.

(ii) The Secretary of Homeland Security or his delegate may require nonimmigrant aliens seeking admission pursuant to a nonimmigrant visa at an air or sea port of entry designated by a notice in the **Federal Register** to provide fingerprints, photograph(s) or other specified biometric identifiers during the inspection process. The failure of an applicant for admission to comply with any requirement to provide biometric identifiers may result in a determination that the alien is inadmissible under section 212(a)(7) of the Immigration and Nationality Act, or other relevant grounds in section 212 of the Act.

(iii) Aliens who are required under paragraph (d)(1)(ii) to provide biometric identifier(s) at inspection may also be subject to the departure requirements for biometrics contained in § 215.8 of this chapter, unless otherwise exempted.

(iv) The requirements of paragraph (d)(1)(ii) shall not apply to:

(A) Aliens younger than 14 or older than 79 on date of admission;

(B) Aliens admitted on A–1, A–2, C–3 (except for attendants, servants or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5 or NATO–6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to the requirements of paragraph (d)(1)(ii):

(C) Classes of aliens to whom the Secretary of Homeland Security and the Secretary of State jointly determine it shall not apply; or

(D) An individual alien to whom the Secretary of Homeland Security, the Secretary of State, or the Director of Central Intelligence determines it shall not apply.

* * * * *

(f) *Form I–94, Arrival-Departure Record.* (1) Unless otherwise exempted, each arriving nonimmigrant who is admitted to the United States will be issued a Form I–94 as evidence of the terms of admission. For land border admission, a Form I–94 will be issued only upon payment of a fee, and will be considered issued for multiple entries unless specifically annotated for a limited number of entries. A Form I–94 issued at other than a land border port-of-entry, unless issued for multiple entries, must be surrendered upon departure from the United States in accordance with the instructions on the form. Form I–94 is not required by:

* * * * *

Dated: December 30, 2003.

Tom Ridge,

Secretary of Homeland Security.

[FR Doc. 03–32331 Filed 12–31–03; 11:51 am]

BILLING CODE 4410–10–U

DEPARTMENT OF HOMELAND SECURITY

Notice to Nonimmigrant Aliens Subject To Be Enrolled in the United States Visitor and Immigrant Status Indicator Technology System

AGENCY: Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice states the requirements for the first phase of the US–VISIT program, implemented pursuant to a Department of Homeland Security (Department) interim rule (see Department interim rule published elsewhere in this issue of the **Federal Register**). This notice requires certain nonimmigrant aliens to provide fingerprints, photographs or other biometric identifiers if arriving in or departing from the United States through designated air or sea ports of entry on or after January 5, 2004. This Notice applies to aliens applying for admission or admitted pursuant to a nonimmigrant visa who arrive in or depart from an air or sea port of entry designated in this Notice. The requirements and exemptions are specified in this Notice.

EFFECTIVE DATES: This notice is effective January 5, 2004.

FOR FURTHER INFORMATION CONTACT: Patrice Ward, Chief Inspector, Air and Sea Exit Manager, US–VISIT, Border and Transportation Security; Department of Homeland Security; 1616 North Fort Myer Drive, 5th Floor, Arlington, VA 22209, telephone (202) 298–5200.

SUPPLEMENTARY INFORMATION: The Department of Homeland Security (Department) has established the United States Visitor and Immigrant Status Indicator Technology Program (US–VISIT) in accordance with several Congressional mandates requiring that the Department create an integrated, automated entry exit system that records the arrival and departure of aliens; that equipment be deployed at all ports of entry to allow for the verification of aliens' identities and the authentication of their travel documents through the comparison of biometric identifiers; and that the entry exit system record alien arrival and departure information from these biometrically authenticated documents. 8 U.S.C. 1187, 1365a and note, 1379, 1731–31.

Concurrently with this Notice, the Department is amending several regulations to implement the first phase of US–VISIT. (See Department interim rule published elsewhere in this issue of the **Federal Register.**) Department regulation 8 CFR 214.1, as amended, states that a nonimmigrant alien's admission to the United States is conditioned on compliance with any inspection requirement in 8 CFR 235.1(d) of this chapter. New regulation 8 CFR 215.8 states that the Secretary of Homeland Security or his delegate may establish pilot programs at up to fifteen air or sea ports of entry through which the Secretary or his delegate may require an alien admitted pursuant to a nonimmigrant visa who is departing from the United State from a designated air or sea port of entry to provide fingerprints, photograph(s) or other specified biometric identifiers, documentation of their immigration status in the United States, and such other evidence as may be requested to determine the alien's identity and whether he or she had properly maintained his or her status while in the United States. Department regulation at 8 CFR 235.1(d)(1), as amended, provides that the Secretary of Homeland Security or his delegate may require nonimmigrant aliens seeking admission pursuant to a nonimmigrant visa at an air or sea port of entry designated by a notice in the Federal Register to provide fingerprints, photograph(s) or other specified biometric identifiers during the inspection process.

Notice of Requirements for Biometric Collection From Certain Nonimmigrant Aliens

Pursuant to 8 CFR 235.1(d)(1) and 215.8, I hereby order as follows:

(a) Aliens subject to Notice. Aliens applying for admission or admitted pursuant to a nonimmigrant visa are subject to this Notice and may be required to provide biometric information at time of application for admission to or departure from the United States.

(b) Aliens exempt. This Notice does not apply to (i) aliens admitted on a A–1, A–2, C–3 (except for attendants, servants or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 visas, unless the Secretary of State and the Secretary of Homeland Security jointly determine that a class of such aliens should be subject to this Notice, (ii) children under the age of 14, (iii) persons over the age of 79, (iv) classes of aliens the Secretary of Homeland Security and the Secretary of State jointly determine shall be exempt, or (v) an individual alien the Secretary of Homeland Security, the Secretary of State or the Director of Central Intelligence determines shall be exempt. Aliens admitted on an A–1, A–2, C–3 (except for attendants, servants or personal employees of accredited officials), G–1, G–2, G–3, G–4, NATO–1, NATO–2, NATO–3, NATO–5, or NATO–6 visas who are no longer in such status on date of departure, however, are subject to the departure requirements of this Notice.

(c) Biometric Information. All aliens subject to this Notice shall: (1) Upon arrival at designated air and seaports, submit fingerprints and photographs as requested by an immigration officer; and (2) at time of departure from designated air and sea ports, submit fingerprints and electronically scan their nonimmigrant visas or passport as requested at the departure inspection locations.

(d) Air ports of entry designated for US–VISIT inspection at time of alien arrival:

Agana, Guam (Agana International Airport)
Aguadilla, Puerto Rico (Rafael Hernandez Airport)
Albuquerque, New Mexico (Albuquerque International Airport)
Anchorage, Alaska (Anchorage International Airport)
Aruba (Pre-Flight Inspection)
Atlanta, Georgia (William B. Hartsfield International Airport)
Austin, Texas (Austin Bergstrom International Airport)
Baltimore, Maryland (Baltimore/Washington International Airport)
Bangor, Maine (Bangor International Airport)
Bellingham, Washington (Bellingham International Airport)
Boston, Massachusetts (General Edward Lawrence Logan International Airport)
Brownsville, Texas (Brownsville/South Padre Island Airport)
Buffalo, New York (Greater Buffalo International Airport)
Calgary, Canada (Pre-Flight Inspection)
Chantilly, Virginia (Washington Dulles International Airport)
Charleston, South Carolina (Charleston International Airport)
Charlotte, North Carolina (Charlotte/Douglas International Airport)
Chicago, Illinois (Chicago Midway Airport)
Chicago, Illinois (Chicago O'Hare International Airport)
Cincinnati, Ohio (Cincinnati/Northern Kentucky International Airport)
Cleveland, Ohio (Cleveland Hopkins International Airport)
Columbus, Ohio (Rickenbacker International Airport)
Columbus, Ohio (Port Columbus International Airport)
Dallas/Fort Worth, Texas (Dallas/Fort Worth International Airport)

Del Rio, Texas (Del Rio International Airport)
Denver, Colorado (Denver International Airport)
Detroit, Michigan (Detroit Metropolitan Wayne County Airport)
Dover/Cheswold, Delaware (Delaware Airpark)
Dublin, Ireland (Pre-Flight Inspection)
Edmonton, Canada (Pre-Flight Inspection)
El Paso, Texas (El Paso International Airport)
Erie, Pennsylvania (Erie International Airport)
Fairbanks, Alaska (Fairbanks International Airport)
Fajardo, Puerto Rico (Diego Jimenez Torres Airport)
Fort Lauderdale, Florida (Fort Lauderdale Executive Airport)
Fort Lauderdale, Florida (Fort Lauderdale/Hollywood International Airport)
Fort Myers, Florida (Fort Myers International Airport)
Freeport, Bahamas (Pre-Flight Inspection)
Greenville, South Carolina (Donaldson Center Airport)
Hamilton, Bermuda (Pre-Flight Inspection)
Hartford/Springfield, Connecticut (Bradley International Airport)
Honolulu, Hawaii (Honolulu International Airport)
Houston, Texas (Houston International Airport)
Indianapolis, Indiana (Indianapolis International Airport)
International Falls, Minnesota (Falls International Airport)
Isla Grande, Puerto Rico (Isla Grande Airport)
Jacksonville, Florida (Jacksonville International Airport)
Juneau, Alaska (Juneau International Airport)
Kansas City, Kansas (Kansas City International Airport)
Kenmore, Washington (Kenmore Air Harbor)
Key West, Florida (Key West International Airport)
King County, Washington (King County International Airport)
Kona, Hawaii (Kona International Airport)
Laredo, Texas (Laredo International Airport and Laredo Private Airport)
Las Vegas, Nevada (McCarren International Airport)
Los Angeles, California (Los Angeles International Airport)
Manchester, New Hampshire (Manchester Airport)
Mayaguez, Puerto Rico (Eugenio Maria de Hostos Airport)
McAllen, Texas (McAllen Miller International Airport)
Memphis, Tennessee (Memphis International Airport)
Miami, Florida (Kendall/Tamiami Executive Airport)
Miami, Florida (Miami International Airport)
Milwaukee, Wisconsin (General Mitchell International Airport)
Minneapolis/St. Paul, Minnesota (Montreal, Canada (Pre-Flight Inspection)
Nashville, Tennessee (Nashville International Airport)
Nassau, Bahamas (Pre-Flight Inspection)
New Orleans, Louisiana (New Orleans International Airport)
New York, New York (John F. Kennedy International Airport)
Newark, New Jersey (Newark International Airport)
Norfolk, Virginia (Norfolk International Airport and Norfolk Naval Air Station)
Oakland, California (Metropolitan Oakland International Airport)
Ontario, California (Ontario International Airport)
Opa Locka/Miami, Florida (Opa Locka Airport)
Orlando, Florida (Orlando International Airport)
Orlando/Sanford, Florida (Orlando/ Sanford Airport)
Ottawa, Canada (Pre-Flight Inspection)
Philadelphia, Pennsylvania (Philadelphia International Airport)
Phoenix, Arizona (Phoenix Sky Harbor International Airport)
Pittsburgh, Pennsylvania (Pittsburgh International Airport)
Ponce, Puerto Rico (Mercedita Airport)
Portland, Maine (Portland International Jetport Airport)
Portland, Oregon (Portland International Airport)
Portsmouth, New Hampshire (Pease International Tradeport Airport)
Providence, Rhode Island (Theodore Francis Green State Airport)
Raleigh/Durham, North Carolina (Raleigh/Durham International Airport)
Reno, Arizona (Reno/Tahoe International Airport)
Richmond, Virginia (Richmond International Airport)
Sacramento, California (Sacramento International Airport)
Salt Lake City, Utah (Salt Lake City International Airport)
San Antonio, Texas (San Antonio International Airport)
San Diego, California (San Diego International Airport)
San Francisco, California (San Francisco International Airport)
San Jose, California (San Jose International Airport)
San Juan, Puerto Rico (Luis Muñoz Marin International Airport)
Sandusky, Ohio (Griffing Sandusky Airport)
Sarasota/Bradenton, Florida (Sarasota-Bradenton International Airport)
Seattle, Washington (Seattle/Tacoma International Airport)
Shannon, Ireland (Pre-Flight Inspection)
Spokane, Washington (Spokane International Airport)
St. Croix, Virgin Island (Alexander Hamilton International Airport)
St. Louis, Missouri (St. Louis International Airport)
St. Lucie, Florida (St. Lucie County International Airport)
St. Petersburg, Florida (Albert Whitted Airport)
St. Thomas, Virgin Island (Cyril E. King International Airport)
Tampa, Florida (Tampa International Airport)
Teterboro, New Jersey (Teleboro Airport)
Toronto, Canada (Pre-Flight Inspection)
Tucson, Arizona (Tucson International Airport)
Vancouver, Canada (Pre-Flight Inspection)
Victoria, Canada (Pre-Flight Inspection)
West Palm Beach, Florida (Palm Beach International Airport)
Wilmington, North Carolina (Wilmington International Airport)
Winnipeg, Canada (Pre-Flight Inspection)
Yuma, Arizona (Yuma International Airport)

(e) Air port of entry designated for US–VISIT inspection at time of alien departure:

Baltimore, Maryland

(f) Sea ports of entry designated for US–VISIT inspection at time of alien arrival:

Galveston, Texas
Jacksonville, Florida
Long Beach, California
Miami, Florida
Port Canaveral, Florida
San Juan, Puerto Rico
San Pedro, California
Seattle, Washington (Cruise Terminal)
Seattle, Washington
Tampa, Florida (Terminal 3)
Tampa, Florida (Terminal 7)
Vancouver, Canada (Ballantyne Pier)
Vancouver, Canada (Canada Place)
Victoria, Canada (Pre Inspection)
West Palm Beach, Florida

(g) Sea port of entry designated for US–VISIT inspection at time of alien departure:

Miami, Florida

The US–VISIT System Is Maintained Consistent With Privacy and Due Process Principles

The Department's Privacy Office, in conjunction with the US–VISIT Privacy

Officer, will exercise oversight of the US–VISIT program to ensure that the information collected and stored in systems associated with US–VISIT is being properly protected under the privacy laws and guidance (68 FR 69412, dated December 12, 2003).

The Department has the responsibility to ensure the security, accuracy, relevance, timeliness and completeness of the information maintained in the US–VISIT system. Information is safeguarded in terms of applicable rules and policies, including the Department's automated systems security and access policies. Only those individuals who have an official need for access to the system in the performance of their duties will, in fact, have access to the system. Records of those individuals who become U.S. citizens and legal permanent resident aliens will be protected in line with all applicable privacy laws and regulations. Those, including nonimmigrant aliens, who wish to contest or seek a change of their records should direct a written request to the US–VISIT Program Office at the following address: Steve Yonkers, Privacy Officer, US–VISIT, Border and Transportation Security, Department of Homeland Security, Washington, DC 20528. Phone (202) 927–5200. Fax (202) 298–5201. The request should include the requestor's full name, current address and date of birth, and a detailed explanation of the change sought. If the matter cannot be resolved by the system manager, further appeal for resolution may be made to the DHS Privacy Officer at the following address: Nuala O'Connor Kelly, Chief Privacy Officer, U.S. Department of Homeland Security, Washington, DC 20528, telephone (202) 282–8000, facsimile (202) 772–5036.

Dated: December 30, 2003.

Tom Ridge,

Secretary of Homeland Security.

[FR Doc. 03–32333 Filed 12–31–03; 11:51 am]

BILLING CODE 4410–10–U

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Federal Register

Vol. 69, No. 2

Monday, January 5, 2004

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FEDERAL REGISTER PAGES AND DATE, JANUARY

1–242 2
243–484 5

CFR PARTS AFFECTED DURING JANUARY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:
7748 227
Executive Orders:
13322 231
13323 241

7 CFR

301 .... 243, 245, 247
718 249
1480 249
Proposed Rules:
1469 194

8 CFR

214 468
215 468
235 468

9 CFR

300 250
301 250
306 250
318 250
320 250
381 250

12 CFR

5 1

14 CFR

39 2
Proposed Rules:
21 282
39 .... 282, 284, 287, 289, 291, 293
121 282

21 CFR

201 255
610 255

24 CFR

203 4

26 CFR

1 .... 5, 12, 22, 436
20 12
25 12
26 12
602 .... 22, 436
Proposed Rules:
1 .... 42, 43, 47
301 47

33 CFR

17 267
165 268
334 271

36 CFR

223 29
Proposed Rules:
1254 295
1256 295

40 CFR

52 34
63 .... 130, 394
Proposed Rules:
52 302
404 307
416 307

42 CFR

52h 272

44 CFR

64 40

46 CFR

401 128
404 128

48 CFR

202 128
204 128
211 128
212 128
243 128
252 128

49 CFR

571 279
Proposed Rules:
571 307

50 CFR

Proposed Rules:
622 .... 309, 310

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT JANUARY 5, 2004

AGRICULTURE DEPARTMENT
Animal and Plant Health Inspection Service
Plant-related quarantine, domestic:
Pine shoot beetle; published 1-5-04
Plant-related quarantine, domestic:
Golden nematode; published 1-5-04
Karnal bunt; published 1-5-04

COMMERCE DEPARTMENT
Economic Analysis Bureau
International services surveys:
Foreign direct investments in U.S.—
BE-15; foreign direct investment in U.S.; annual survey; published 12-5-03

ENVIRONMENTAL PROTECTION AGENCY
Air pollutants, hazardous; national emission standards:
Lime manufacturing plants; published 1-5-04
Air quality implementation plans; approval and promulgation; various States:
Montana and Wyoming; published 11-5-03

FEDERAL COMMUNICATIONS COMMISSION
Digital television stations; table of assignments:
Florida; published 12-2-03
Radio stations; table of assignments:
Florida; published 12-5-03
Texas; published 12-8-03

HEALTH AND HUMAN SERVICES DEPARTMENT
Centers for Medicare & Medicaid Services
Medicare:
Photocopying reimbursement methodology; published 12-5-03

HOMELAND SECURITY DEPARTMENT
Customs and Border Protection Bureau
Electronic cargo information; advance presentation requirement; published 12-5-03

HOMELAND SECURITY DEPARTMENT
United States Visitor and Immigrant Status Indicator Technology Program (US-VISIT); Biometric Requirements; implementation; published 1-5-04

TRANSPORTATION DEPARTMENT
Federal Aviation Administration
Airworthiness directives:
Eurocopter France; published 12-1-03

TRANSPORTATION DEPARTMENT
National Highway Traffic Safety Administration
Motor vehicle safety standards:
Glazing materials—
Low-speed vehicles, etc.; published 1-5-04

COMMENTS DUE NEXT WEEK

ADMINISTRATIVE COMMITTEE OF THE FEDERAL REGISTER
Federal Register, Administrative Committee
Federal Register publications; prices and availability; comments due by 1-16-04; published 12-17-03 [FR 03-31145]

AGRICULTURE DEPARTMENT
Agricultural Marketing Service
Cherries (tart) grown in—
Michigan et al.; comments due by 1-14-04; published 12-30-03 [FR 03-31946]
Pork promotion, research, and consumer information order; comments due by 1-16-04; published 12-17-03 [FR 03-31074]

AGRICULTURE DEPARTMENT
Animal and Plant Health Inspection Service
Exportation and importation of animals and animal products:
Classical swine fever; disease status change—
Chile; comments due by 1-12-04; published 11-13-03 [FR 03-28389]

AGRICULTURE DEPARTMENT
Federal Crop Insurance Corporation
Crop insurance regulations:
Processing tomato crop insurance provisions; comments due by 1-13-04; published 11-14-03 [FR 03-28219]

AGRICULTURE DEPARTMENT
Food and Nutrition Service
Food Stamp Program:
Non-discretionary quality control provisions; comments due by 1-14-04; published 10-16-03 [FR 03-26176]

COMMERCE DEPARTMENT
Industry and Security Bureau
Export administration regulations:
Simplified Network Application Processing; revision implementation; comments due by 1-12-04; published 11-12-03 [FR 03-28133]

COMMERCE DEPARTMENT
National Oceanic and Atmospheric Administration
Fishery conservation and management:
Northeastern United States fisheries—
Atlantic herring; comments due by 1-12-04; published 12-12-03 [FR 03-30796]
Marine mammals:
Commercial fishing operations—
Sea turtles protection; shallow longline sets in Pacific Ocean; prohibition; comments due by 1-16-04; published 12-17-03 [FR 03-31140]

COMMODITY FUTURES TRADING COMMISSION
Federal claims collection:
Debt Collection Improvement Act; administrative wage garnishment provisions implementation; comments due by 1-14-04; published 12-15-03 [FR 03-30877]

COURT SERVICES AND OFFENDER SUPERVISION AGENCY FOR THE DISTRICT OF COLUMBIA
Semi-annual agenda; Open for comments until further notice; published 12-22-03 [FR 03-25121]

DEFENSE DEPARTMENT
Acquisition regulations:
Central contractor registration; comments due by 1-13-04; published 11-14-03 [FR 03-28441]
Federal Acquisition Regulation (FAR):
Procurement list; when Javits-Wagner O'Day Program becomes mandatory source of supplies and services; clarification; comments due by 1-12-04; published 12-11-03 [FR 03-30694]

ENERGY DEPARTMENT
Federal Energy Regulatory Commission
Electric rate and corporate regulation filings:
Virginia Electric & Power Co. et al.; Open for comments until further notice; published 10-1-03 [FR 03-24818]

ENVIRONMENTAL PROTECTION AGENCY
Air programs; State authority delegations:
New Mexico; comments due by 1-12-04; published 12-11-03 [FR 03-30709]
Air quality implementation plans; approval and promulgation; various States:
California; comments due by 1-12-04; published 12-12-03 [FR 03-30773]
Indiana; comments due by 1-12-04; published 12-11-03 [FR 03-30696]
Air quality implementation plans; approval and promulgation; various States; air quality planning purposes; designation of areas:
Nevada; comments due by 1-14-04; published 12-15-03 [FR 03-30369]
Air quality implementation plans; approval and promulgation; various States:
New Jersey; comments due by 1-14-04; published 12-15-03 [FR 03-30887]
Air quality planning purposes; designation of areas:
Various States; comments due by 1-15-04; published 12-16-03 [FR 03-31109]
Various States; correction; comments due by 1-15-04; published 12-29-03 [FR C3-31109]
Environmental statements; availability, etc.:
Coastal nonpoint pollution control program—
Minnesota and Texas; Open for comments until further notice; published 10-16-03 [FR 03-26087]
Superfund program:
Emergency planning and community right-to-know—

Extremely hazardous substances list; proposed deletion of phosmet; comments due by 1-12-04; published 11-12-03 [FR 03-28308]

Toxic substances:

Significant new uses—

Polycarboxylic acid ester, etc.; comments due by 1-16-04; published 12-17-03 [FR 03-31121]

Water supply:

National primary drinking water regulations—

Stage 2 disinfectants and disinfection byproducts rule and analytical methods for chemical contaminants, approval; comments due by 1-16-04; published 10-8-03 [FR 03-25547]

FEDERAL COMMUNICATIONS COMMISSION

Common carrier services:

Federal-State Joint Board on Universal Service—

Non-rural carrier high-cost universal service support mechanism modification; comments due by 1-14-04; published 12-15-03 [FR 03-30827]

Radio stations; table of assignments:

Ohio; comments due by 1-15-04; published 12-2-03 [FR 03-29861]

Television broadcasting:

Digital cable products; commercial availability of navigation devices and compatibility between cable systems and consumer electronics equipment; comments due by 1-14-04; published 11-28-03 [FR 03-29521]

Digital television—

Digital broadcast television redistribution control; digital broadcast content protection; comments due by 1-14-04; published 12-3-03 [FR 03-30008]

FEDERAL HOUSING FINANCE BOARD

Federal home loan bank system:

Bank business and financial condition disclosure requirements; class of securities registration; comments due by 1-15-04; published 9-17-03 [FR 03-23761]

FEDERAL RESERVE SYSTEM

Fair and Accurate Credit Transactions Act; implementation:

Fair credit reporting provisions (Regulation V); comments due by 1-12-04; published 12-24-03 [FR 03-31359]

FEDERAL TRADE COMMISSION

Fair and Accurate Credit Transactions Act; implementation:

Fair credit reporting provisions; comments due by 1-12-04; published 12-24-03 [FR 03-31359]

Fair and Accurate Credit Transactions Act; implementation

Fair credit reporting provisions; comments due by 1-12-04; published 12-24-03 [FR 03-31360]

GENERAL SERVICES ADMINISTRATION

Federal Acquisition Regulation (FAR):

Procurement list; when Javits-Wagner O'Day Program becomes mandatory source of supplies and services; clarification; comments due by 1-12-04; published 12-11-03 [FR 03-30694]

HEALTH AND HUMAN SERVICES DEPARTMENT

Centers for Medicare & Medicaid Services

Medicare

Prescription drug discount card; comments due by 1-14-04; published 12-15-03 [FR 03-30753]

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Reports and guidance documents; availability, etc.:

Evaluating safety of antimicrobial new animal drugs with regard to their microbiological effects on bacteria of human health concern; Open for comments until further notice; published 10-27-03 [FR 03-27113]

HOMELAND SECURITY DEPARTMENT

Coast Guard

Ports and waterways safety:

San Francisco Bay, CA—

Security zones; comments due by 1-12-04; published 11-12-03 [FR 03-28329]

INTERIOR DEPARTMENT

Fish and Wildlife Service

Endangered and threatened species:

Scimitar-horned oryx, addax, and dama gazelle; comments due by 1-12-04; published 11-26-03 [FR 03-29533]

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Acquisition regulations:

Administrative procedures and guidance; comments due by 1-16-04; published 11-17-03 [FR 03-28551]

Federal Acquisition Regulation (FAR):

Procurement list; when Javits-Wagner O'Day Program becomes mandatory source of supplies and services; clarification; comments due by 1-12-04; published 12-11-03 [FR 03-30694]

NUCLEAR REGULATORY COMMISSION

Domestic licensing proceedings and issuance of orders; practice rules:

High-level radioactive waste disposal at geologic repository; licensing support network; electronic docket submissions; comments due by 1-12-04; published 11-26-03 [FR 03-29557]

POSTAL SERVICE

Domestic Mail Manual:

Low-weight standard mail flats; 5-digit and 5-digit scheme packages; required number of pieces increased; comments due by 1-12-04; published 12-11-03 [FR 03-30664]

SOCIAL SECURITY ADMINISTRATION

Social security benefits:

Federal old-age, survivors, and disability insurance and aged, blind, and disabled

Disability benefits terminated due to work activity; reinstatement of entitlement; comments due by 1-16-04; published 1-5-04 [FR 04-00058]

STATE DEPARTMENT

Acquisition regulations:

Miscellaneous amendments; comments due by 1-12-04; published 11-13-03 [FR 03-27971]

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Air carrier certification and operations:

Multi-engine airplanes; extended operations; comments due by 1-13-04; published 11-14-03 [FR 03-28407]

Airworthiness directives:

Aerospatiale; comments due by 1-16-04; published 12-17-03 [FR 03-31066]

Airbus; comments due by 1-16-04; published 12-17-03 [FR 03-31067]

Boeing; comments due by 1-12-04; published 11-26-03 [FR 03-29572]

Bombardier; comments due by 1-12-04; published 12-11-03 [FR 03-30677]

Cessna; comments due by 1-12-04; published 11-13-03 [FR 03-28428]

Empresa Brasileira de Aeronautica S.A. (EMBRAER); comments due by 1-12-04; published 12-11-03 [FR 03-30676]

General Electric; comments due by 1-12-04; published 11-12-03 [FR 03-28323]

McDonnell Douglas; comments due by 1-12-04; published 11-26-03 [FR 03-29573]

Pratt & Whitney Canada; comments due by 1-12-04; published 11-13-03 [FR 03-28431]

Raytheon; comments due by 1-16-04; published 11-18-03 [FR 03-28737]

Class E airspace; comments due by 1-12-04; published 11-26-03 [FR 03-29594]

Restricted areas; comments due by 1-16-04; published 11-17-03 [FR 03-28617]

TRANSPORTATION DEPARTMENT

Federal Motor Carrier Safety Administration

Motor carrier safety standards:

Parts and accessories necessary for safe operation—

Fuel systems; comments due by 1-12-04; published 11-12-03 [FR 03-28255]

TRANSPORTATION DEPARTMENT

National Highway Traffic Safety Administration

Motor vehicle safety standards:

Fuel system integrity; comments due by 1-15-04; published 12-1-03 [FR 03-29805]

TRANSPORTATION DEPARTMENT

Research and Special Programs Administration

Pipeline safety:

Gas and hazardous liquid gathering lines; safety regulation; meeting; comments due by 1-17-04; published 12-1-03 [FR 03-29394]

TREASURY DEPARTMENT

Internal Revenue Service

Income taxes:

Consolidated return regulations—

Section 108 application to consolidated group members; indebtedness income discharge; cross-reference; comments due by 1-12-04; published 12-11-03 [FR 03-30637]

TREASURY DEPARTMENT

Government Securities Act regulations:

Protection of customer securities and balances; comments due by 1-12-04; published 12-11-03 [FR 03-30485]

VETERANS AFFAIRS DEPARTMENT

Board of Veterans Appeals:

Appeals regulations and rules of practice—

Obtaining evidence and curing procedural defects; comments due by 1-12-04; published 12-11-03 [FR 03-30668]

LIST OF PUBLIC LAWS

Note: The List of Public Laws for the first session of the 108th Congress has been completed. It will resume when bills are enacted into public law during the next session of Congress. A cumulative List of Public Laws for the first session of the 108th Congress will appear in the issue of January 30, 2004.

Last List December 24, 2003

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1, 2 (2 Reserved)	(869-050-00001-6)	9.00	[4] Jan. 1, 2003
3 (2002 Compilation and Parts 100 and 101)	(869-050-00002-4)	32.00	[1] Jan. 1, 2003
4	(869-050-00003-2)	9.50	Jan. 1, 2003
5 Parts:			
1-699	(869-050-00004-1)	57.00	Jan. 1, 2003
700-1199	(869-050-00005-9)	46.00	Jan. 1, 2003
1200-End, 6 (6 Reserved)	(869-050-00006-7)	58.00	Jan. 1, 2003
7 Parts:			
1-26	(869-050-00007-5)	40.00	Jan. 1, 2003
27-52	(869-050-00008-3)	47.00	Jan. 1, 2003
53-209	(869-050-00009-1)	36.00	Jan. 1, 2003
210-299	(869-050-00010-5)	59.00	Jan. 1, 2003
300-399	(869-050-00011-3)	43.00	Jan. 1, 2003
400-699	(869-050-00012-1)	39.00	Jan. 1, 2003
700-899	(869-050-00013-0)	42.00	Jan. 1, 2003
900-999	(869-050-00014-8)	57.00	Jan. 1, 2003
1000-1199	(869-050-00015-6)	23.00	Jan. 1, 2003
1200-1599	(869-050-00016-4)	58.00	Jan. 1, 2003
1600-1899	(869-050-00017-2)	61.00	Jan. 1, 2003
1900-1939	(869-050-00018-1)	29.00	[4] Jan. 1, 2003
1940-1949	(869-050-00019-9)	47.00	Jan. 1, 2003
1950-1999	(869-050-00020-2)	45.00	Jan. 1, 2003
2000-End	(869-050-00021-1)	46.00	Jan. 1, 2003
8	(869-050-00022-9)	58.00	Jan. 1, 2003
9 Parts:			
1-199	(869-050-00023-7)	58.00	Jan. 1, 2003
200-End	(869-050-00024-5)	56.00	Jan. 1, 2003
10 Parts:			
1-50	(869-050-00025-3)	58.00	Jan. 1, 2003
51-199	(869-050-00026-1)	56.00	Jan. 1, 2003
200-499	(869-050-00027-0)	44.00	Jan. 1, 2003
500-End	(869-050-00028-8)	58.00	Jan. 1, 2003
11	(869-050-00029-6)	38.00	Feb. 3, 2003
12 Parts:			
1-199	(869-050-00030-0)	30.00	Jan. 1, 2003
200-219	(869-050-00031-8)	38.00	Jan. 1, 2003
220-299	(869-050-00032-6)	58.00	Jan. 1, 2003
300-499	(869-050-00033-4)	43.00	Jan. 1, 2003
500-599	(869-050-00034-2)	38.00	Jan. 1, 2003
600-899	(869-050-00035-1)	54.00	Jan. 1, 2003
900-End	(869-050-00036-9)	47.00	Jan. 1, 2003
13	(869-050-00037-7)	47.00	Jan. 1, 2003
14 Parts:			
1-59	(869-050-00038-5)	60.00	Jan. 1, 2003
60-139	(869-050-00039-3)	58.00	Jan. 1, 2003
140-199	(869-050-00040-7)	28.00	Jan. 1, 2003
200-1199	(869-050-00041-5)	47.00	Jan. 1, 2003
1200-End	(869-050-00042-3)	43.00	Jan. 1, 2003
15 Parts:			
0-299	(869-050-00043-1)	37.00	Jan. 1, 2003
300-799	(869-050-00044-0)	57.00	Jan. 1, 2003
800-End	(869-050-00045-8)	40.00	Jan. 1, 2003
16 Parts:			
0-999	(869-050-00046-6)	47.00	Jan. 1, 2003
1000-End	(869-050-00047-4)	57.00	Jan. 1, 2003
17 Parts:			
1-199	(869-050-00049-1)	50.00	Apr. 1, 2003
200-239	(869-050-00050-4)	58.00	Apr. 1, 2003
240-End	(869-050-00051-2)	62.00	Apr. 1, 2003
18 Parts:			
1-399	(869-050-00052-1)	62.00	Apr. 1, 2003
400-End	(869-050-00053-9)	25.00	Apr. 1, 2003
19 Parts:			
1-140	(869-050-00054-7)	60.00	Apr. 1, 2003
141-199	(869-050-00055-5)	58.00	Apr. 1, 2003
200-End	(869-050-00056-3)	30.00	Apr. 1, 2003
20 Parts:			
1-399	(869-050-00057-1)	50.00	Apr. 1, 2003
400-499	(869-050-00058-0)	63.00	Apr. 1, 2003
500-End	(869-050-00059-8)	63.00	Apr. 1, 2003
21 Parts:			
1-99	(869-050-00060-1)	40.00	Apr. 1, 2003
100-169	(869-050-00061-0)	47.00	Apr. 1, 2003
170-199	(869-050-00062-8)	50.00	Apr. 1, 2003
200-299	(869-050-00063-6)	17.00	Apr. 1, 2003
300-499	(869-050-00064-4)	29.00	Apr. 1, 2003
500-599	(869-050-00065-2)	47.00	Apr. 1, 2003
600-799	(869-050-00066-1)	15.00	Apr. 1, 2003
800-1299	(869-050-00067-9)	58.00	Apr. 1, 2003
1300-End	(869-050-00068-7)	22.00	Apr. 1, 2003
22 Parts:			
1-299	(869-050-00069-5)	62.00	Apr. 1, 2003
300-End	(869-050-00070-9)	44.00	Apr. 1, 2003
23	(869-050-00071-7)	44.00	Apr. 1, 2003
24 Parts:			
0-199	(869-050-00072-5)	58.00	Apr. 1, 2003
200-499	(869-050-00073-3)	50.00	Apr. 1, 2003
500-699	(869-050-00074-1)	30.00	Apr. 1, 2003
700-1699	(869-050-00075-0)	61.00	Apr. 1, 2003
1700-End	(869-050-00076-8)	30.00	Apr. 1, 2003
25	(869-050-00077-6)	63.00	Apr. 1, 2003
26 Parts:			
§§ 1.0-1-1.60	(869-050-00078-4)	49.00	Apr. 1, 2003
§§ 1.61-1.169	(869-050-00079-2)	63.00	Apr. 1, 2003
§§ 1.170-1.300	(869-050-00080-6)	57.00	Apr. 1, 2003
§§ 1.301-1.400	(869-050-00081-4)	46.00	Apr. 1, 2003
§§ 1.401-1.440	(869-050-00082-2)	61.00	Apr. 1, 2003
§§ 1.441-1.500	(869-050-00083-1)	50.00	Apr. 1, 2003
§§ 1.501-1.640	(869-050-00084-9)	49.00	Apr. 1, 2003
§§ 1.641-1.850	(869-050-00085-7)	60.00	Apr. 1, 2003
§§ 1.851-1.907	(869-050-00086-5)	60.00	Apr. 1, 2003
§§ 1.908-1.1000	(869-050-00087-3)	60.00	Apr. 1, 2003
§§ 1.1001-1.1400	(869-050-00088-1)	61.00	Apr. 1, 2003
§§ 1.1401-1.1503-2A	(869-050-00089-0)	50.00	Apr. 1, 2003
§§ 1.1551-End	(869-050-00090-3)	50.00	Apr. 1, 2003
2-29	(869-050-00091-1)	60.00	Apr. 1, 2003
30-39	(869-050-00092-0)	41.00	Apr. 1, 2003
40-49	(869-050-00093-8)	26.00	Apr. 1, 2003
50-299	(869-050-00094-6)	41.00	Apr. 1, 2003
300-499	(869-050-00095-4)	61.00	Apr. 1, 2003
500-599	(869-050-00096-2)	12.00	[5] Apr. 1, 2003
600-End	(869-050-00097-1)	17.00	Apr. 1, 2003

Title	Stock Number	Price	Revision Date
27 Parts:			
1–199	(869–050–00098–9)	63.00	Apr. 1, 2003
200–End	(869–050–00099–7)	25.00	Apr. 1, 2003
28 Parts:			
0–42	(869–050–00100–4)	61.00	July 1, 2003
43–End	(869–050–00101–2)	58.00	July 1, 2003
29 Parts:			
0–99	(869–050–00102–1)	50.00	July 1, 2003
100–499	(869–050–00103–9)	22.00	July 1, 2003
500–899	(869–050–00104–7)	61.00	July 1, 2003
900–1899	(869–050–00105–5)	35.00	July 1, 2003
1900–1910 (§§ 1900 to 1910.999)	(869–050–00106–3)	61.00	July 1, 2003
1910 (§§ 1910.1000 to end)	(869–050–00107–1)	46.00	July 1, 2003
1911–1925	(869–050–00108–0)	30.00	July 1, 2003
1926	(869–050–00109–8)	50.00	July 1, 2003
1927–End	(869–050–00110–1)	62.00	July 1, 2003
30 Parts:			
1–199	(869–050–00111–0)	57.00	July 1, 2003
200–699	(869–050–00112–8)	50.00	July 1, 2003
700–End	(869–050–00113–6)	57.00	July 1, 2003
31 Parts:			
0–199	(869–050–00114–4)	40.00	July 1, 2003
200–End	(869–050–00115–2)	64.00	July 1, 2003
32 Parts:			
1–39, Vol. I		15.00	[2] July 1, 1984
1–39, Vol. II		19.00	[2] July 1, 1984
1–39, Vol. III		18.00	[2] July 1, 1984
1–190	(869–050–00116–1)	60.00	July 1, 2003
191–399	(869–050–00117–9)	63.00	July 1, 2003
400–629	(869–050–00118–7)	50.00	July 1, 2003
630–699	(869–050–00119–5)	37.00	[7] July 1, 2003
700–799	(869–050–00120–9)	46.00	July 1, 2003
800–End	(869–050–00121–7)	47.00	July 1, 2003
33 Parts:			
1–124	(869–050–00122–5)	55.00	July 1, 2003
125–199	(869–050–00123–3)	61.00	July 1, 2003
200–End	(869–050–00124–1)	50.00	July 1, 2003
34 Parts:			
1–299	(869–050–00125–0)	49.00	July 1, 2003
300–399	(869–050–00126–8)	43.00	[7] July 1, 2003
400–End	(869–050–00127–6)	61.00	July 1, 2003
35	(869–050–00128–4)	10.00	[6] July 1, 2003
36 Parts			
1–199	(869–050–00129–2)	37.00	July 1, 2003
200–299	(869–050–00130–6)	37.00	July 1, 2003
300–End	(869–050–00131–4)	61.00	July 1, 2003
37	(869–050–00132–2)	50.00	July 1, 2003
38 Parts:			
0–17	(869–050–00133–1)	58.00	July 1, 2003
18–End	(869–050–00134–9)	62.00	July 1, 2003
39	(869–050–00135–7)	41.00	July 1, 2003
40 Parts:			
1–49	(869–050–00136–5)	60.00	July 1, 2003
50–51	(869–050–00137–3)	44.00	July 1, 2003
52 (52.01–52.1018)	(869–050–00138–1)	58.00	July 1, 2003
52 (52.1019–End)	(869–050–00139–0)	61.00	July 1, 2003
53–59	(869–050–00140–3)	31.00	July 1, 2003
60 (60.1–End)	(869–050–00141–1)	58.00	July 1, 2003
60 (Apps)	(869–050–00142–0)	51.00	[8] July 1, 2003
61–62	(869–050–00143–8)	43.00	July 1, 2003
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[2] The July 1, 1985 edition of 32 CFR Parts 1–189 contains a note only for Parts 1–39 inclusive. For the full text of the Defense Acquisition Regulations in Parts 1–39, consult the three CFR volumes issued as of July 1, 1984, containing those parts.

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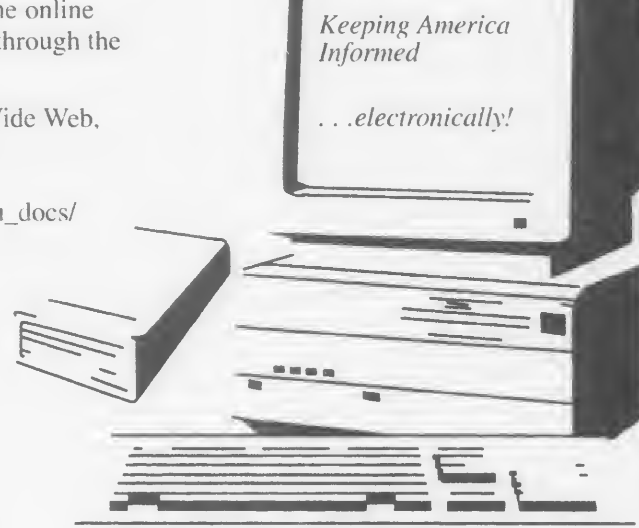

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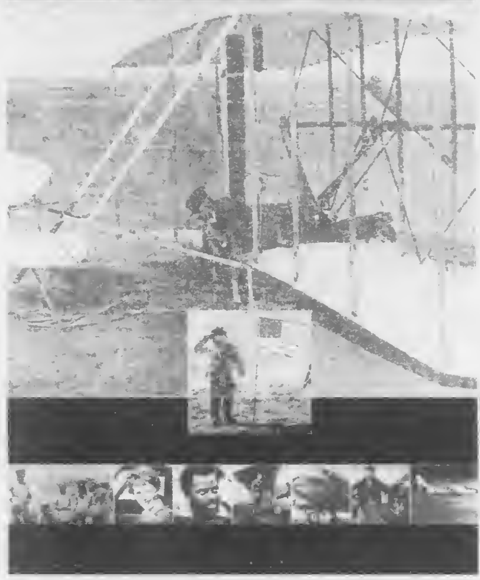

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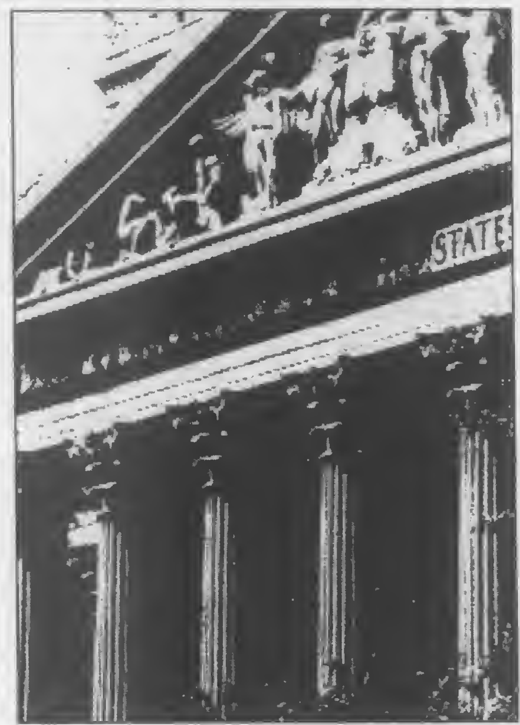

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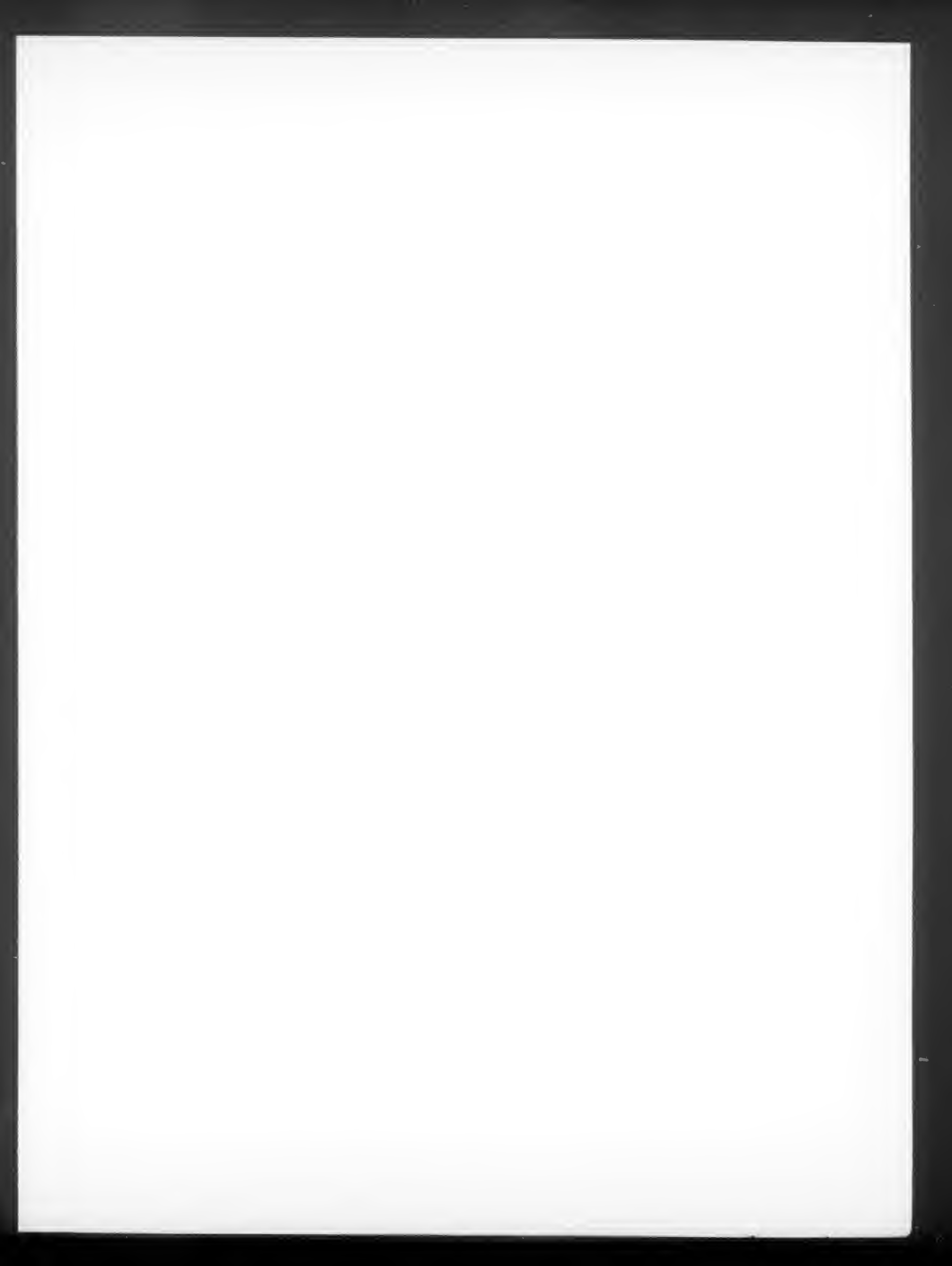

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